

No. 15-

IN THE
Supreme Court of the United States

LITTLE RIVER BAND OF OTTAWA INDIANS TRIBAL
GOVERNMENT,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit**

PETITION FOR A WRIT OF CERTIORARI

CARTER G. PHILLIPS
KWAKU A. AKOWUAH
CHRISTOPHER A.
EISWERTH
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

LLOYD B. MILLER*
DOUGLAS B.L. ENDRESON
REBECCA A. PATTERSON
SONOSKY, CHAMBERS,
SACHSE, ENDRESON &
PERRY LLP
1425 K Street, N.W.,
Suite 600
Washington, D.C. 20005
(202) 682-0240
lloyd@sonosky.net

Counsel for Petitioner

February 12, 2016

* Counsel of Record

QUESTION PRESENTED

Whether the National Labor Relations Board exceeded its authority by ordering an Indian tribe not to enforce a tribal labor law that governs the organizing and collective bargaining activities of tribal government employees working on tribal trust lands.

PARTIES TO THE PROCEEDINGS

Petitioner Little River Band of Ottawa Indians
Tribal Government was the respondent below.

Respondent National Labor Relations Board was
the petitioner below.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS.....	1
INTRODUCTION	2
STATEMENT OF THE CASE.....	6
REASONS FOR GRANTING THE PETITION...	13
I. <i>LITTLE RIVER</i> CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS AND OF THIS COURT.....	13
A. The Courts Of Appeals Have Fractured Over Whether The NLRB Has Juris- diction To Regulate Tribal Governments’ Labor Relations Laws	13
B. The Decision Below Contravenes This Court’s Precedent.....	16
II. THE SIXTH CIRCUIT’S DECISION IS INCORRECT	19
A. The NLRA’s Public-Employer Exclusion Encompasses Indian Tribes.....	19
B. NLRB Jurisdiction Significantly Infring- es Important Tribal Sovereign Interests .	24

TABLE OF CONTENTS—continued

	Page
III. RESOLUTION OF THE QUESTION PRESENTED IS CRITICALLY IMPORTANT TO THE FAIR AND UNIFORM ADMINISTRATION OF FEDERAL LABOR LAW AND TO FEDERAL INDIAN POLICY	28
CONCLUSION	35
APPENDICES	
APPENDIX A: <i>NLRB v. Little River Band of Ottawa Indians Tribal Government</i> , 788 F.3d 537 (6th Cir. 2015).....	1a
APPENDIX B: <i>Little River Band of Ottawa Indians Tribal Government</i> , 361 NLRB No. 45 (2014)	53a
APPENDIX C: <i>Little River Band of Ottawa Indians Tribal Government</i> , 359 NLRB No. 84 (2013)	63a
APPENDIX D: <i>NLRB v. Little River Band of Ottawa Indians Tribal Government</i> , No. 14-2239 (6th Cir. Sept. 18, 2015) (order denying rehearing en banc).....	86a
APPENDIX E: Federal Statutes	87a
APPENDIX F: Local Ordinance	124a
APPENDIX G: Statement of Stipulated Facts	148a

TABLE OF AUTHORITIES

CASES	Page
<i>Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort</i> , 629 F.3d 1173 (10th Cir. 2010).....	32
<i>Brown v. Port Auth. Police Superior Officers Ass’n</i> , 661 A.2d 312 (N.J. Super. Ct. App. Div. 1995).....	20
<i>California v. Cabazon Band of Mission Indians</i> , 480 U.S. 202 (1987), <i>superseded on other grounds by statute</i> , Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2472 (1988), <i>as recognized in Michigan v. Bay Mills Indian Cmty.</i> , 134 S. Ct. 2024 (2014).....	25
<i>Chaparro-Febus v. Int’l Longshoremen Ass’n</i> , 983 F.2d 325 (1st Cir. 1992).....	20
<i>Davenport v. Wash. Educ. Ass’n</i> , 551 U.S. 177 (2007)	23
<i>Dobbs v. Anthem Blue Cross & Blue Shield</i> , 600 F.3d 1275 (10th Cir. 2010).....	14
<i>Dollar Gen. Corp. v. Miss. Band of Choctaw Indians</i> , 83 U.S.L.W. 3006 (June 12, 2014) (No. 13-1496)	18
<i>Donovan v. Coeur d’Alene Tribal Farm</i> , 751 F.2d 1113 (9th Cir. 1985).....	10
<i>FDA v. Brown & Williamson Tobacco Corp.</i> , 529 U.S. 120 (2000).....	19
<i>Fed. Power Comm’n v. Tuscarora Indian Nation</i> , 362 U.S. 99 (1960).....	3, 10, 16
<i>Garcia v. San Antonio Metro. Transit Auth.</i> , 469 U.S. 528 (1985).....	26
<i>Helvering v. Gerhardt</i> , 304 U.S. 405 (1938).....	26
<i>Helvering v. Morgan’s, Inc.</i> , 293 U.S. 121 (1934).....	20

TABLE OF AUTHORITIES—continued

	Page
<i>Hinderlider v. La Plata River & Cherry Creek Ditch Co.</i> , 304 U.S. 92 (1938)	25
<i>Iowa Mut. Ins. Co. v. LaPlante</i> , 480 U.S. 9 (1987)	17
<i>Little River Band of Ottawa Indians v. NLRB</i> , 747 F. Supp. 2d 872 (W.D. Mich. 2010)	9
<i>McClanahan v. State Tax Comm'n</i> , 411 U.S. 164 (1973)	21
<i>Merrion v. Jicarilla Apache Tribe</i> , 455 U.S. 130 (1982)	17, 24
<i>Mescalero Apache Tribe v. Jones</i> , 411 U.S. 145 (1973)	31
<i>Michigan v. Bay Mills Indian Cmty.</i> , 134 S. Ct. 2024 (2014)	<i>passim</i>
<i>Montana v. United States</i> , 450 U.S. 544 (1981)	18, 27, 28
<i>New Mexico v. Mescalero Apache Tribe</i> , 462 U.S. 324 (1983)	18
<i>New York v. United States</i> , 326 U.S. 572 (1946)	26
<i>NLRB v. Catholic Bishop of Chi.</i> , 440 U.S. 490 (1979)	4, 20
<i>NLRB v. Chapa De Indian Health Program</i> , 316 F.3d 995 (9th Cir. 2003) ...	14, 29
<i>NLRB v. Nat. Gas Util. Dist.</i> , 402 U.S. 600 (1971)	23
<i>NLRB v. Noel Canning</i> , 134 S. Ct. 2550 (2014)	10
<i>NLRB v. Pueblo of San Juan</i> , 276 F.3d 1186 (10th Cir. 2002)	2, 3, 14, 17
<i>Norfolk Redev. & Hous. Auth. v. Chesapeake & Potomac Tel. Co.</i> , 464 U.S. 30 (1983)	23

TABLE OF AUTHORITIES—continued

	Page
<i>Plains Commerce Bank v. Long Family Land & Cattle Co.</i> , 554 U.S. 316 (2008)....	27
<i>San Manuel Indian Bingo & Casino v. NLRB</i> , 475 F.3d 1306 (D.C. Cir. 2007)	2, 5, 15, 16
<i>Santa Clara Pueblo v. Martinez</i> , 436 U.S. 49 (1978)	18, 22
<i>Soaring Eagle Casino & Resort v. NLRB</i> , 791 F.3d 648 (6th Cir. 2015)	2, 13, 14, 32
<i>Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng’rs</i> , 531 U.S. 159 (2001)	24
<i>South Carolina v. Catawba Indian Tribe</i> , 476 U.S. 498 (1986)	23
<i>Textile Workers Union of Am. v. Lincoln Mills of Ala.</i> , 353 U.S. 448 (1957)	22
<i>United Fed’n of Postal Clerks v. Blount</i> , 325 F. Supp. 879 (D.D.C.), <i>aff’d</i> , 404 U.S. 802 (1971)	23
<i>United States v. United Mine Workers of Am.</i> , 330 U.S. 258 (1947)	23
<i>V.I. Port Auth. v. S.I.U. de P.R.</i> , 354 F. Supp. 312 (D. V.I. 1973), <i>aff’d on other grounds</i> , 494 F.2d 452 (3d Cir. 1974)	20
<i>Washington v. Confederated Tribes of the Colville Indian Reservation</i> , 447 U.S. 134 (1980)	21
<i>White Mountain Apache Tribe v. Bracker</i> , 448 U.S. 136 (1980)	3, 24

STATUTES AND REGULATIONS

Labor-Management Relations Act, ch. 120, 61 Stat. 136 (1947)	22
5 U.S.C. § 7116(b)(7)	30

TABLE OF AUTHORITIES—continued

	Page
18 U.S.C. § 1918(3).....	30
25 U.S.C. §§ 461-479	6
§ 1300k-2(a)	6
§§ 2701-2721	8
§ 2702(1).....	31
§ 2710	8, 25, 33
29 U.S.C. § 152(2).....	1, 20
Mich. Comp. Laws §§ 432.1 <i>et seq.</i>	26
§ 423.202	30
N.Y. Exec. Law § 12(a)	34
29 C.F.R. § 102.7	20
1 Fed. Reg. 207 (Apr. 18, 1936).....	20

AGENCY DECISIONS

<i>Casino Pauma</i> , 363 NLRB No. 60 (2015).....	34
<i>Fort Apache Timber Co.</i> , 226 NLRB 503 (1976).....	21, 22
<i>S. Indian Health Council, Inc.</i> , 290 NLRB 436 (1988).....	22
<i>San Manuel Indian Bingo & Casino</i> , 341 NLRB 1055 (2004).....	10, 11, 15, 29
<i>Yukon Kuskokwim Health Corp.</i> , 341 NLRB 1075 (2004).....	30

OTHER AUTHORITIES

Indian Gaming Compact Between the State of New Mexico and the Mescalero Apache Tribe (Apr. 13, 2015).....	33
Tribal-State Compact Between the State of California and the Karuk Tribe (Nov. 12, 2014)	33

TABLE OF AUTHORITIES—continued

	Page
Tribal-State Compact Between the Match-E-Be-Nash-She-Wish Band of Pottawatomis Indians of Michigan and the State of Michigan (May 9, 2007)	33
Tribal-State Compact Between the Mashpee Wampanoag Tribe and the Commonwealth of Massachusetts (Mar. 19, 2013)	33
Mich. Gaming Control Bd., <i>Indian Gaming Section Annual Report to the Executive Director</i> (2011), https://www.michigan.gov/documents/mgcb/Annual_Report_-_Indian_Gaming_2010_Final_proprietary_remove_353286_7.pdf	33
Franklin D. Roosevelt, <i>Letter on the Resolution of Federation of Federal Employees Against Strikes in Federal Service</i> (Aug. 16, 1937)	32
Stephanie Simon, <i>(State) House Rules in Kansas Casino</i> , Wall St. J., Feb. 4, 2010, http://www.wsj.com/articles/SB10001424052748703338504575041433293903748...	26

PETITION FOR A WRIT OF CERTIORARI

Petitioner Little River Band of Ottawa Indians Tribal Government (“the Band”) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit’s opinion is reported at *NLRB v. Little River Band of Ottawa Indians Tribal Government*, 788 F.3d 537 (6th Cir. 2015), and reproduced at Petition Appendix (“App.”) 1a-52a. The Sixth Circuit’s order denying the petition for rehearing en banc is unpublished and reproduced at App. 86a. The National Labor Relations Board’s decisions are published at 359 NLRB No. 84 (2013) and 361 NLRB No. 45 (2014), and reproduced at App. 63a-85a and App. 53a-62a, respectively.

JURISDICTION

The Sixth Circuit entered judgment on June 9, 2015, and denied the petition for rehearing en banc on September 18, 2015. App. 86a. On December 8, 2015, Justice Kagan extended the time for filing the petition to February 15, 2016. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

29 U.S.C. § 152(2) provides: “The term ‘employer’ includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof[.]” Other relevant provisions are attached at App. 87a-123a.

INTRODUCTION

This petition raises the important question whether Congress vested the NLRB with the power to nullify tribal labor relations laws governing the tribes' employment of public employees working on tribal trust lands. This critical question is the subject of a direct conflict among the courts of appeals. A sharply divided Sixth Circuit held that the NLRB may strike down such laws. It squarely rejected the contrary decision of the Tenth Circuit in *NLRB v. Pueblo of San Juan*, 276 F.3d 1186 (10th Cir. 2002) (en banc), sustaining tribal labor laws, and departed from the reasoning (but not the result) of the D.C. Circuit's decision in *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306 (D.C. Cir. 2007). *See* App. 21a-23a, 33a-34a. "[C]reat[ing] a circuit split" was "unwis[e]," Judge McKeague explained in dissent, because the decision below "is authorized neither by Congress nor the Supreme Court" and "encroaches on Congress's plenary and exclusive authority over Indian affairs." *Id.* at 34a. In fact, the Sixth Circuit divided twice over: a second panel of the Sixth Circuit agreed with Judge McKeague, declaring that it would have followed the Tenth Circuit. *Soaring Eagle Casino & Resort v. NLRB*, 791 F.3d 648, 663 (6th Cir. 2015).

This conflict has its origins in two approaches to statutory interpretation and two potentially "conflicting Supreme Court canons of interpretation," *San Manuel*, 475 F.3d at 1310. The Tenth Circuit correctly looks first to the text of the statute and then, if ambiguity remains, deems controlling this Court's long line of cases holding that tribal sovereignty is not abrogated unless Congress clearly signals its intent to do so. *See, e.g., Michigan v. Bay*

Mills Indian Cmty., 134 S. Ct. 2024, 2037 (2014); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 (1980). Recognizing that an Indian tribe possesses authority to regulate labor relations and other economic activity on tribal lands, and that the NLRA does not indicate any intention by Congress to regulate tribal sovereigns, *San Juan*, 276 F.3d at 1198-99, the en banc Tenth Circuit held that tribal labor relations laws are not preempted by the NLRA, *id.* at 1191-92.

The Sixth Circuit majority followed a very different path. Finding no express treatment of tribes in the NLRA’s text, it applied the statement from *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960)—that “a general statute in terms applying to all persons includes Indians and their property interests,” *id.* at 116. The Sixth Circuit thus presumed that the NLRB had jurisdiction over Indian tribes. In so doing, the majority neglected to perform a careful analysis of the NLRA’s text and context, and rejected the argument that in operating a government casino under the Indian Gaming Regulatory Act (“IGRA”), the Band was acting as a public employer with sovereign authority to regulate its employees on tribal trust lands. It also ignored that *Tuscarora* did not involve an issue of tribal sovereign authority, *id.* at 110-15 (a fact the Tenth Circuit explained, *San Juan*, 276 F.3d at 1198-99). Contrary to the NLRA’s text and this Court’s repeated instruction that courts should not infer that Congress has abrogated tribal sovereignty absent a clear legislative statement, the decision below subjects tribal governments to organizing and collective bargaining rules aimed at *private*

employers, and makes Indian tribes the only public employers in the United States covered by the Act.

The Tenth Circuit’s approach and decision are correct. Congress did not give the Board power to displace tribal labor relations laws that a sovereign enacts to govern public employees, much less the laws a tribal sovereign enacts to govern its own public employees working on tribal lands. The NLRA only regulates private employers, *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 504 (1979); the Act’s definition of “employer” excludes public-sector employers as a category, and the Act’s private enforcement mechanism is not designed for public employers (since the Act does not waive the immunity of any sovereign). From the beginning, the NLRB itself has concluded that it lacks jurisdiction over all manner of public employers *not* listed by name in the NLRA’s “employer” definition—including U.S. territories, U.S. possessions, the District of Columbia, and, until recently, Indian tribes. The Board’s prior conclusion that tribes are not “employers” was consistent with this Court’s repeated instruction that courts should not infer that Congress has abrogated tribal sovereignty absent a clear legislative statement.

The Board’s root justification for expanding its jurisdiction to a sovereign employer—its conclusion that the Band was engaged in “commercial,” not “governmental,” activity—is untethered to the text, contrary to law, and arbitrary. It is inconsistent with the statutory text because the NLRA divides the jurisdictional world into public and private employers, not governmental and commercial spheres. It is contrary to law because the Board cannot rewrite Congress’s determination in IGRA

that *tribal* gaming is per se governmental, that *tribal* gaming facilities must operate under inter-governmental compacts between states and tribes, and that *tribal* gaming revenues must be used exclusively for public purposes. *See Bay Mills*, 134 S. Ct. at 2037. And it is arbitrary because it permits the Board to create and use a free-form balancing test to decide when any individual tribal entity is subject to tribal labor relations laws or to the Board's standards.¹

This Circuit split should not be tolerated. It subjects Indian tribes in different circuits to vastly differing legal regimes. Unlike all other public employers in the United States, tribes in the Sixth Circuit may not forbid public-employee strikes and must bargain collectively under the shadow of the crippling consequences such strikes would visit upon a tribe's ability to discharge essential government functions. Meanwhile, dozens of tribes in the Tenth Circuit must operate under the conflicting authorities emanating from the Tenth and D.C. Circuits. The Band is particularly vulnerable to strike threats. As IGRA contemplates, the Band relies heavily on gaming revenues to fund its courts, educational programs, law enforcement services, and other governmental functions. *See infra* at 9. The Band is far from alone in this respect. For scores of Indian tribes, this issue is therefore of paramount importance. The Sixth Circuit's decision expands the NLRB's jurisdictional reach without legislative

¹ The D.C. Circuit made a similar error in *San Manuel*, although it assigned to the courts (not the Board) the decision whether a tribe's particular sovereign activities are governmental "enough" to be exempted from Board jurisdiction. 475 F.3d at 1317.

authorization, while also contravening this Court's decisions and important congressional policies embodied in IGRA and other federal laws enacted to enhance tribal sovereignty and self-sufficiency. The petition should be granted.

STATEMENT OF THE CASE

1. *Background.* The Little River Band is a federally recognized Indian tribe, 25 U.S.C. § 1300k-2(a), with over 4,000 enrolled members, most of whom live on or near the Band's aboriginal lands on Michigan's Lower Peninsula. The Band has adopted a Constitution that has been approved by the Secretary of the Interior under the Indian Reorganization Act of 1934. *Id.* §§ 461-479 ("IRA"). The Constitution vests legislative power in a Tribal Council, which is empowered "[t]o exercise the inherent powers of the ... Band by establishing laws ... to govern the conduct of members of the ... Band and other persons within its jurisdiction." App. 149a, 155a (alteration in original).

The Tribal Council has promulgated laws governing employment and labor relations on the reservation. In 2005, the Council enacted the Band's Fair Employment Practices Code ("Code") to address employment discrimination, family medical leave, and minimum wages. App. 158a. In 2007, the Tribal Council determined that the Band's best interests would be advanced by allowing its public employees to engage in collective bargaining, subject to regulations designed to protect the Band's revenues and welfare. *Id.* at 159a.

Thus, the Tribal Council added a new Article XVI to govern "Labor Organizations and Collective Bargaining" in the Band's public sector. App. 158a-159a. Like the public-sector labor relations laws of

most states and the federal government, Article XVI, *inter alia*: (i) defines the rights and duties of public employers in collective bargaining; (ii) requires labor organizations engaged in organizing public employees to be licensed; (iii) establishes procedures and remedies for addressing unfair labor practice complaints; (iv) prohibits employee strikes and employer lockouts; (v) establishes processes to resolve bargaining impasses through mediation and arbitration; (vi) adopts a right-to-work provision (meaning that neither union membership nor the payment of union dues may be made a condition of employment); and (vi) vests the Tribal Court with jurisdiction to enforce the Code and collective bargaining agreements. *Id.* at 159a-164a. Subsequently, the Council enacted Article XVII to give primacy to the Code's dispute-resolution mechanisms, including by requiring exhaustion of tribal remedies.

Articles XVI and XVII regulate the Band's "public employers," defined as any "subordinate economic organization, department, commission, agency, or authority of the Band," including its IGRA gaming operations. App. 3a, 160a, 161a. Both Articles have been fully and productively implemented. A Neutral Election Official administers and oversees union elections. Regulations governing the licensing of labor organizations have been promulgated, and numerous licenses have issued. Band entities and labor organizations have engaged in collective bargaining, and several agreements have been executed. Unfair labor practice allegations and bargaining impasses have been resolved. *Id.* at 165a-166a. The Band's authority to continue to regulate its public-sector

employment relations—including at its IGRA gaming operations—is at stake here.

2. *IGRA and the Little River Casino*. Congress has recognized that few tribes have a reliable tax base, and that this revenue shortfall impedes the IRA’s central goal of fostering effective tribal self-government. Accordingly, to promote “tribal economic development, self-sufficiency and strong tribal governments,” and regulate “the conduct of gaming on Indian lands,” Congress enacted IGRA, 25 U.S.C. §§ 2701-2721. Significantly, Congress instructed that net revenues from gaming

are *not* to be used for purposes other than—(i) to fund tribal government operations or programs; (ii) to provide for the general welfare of the Indian tribe and its members; (iii) to promote tribal economic development; (iv) to donate to charitable organizations; or (v) to help fund operations of local government agencies[.]

Id. § 2710(b)(2)(B) (emphasis added); *see also id.* § 2710(d)(1)(A)(ii). Congress also directed that IGRA gaming operations must be “conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State.” *Id.* § 2710(d)(1)(C).

The Band’s Constitution authorizes the Tribal Council to conduct reservation gaming under IGRA. In 1998, the Band entered into a compact with Michigan governing the conduct of class III gaming activities on the Band’s trust lands. The Band chartered an instrumentality, the Little River Casino Resort, to manage these operations. The Casino is a subordinate organization of the Band, administered by a Board appointed by the Tribal Council. App. 156a.

As Congress mandated, the Band uses IGRA gaming revenues to govern itself, discharge essential government functions, and provide economic opportunities for tribal members and others. App. 150a-151a, 152a-153a, 155a. Gaming revenues account for 100% of the budget of the Tribal Court and prosecutor's office; 80% of the budget for mental health and substance abuse services at the Band's Health Clinic; 77% of the budget for the Department of Family Services; and 62% of the budget for the Department of Public Safety. *Id.* at 153a-155a. Essentially all other Band revenues are supplied by the federal government. *Id.* at 153a.

3. *NLRB Decision*. In 2008, Local 406, International Brotherhood of Teamsters ("Teamsters"), filed a "Charge Against Employer" with the NLRB. The Teamsters alleged that the Band had engaged in an unfair labor practice, in violation of the NLRA, by asserting authority to govern labor relations and collective bargaining for public-sector employees working on reservation lands. App. 5a. The Band responded that the NLRB has no authority to charge the Band and sought declaratory and injunctive relief. *See Little River Band of Ottawa Indians v. NLRB*, 747 F. Supp. 2d 872, 881 (W.D. Mich. 2010). The district court held that administrative exhaustion principles barred the Band's claims. *Id.* at 890.

In December 2010, the NLRB's Acting General Counsel filed an unfair labor practice complaint against the Band, alleging that Code Articles XVI and XVII constitute unfair labor practices. App. 5a. The Band moved to dismiss, arguing that the NLRA exempts public employers, including Indian tribes, from NLRB jurisdiction, and that the Tribal Council

has sovereign and statutory authority to enact public-sector labor relations laws.

In 2013, the NLRB struck down certain provisions of Articles XVI and XVII as “unfair labor practices,” on the ground that they differ from the NLRA’s private-employer standards. In so ruling, the Board relied upon its decision in *San Manuel Indian Bingo & Casino*, 341 NLRB 1055, 1061 (2004), a split decision which had overruled the Board’s longstanding position that it lacked jurisdiction over the on-reservation conduct of tribal governments. App. 69a & n.4 (overruling *Fort Apache Timber Co.*, 226 NLRB 503 (1976)).²

The Board’s *San Manuel* decision adopted the so-called *Tuscarora-Coeur d’Alene* framework. Instead of looking first to the statute’s text and context, that framework focuses on this Court’s statement that “a general statute in terms applying to all persons includes Indians and their property interests,” *Tuscarora*, 362 U.S. at 116. The framework also encompasses three exceptions, first created in *Donovan v. Coeur d’Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985). According to *Coeur d’Alene*, general statutes do *not* apply to Indians tribes if: “(1) the law touches ‘exclusive rights of self-governance in purely intramural matters’; (2) the application of the law to the tribe would ‘abrogate rights guaranteed by Indian treaties’; or (3) there is proof ‘by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations.’” *Id.* In *San Manuel*, the Board

² The Court of Appeals vacated this decision following *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014). On remand, the Board re-adopted its initial conclusion. See App. 54a.

applied this framework to the NLRA and to tribal regulation of public-sector employees working on tribal trust lands. The Board found that none of the *Coeur d'Alene* exceptions applies to IGRA gaming facilities, and asserted that Board control over labor relations rules at these tribal workplaces would not “implicate ... critical self-governance issues.” 341 NLRB at 1061. The Board explained both the abandonment of its prior statutory interpretation and its construction of the *Coeur d'Alene* exceptions by characterizing tribal gaming under IGRA as “commercial” rather than “governmental.” *Id.* at 1057-62. In recognition of the fact that these categories lack defined boundaries, the Board reserved to itself discretion *not* to apply the Act “when [tribes] are fulfilling traditionally tribal or governmental functions that are unique to their status as Indian tribes.” *Id.* at 1062.

Here, the Board followed *San Manuel* and determined that the Band’s public-sector labor laws may not be lawfully applied to the Little River Casino. The NLRB ordered the Band “*to rescind [its] application of the ... Code*” or otherwise announce that it is no longer in effect. App. 80a (emphasis added).

4. *Sixth Circuit Proceedings.* A sharply divided panel upheld the Board’s order. The majority, finding the NLRA “silent as to Indian tribes,” App. 8a, “beg[an] [its analysis] by reviewing the law governing the implicit divestiture of tribal sovereignty,” *id.* at 10a. It then adopted the Board’s *Tuscarora-Coeur d'Alene* framework and concluded that the *Coeur d'Alene* exceptions to the *Tuscarora* presumption were inapplicable. For two reasons, the majority concluded that the Board order requiring the Band to

rescind its public-employee labor relations law would *not* infringe upon the Band's sovereignty. First, it asserted that the Band's interest in applying its law to tribal employees working on reservation lands lies at the "periphery" of tribal sovereignty, and second, it observed that many Casino employees are non-members. *Id.* at 15a. The majority was unmoved by the Band's arguments that the NLRA's public-employer exclusion applies to Indian tribes and that Congress did not intend the Act to cover sovereigns "since Congress did not waive tribal sovereign immunity" with respect to private enforcement actions. *Id.* at 32a. The majority further rejected the Band's contention that Congress intended tribal gaming revenues to function as tax revenues to finance essential government services, *id.* at 27a-28a, and expressly disagreed with the Tenth Circuit's contrary decision in *San Juan*, *id.* at 21a.

Judge McKeague dissented. He explained in detail why the decision "impinges on tribal sovereignty, encroaches on Congress's plenary and exclusive authority over Indian affairs, conflicts with Supreme Court precedent, and unwisely creates a circuit split." App. 34a. He stated that the Tenth Circuit's decision in *San Juan* "is true to the governing law and should be adopted in the Sixth Circuit as well." *Id.* at 43a-44a. And, he observed that the panel decision contravened, *inter alia*, this Court's recent decision in *Bay Mills*, 134 S. Ct. at 2030-32, which had "reaffirmed the 'enduring principle of Indian law' that tribal sovereignty is retained unless and until Congress clearly indicates intent to limit it." App. 36a.

The Circuit denied rehearing en banc despite the NLRB's concession that it was warranted. *See* NLRB

Response to Pet. for Reh’g En Banc at 1 (Aug. 28, 2015) (“NLRB Resp.”). App. 86a.

Shortly after the court decided this case, another Sixth Circuit panel considered the same question and “disagree[d] with the holding in *Little River*.” *Soaring Eagle*, 791 F.3d at 662. After a thorough critique of the majority decision below, the *Soaring Eagle* panel held that “in light of our prior panel decision in *Little River*, we are bound to conclude that the NLRA applies to the Soaring Eagle Casino and Resort, and thus that the Board has jurisdiction.” *Id.* at 675.

REASONS FOR GRANTING THE PETITION

I. *LITTLE RIVER* CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS AND OF THIS COURT.

A. The Courts Of Appeals Have Fractured Over Whether The NLRB Has Jurisdiction To Regulate Tribal Governments’ Labor Relations Laws.

The decision below deepens an acknowledged conflict among the courts of appeals over the NLRB’s jurisdiction to displace labor relations laws enacted by tribal governments. Like the Board, the majority below adopted the *Tuscarora* presumption and applied it to the NLRA, even though *Tuscarora* involved neither sovereign authority nor activity on tribal trust land. Like the Board, the majority also adopted the *Coeur d’Alene* exceptions to that presumption.³ App. 6a. The majority concluded that

³ Although the Ninth Circuit has not expressly addressed this precise question, it applied the *Tuscarora-Coeur d’Alene* framework (which it first authored) to another provision of the NLRA and, in doing so, upheld the NLRB’s power to enforce

the Band's authority to enforce its public-sector labor relations law can be "implicitly divested by generally applicable congressional statutes." *Id.* at 21a.

The Sixth Circuit's approach stands in sharp conflict with the Tenth Circuit's. That Circuit started with the text and found it inappropriate to apply the *Tuscarora-Coeur d'Alene* framework to the NLRA. It recognized that tribal labor relations laws constitute a central sovereign concern and held that "Congress did not intend by its NLRA provisions to preempt tribal sovereign authority" over such laws. *San Juan*, 276 F.3d at 1197-98, 1200. *See also Dobbs v. Anthem Blue Cross & Blue Shield*, 600 F.3d 1275, 1284 (10th Cir. 2010) (*San Juan* held that "Congressional silence exempted Indian tribes from the [NLRA]"). In addition, the Tenth Circuit found inapplicable *Tuscarora's* statement that "a general statute ... applying to all persons" applies to Indian tribes. It reasoned that *Tuscarora* did not involve the exercise of sovereign tribal authority, and that because the NLRA excludes thousands of public employers, it therefore is not a generally applicable law. 276 F.3d at 1198-99.

The Sixth Circuit here, however, insisted the Tenth Circuit's approach "cannot be the rule," App. 21a, thereby "creat[ing] a needless circuit split." *Id.* at 52a (McKeague, J., dissenting). *See also Soaring Eagle*, 791 F.3d at 673, 675 (expressly agreeing with the Tenth Circuit's decision in *San Juan* and its "reject[ion] [of] the *Coeur d'Alene* framework," but holding that it was bound to follow circuit precedent).

subpoenas against a tribal entity. *See NLRB v. Chapa De Indian Health Program*, 316 F.3d 995 (9th Cir. 2003).

The NLRB, too, recognizes that its approach is the subject of a conflict in the circuits. In its initial decision asserting jurisdiction to invalidate tribal governments' labor relations laws, a divided Board acknowledged that "the Tenth Circuit's interpretation of *Tuscarora* stands in contrast to that of the other courts of appeals" and that of the Board. *San Manuel*, 341 NLRB at 1060 n.16. That disagreement, moreover, is intentional as the Tenth Circuit "addressed (and definitively rejected) the NLRB's new approach." App. 40a-41a (McKeague, J., dissenting).

The D.C. Circuit, like the Sixth Circuit, has agreed that the Board has jurisdiction in the circumstances presented here, but these two circuits disagree on the proper analysis to employ. Unlike the Sixth Circuit, the Ninth Circuit (*see supra* note 3), and the Board, the D.C. Circuit declined to follow the *Tuscarora-Coeur d'Alene* framework. Instead, the D.C. Circuit decided that when interpreting a federal statute that is not explicit about its application to Indian tribes, courts should determine whether applying the statute would materially constrain or "impinge on" tribal sovereignty, *San Manuel*, 475 F.3d at 1317, asking whether the tribal activity is governmental "enough." If a court's answer is yes, then the statute does not apply. *Id.* at 1315.

The D.C. Circuit's approach embraces yet a third framework for deciding whether, or to what extent, the NLRA will apply to Indian tribes. And its conclusion rests on the counter-intuitive notion that tribal sovereignty is not materially impaired when the NLRB displaces tribal labor relations laws regulating tribal casino employees on tribal trust land, even though no other public employer is so

burdened, and even though IGRA mandates that those same tribal casinos must operate under state-tribal intergovernmental compacts and must devote their net revenues exclusively to the provision of essential tribal government functions. *Id.* at 1315, 1318.

In sum, the courts of appeals are deeply fractured over the proper approach to interpreting the NLRA's application to Indian tribes. Moreover, they disagree sharply about whether Board jurisdiction in this area interferes significantly with tribal sovereignty. Only this Court's intervention can unify the circuits' approach to statutory interpretation and ensure that the NLRA will be correctly and consistently applied nationwide.

B. The Decision Below Contravenes This Court's Precedent.

The NLRB insists “[t]he Supreme Court has not addressed or decided whether comprehensive federal laws like the NLRA apply to on-reservation tribal enterprises absent express language specifying application to Indian tribes.” NLRB Resp. 2. In contrast, the D.C. Circuit maintains that this statutory-interpretation question involves two “conflicting Supreme Court canons of interpretation,” *San Manuel*, 475 F.3d at 1310: *first*, the statement in *Tuscarora* that “a general statute in terms applying to all persons includes Indians and their property interests” (362 U.S. at 116); and *second*, numerous cases holding that tribal sovereignty is not abrogated unless Congress clearly manifests its intent to do so, most recently *Bay Mills*, 134 S. Ct. at 2037. The Sixth Circuit parts company with both. It takes the position that under *Tuscarora*, the process of statutory

interpretation must begin with the *presumption* that a given law applies to tribes as governments, App. 6a, and this presumption is overcome only by some contrary indication in the language, context, and history of the act. *Id.*

All these views disregard this Court's oft-stated rule that any ambiguity in a federal statute must not be construed to infringe upon sovereign tribal interests absent a "clear expression" of Congressional intent. *Bay Mills*, 134 U.S. at 2031-32 (describing this rule as an "enduring principle of Indian law"). *Bay Mills* illustrates that this rule even applies to statutes like IGRA that directly address Indian tribes and Indian interests. The same rule applies to general legislation that does not expressly address Indian tribes. *See, e.g., Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987) ("the proper inference from silence ... is that the sovereign power ... remains intact") (interpreting federal diversity statute); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149 n.14 (1982) ("the proper inference from silence ... is that the sovereign power ... remains intact") (interpreting various federal energy enactments). Thus the Tenth Circuit correctly explained that its interpretation of the NLRA's language must be informed by this Court's numerous cases mandating that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *San Juan*, 276 F.3d at 1191 (quoting *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985)). Guided by that line of authority, the Tenth Circuit rightly concluded that Congress had not intended in the NLRA to infringe Indian tribes' sovereign interests in enacting and enforcing labor relations laws. *Id.* at 1200.

Significantly, this Court's cases have made clear that tribal sovereignty interests are at their zenith in two circumstances directly relevant here. First, a tribe retains "the power to manage the use of *its territory and resources* by both members and nonmembers" and "to undertake and regulate economic activity *within the reservation*." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983) (emphases added). Second, this Court has recognized the tribes' "power to make their own substantive law," *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978), which includes the authority to "regulate, through taxation, licensing, or other means, the activities of nonmembers who enter into consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana v. United States*, 450 U.S. 544, 557, 565-66 (1981). Individual employees have entered into "consensual" commercial relationships (*i.e.*, employment contracts) with the Band that occur on tribal lands and that directly relate to the Band's regulation of the employment relationship. The Sixth Circuit and the Board failed to recognize the significance of these circumstances and this precedent in interpreting the NLRA's application to tribes, and similarly failed to acknowledge the significant harm that expansion of NLRB authority would inflict on important sovereign interests.⁴

⁴ This case concerns only the legislative jurisdiction of the tribes, in contrast to *Dollar General Corp. v. Mississippi Band of Choctaw Indians*, which concerns the authority of tribal courts to "adjudicate civil tort claims against nonmembers." 83 U.S.L.W. 3006 (June 12, 2014) (No. 13-1496).

In sum, the division among the courts of appeals over the NLRB’s jurisdiction is reflected not only in their differing readings of the statutory text, but also in their reliance on different precedents of this Court. The Court should grant the petition to ensure that the NLRA is interpreted uniformly and in a manner consistent with this Court’s precedents.

II. THE SIXTH CIRCUIT’S DECISION IS INCORRECT.

Another critical error underlies the *Little River* decision: The court failed to ground its analysis in the text and context of the NLRA. *See, e.g., Bay Mills*, 134 S. Ct. at 2034. *See also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (courts and agencies must “interpret the statute ‘as a symmetrical and coherent regulatory scheme,’” and attempt to fit “all parts into an harmonious whole”).

Here, examination of the Act’s text and context demonstrates that Congress removed *all* public employers—including tribes—from the Board’s control. Moreover, a contrary interpretation infringes tribal sovereignty in direct contravention of this Court’s precedents recognizing tribal authority to regulate the voluntary commercial conduct of members and non-members on reservation lands, a category that surely includes public employment with the Band. As this Court has held, that authority cannot be displaced unless Congress clearly expresses its intention to do so. No such expression is present in the NLRA.

A. The NLRA’s Public-Employer Exclusion Encompasses Indian Tribes.

1. From enactment, the NLRA has drawn a fundamental distinction between private-sector and

public-sector employers. “[C]ongressional attention” in the NLRA was exclusively “focused on employment in private industry.” *Catholic Bishop*, 440 U.S. at 504. In contrast, Congress removed *public* employers from the Board’s jurisdiction:

The term ‘employer’ *includes* any person acting as an agent of an employer, directly or indirectly, but *shall not include* the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof[.]

29 U.S.C. § 152(2) (emphases added).

This public-employer exclusion uses the term “include,” followed by a list of excluded public employers. “[I]ncludes’ imports a general class, some of whose particular instances are those specified in the definition,” *Helvering v. Morgan’s, Inc.*, 293 U.S. 121, 125 n.1 (1934). The NLRB has *never* read the public-employer exclusion as an exhaustive list of exempted entities. For example, since 1936 the Board has construed “[t]he term *State* as used in [§ 152(2) to] include the District of Columbia and all States, Territories, and possessions of the United States.” 29 C.F.R. § 102.7; *see also* 1 Fed. Reg. 207, 208 (Apr. 18, 1936). Courts, too, have long held that government entities not listed in the public-employer exclusion are nonetheless shielded by that exclusion from NLRB jurisdiction. *See, e.g., Chaparro-Febus v. Int’l Longshoremen Ass’n*, 983 F.2d 325, 329-30 (1st Cir. 1992) (commercial instrumentality of Puerto Rico is exempt); *V.I. Port Auth. v. S.I.U. de P.R.*, 354 F. Supp. 312, 313 (D. V.I. 1973), *aff’d on other grounds*, 494 F.2d 452, 453 n.2 (3d Cir. 1974) (commercial instrumentality of the Virgin Islands government exempt); *Brown v. Port Auth. Police Superior Officers*

Ass’n, 661 A.2d 312, 315-16 (N.J. Super. Ct. App. Div. 1995) (Port Authority of New York and New Jersey exempt because created by interstate compact).

The Board’s 1976 *Fort Apache* decision—holding that tribal employers are excluded from the Act under the public-employer exclusion—fit naturally with the Board’s then-prevailing view that *all* sovereigns are excluded from the reach of the NLRA. There, the Board resolved a question “of first impression ... whether an Indian tribal governing council *qua* government, acting to direct the utilization of tribal resources through a tribal commercial enterprise on the tribe’s own reservation, is an ‘employer’ within the meaning of the [NLRA].” *Fort Apache Timber Co.*, 226 NLRB at 504. The Board held that the NLRA did not apply because “it is clear beyond peradventure that a tribal council such as the one involved herein ... is a government both in the usual meaning of the word, and as interpreted and applied by Congress, the Executive, and the Courts.” *Id.* at 506 (footnote omitted). Indeed, the Board observed that “it would be possible to conclude the [tribal government] is the equivalent of a State, or an integral part of the government of the United States as a whole,⁵ and as such specifically” exempted by the language of the public-employer exclusion. *Id.* (footnote omitted). The Board’s

⁵ In 1935, when the NLRA was enacted, this Court was still “treat[ing] Indian immunities as derivative from the Federal Government’s immunity” and, thus, Indian tribes as “federal instrumentalities for purposes of state taxation.” *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 183 n.8 (1980) (Rehnquist, J., concurring in part and dissenting in part). *See also, e.g., McClanahan v. State Tax Comm’n*, 411 U.S. 164, 169 (1973) (collecting cases).

ultimate conclusion was that the tribe’s governmental nature made it “implicitly exempt” from the NLRA’s “employer” definition. *Id.*; see also *S. Indian Health Council, Inc.*, 290 NLRB 436 (1988) (applying *Fort Apache* rule to health-care clinic). That conclusion was correct.

2. Further textual support for the Band’s interpretation of the Act is found in Congress’s 1947 amendment of the NLRA in the Labor-Management Relations Act (“LMRA”), ch. 120, 61 Stat. 136 (1947). One central purpose of the amendments—embodied in section 301 of the Act, *id.* at 156-57 (codified at 29 U.S.C. § 185)—was to create causes of action that would allow private-sector employers, employees, and labor organizations to enforce specific obligations arising under the NLRA, including obligations created through collective-bargaining agreements. See *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 453-55 (1957).

The LMRA did not, however, waive any sovereign’s immunity from suit. Accordingly, under section 301 private parties cannot enforce, *inter alia*, collectively bargained obligations against any *public* employer. Like other public employers, Indian tribes “possess[] the common-law immunity from suit traditionally enjoyed by sovereign powers,” *Santa Clara Pueblo*, 436 U.S. at 58; that immunity can be waived by statute, but only through an “unequivocal[]” expression of congressional intent. *Bay Mills*, 134 S. Ct. at 2031. Congress’s failure to include a sovereign immunity waiver in the LMRA provides further evidence that Congress did not intend the NLRA to cover any public employers. Congress cannot have intended to subject tribal employers, alone among sovereigns, to the NLRA’s private-sector regime

without waiving their immunity from the key enforcement mechanism of that regime. Far more likely is that Congress did not include any waiver of sovereign immunity because it understood that the NLRA did not apply to public employers, *including* Indian tribes, in the first place.

3. Congress’s decision to limit the NLRA to private-sector employers also squares with, and reflects, enduring common-law principles. The common law generally prohibits public-employee strikes against the government. *United Fed’n of Postal Clerks v. Blount*, 325 F. Supp. 879, 882 (D.D.C.), *aff’d*, 404 U.S. 802 (1971); *see also United States v. United Mine Workers of Am.*, 330 U.S. 258, 270 (1947) (holding Norris-LaGuardia Act’s proscription on injunctions against strikes inapplicable to federal government). Because courts do not lightly presume that Congress has silently derogated from the common law, *Norfolk Redev. & Hous. Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 35 (1983), that fact alone strongly supports the Band’s position.

Moreover, this Court has expressly recognized that the public-employer exclusion embraces the common-law rule that “governmental employees did not usually enjoy the right to strike.” *NLRB v. Nat. Gas Util. Dist.*, 402 U.S. 600, 604 (1971); *see also Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177, 181 (2007) (NLRA “leaves States free to regulate their labor relationships with their public employees”). And yet the Board’s rule, approved in *Little River*, exposes a tribal government to public-employee strikes—a conclusion directly contrary to the common law and this Court’s starting presumption against the displacement of that law.

4. Were there any ambiguity whether the NLRA grants the Board jurisdiction over tribal governments, that doubt would have to be resolved in favor of the tribes.⁶ This Court has repeatedly declared that “doubtful expressions of legislative intent must be resolved in favor of the Indians,” *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 506 (1986); *see also supra* at 2-3, particularly where sovereign tribal interests are at stake. *Bracker*, 448 U.S. at 143-44. Thus, even if the NLRA were “silent” about its application to tribal government employers, the Band should have prevailed. “[T]he proper inference from silence ... is that the [Tribe’s] sovereign power ... remains intact.” *Merrion*, 455 U.S. at 149 n.14.

B. NLRB Jurisdiction Significantly Infringes Important Tribal Sovereign Interests.

Beyond misreading the NLRA and this Court’s controlling precedent on the interaction between federal law and Indian tribes’ sovereign powers, both the Board and the Sixth Circuit erred in concluding that NLRB jurisdiction would not infringe important tribal sovereign interests. The Sixth Circuit based this determination on its conclusion that the Band’s gaming operations constitute “commercial” conduct. That conclusion cannot be squared with IGRA or this

⁶ No court of appeals has granted the Board *Chevron* deference in its assessment of whether tribal sovereign interests are at stake. Even if *Chevron* were applicable, the rule of construction holding that tribal sovereignty cannot be significantly infringed without a clear expression from Congress would control at the first step of the analysis. *Cf. Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 174 (2001).

Court's precedents concerning the governmental nature of Indian gaming.

Congress considers a tribe's IGRA gaming operations to be *sovereign* activity. It requires tribes to "ente[r] into a Tribal-State compact governing the conduct of gaming activities" to conduct class III gaming activities such as casino games and slot machines. 25 U.S.C. § 2710(d)(3)(A). Compacts are governmental agreements by nature, *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 105 (1938); and IGRA compacts address core sovereign concerns like "the allocation of criminal and civil jurisdiction between the State and the Indian tribe," "taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities," and the proper "remedies for breach of contract," 25 U.S.C. § 2710(d)(3)(C). Further, net revenues generated from IGRA gaming may be spent only for public purposes, *see id.* § 2710(b)(2)(B), (d)(1)(A)(ii).

This Court, too, has recognized the sovereign nature of tribal gaming activities. In *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 218-19 (1987), the Court explained that gaming operations "at present provide the sole source of revenues for the operation of the tribal governments and the provision of tribal services." When the United States argued to this Court in *Bay Mills* that "tribal gaming under IGRA is not just ordinary commercial activity," U.S. Br. 29 n.7, No. 12-515, Justice Sotomayor agreed, stating "tribal gaming operations cannot be understood as mere profit-making ventures that are wholly separate from the Tribes' core governmental functions." *Bay Mills*, 134 S. Ct. at 2043 (Sotomayor, J., concurring). The Board and the

court of appeals erred in adopting a contrary conclusion.

More generally, this Court has repeatedly recognized that distinctions between “governmental” and “proprietary” activities are “untenable,” *New York v. United States*, 326 U.S. 572, 583 (1946); *see also Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546-47 (1985), because “[t]here is not, and there cannot be, any unchanging line of demarcation between essential and non-essential governmental functions.” *Helvering v. Gerhardt*, 304 U.S. 405, 427 (1938) (Black, J., concurring). *See also Bay Mills*, 134 S. Ct. at 2031, 2036-37 (rejecting a “commercial activities” exception to sovereign immunity). The Sixth Circuit’s use of a governmental/commercial distinction to minimize the sovereignty interests at stake here is deeply misguided. And it permits the Board to engage in standardless balancing to determine when tribal government entities are subject to tribal public-sector labor relations law or are instead controlled by the Board.

In addition, the Sixth Circuit’s distinction has no basis in modern practice. Today, state and local governments are heavily engaged in gaming activities of various forms. They run lotteries, race-tracks, and casinos; and like tribes, they use the revenues from those enterprises to fund governmental programs, including public schools. *See, e.g., Mich. Comp. Laws §§ 432.1 et seq.* (governing state-run lottery); Stephanie Simon, *(State) House Rules in Kansas Casino*, Wall St. J., Feb. 4, 2010, <http://www.wsj.com/articles/SB10001424052748703338504575041433293903748> (describing state-owned casino). These examples demonstrate that gaming enterprises are neither inherently “governmental” nor inherently “commercial.” Their public or private character

depends on their ownership and management structures and the purposes underlying their creation.

Congress has stated that Indian gaming shall be under the auspices of two sovereigns—the states and the tribes—and shall raise revenues for strictly public purposes. Against that backdrop, the court of appeals committed a clear category error by characterizing IGRA gaming operations as non-governmental. And it only compounded that error by claiming that an NLRB order displacing tribal regulation of casino operations does not significantly interfere with tribal sovereign interests.

That conclusion is also incompatible with *Montana v. United States*, 450 U.S. 544 (1981). The Sixth Circuit recognized it was displacing a tribal public-sector labor relations law, yet it seemed to believe the Band’s sovereign interest was diminished because “tribes lack the inherent power to govern the activities of non-members” on tribal lands. App. 28a. That is incorrect. *Montana* holds, to the contrary, that tribal governments “retain inherent sovereign power” to “regulate, through taxation, licensing, or other means, the activities of nonmembers who enter into consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.” 450 U.S. at 565-66. *See also Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 332-33 (2008) (tribes possess legislative authority to regulate “nonmember conduct inside the reservation that implicates” commerce, such as “the sale of merchandise by a non-Indian to an Indian on the reservation”).

This retained sovereign power encompasses a tribe’s labor relations with tribal employees, whether at casinos or other facilities. By accepting

employment with tribal governments, they have “enter[ed] into consensual relationship[s] with the tribe or its members, through commercial dealing [and] contracts.” *Montana*, 450 U.S. at 565. Unions that seek to organize the Band’s employees similarly have opted to engage in activities on reservation lands that involve commerce with the tribe and have a clear and direct effect on the Band’s “economic security” and “welfare,” *id.* at 566, as IGRA’s requirement that the Band use gaming revenues to provide essential government services makes doubly clear.

* * * *

In sum, the Sixth Circuit incorrectly interpreted the NLRA to include tribal governments as “employers.” It also erred in holding that expanding the Board’s jurisdiction to include tribal IGRA gaming employees would not infringe tribal sovereignty.

III. RESOLUTION OF THE QUESTION PRESENTED IS CRITICALLY IMPORTANT TO THE FAIR AND UNIFORM ADMINISTRATION OF FEDERAL LABOR LAW AND TO FEDERAL INDIAN POLICY.

The time is ripe for the Court to decide whether the NLRB has power to displace tribal labor relations laws that govern the conduct of employees and unions on tribal trust lands.

First, the circuit split will necessarily lead to arbitrary disparities in the treatment of tribes if permitted to persist. There are 73 Indian tribes within the Tenth Circuit, operating 157 casinos pursuant to compacts with Colorado, Kansas, New Mexico, Oklahoma, and Wyoming. There are 12

Indian tribes within the Sixth Circuit, operating 19 casinos pursuant to compacts with Michigan. The Ninth Circuit (which given *Chapa*, 316 F.3d 995, likely will follow the same path as the Sixth Circuit), includes another 424 tribes and 149 casinos operating pursuant to compacts with Arizona, California, Idaho, Montana, Nevada, Oregon, and Washington.

Tribes within the Tenth Circuit retain inherent sovereign authority to enact labor relations laws for gaming and other facilities that are consistent with their own laws and the terms of IGRA compact agreements with surrounding states. The tribes of the Sixth and (likely) the Ninth Circuits, in contrast, will suffer damage to their sovereign and financial interests as a result of the Board's decision to impose the NLRA's ill-fitting private-employment rules on their gaming operations (and other facilities—such as hospitals or charter schools—that the Board may deem insufficiently governmental to permit tribal regulation). It is fundamentally unfair to allow these significant disparities to persist.

Second, the arbitrary outcomes produced by the circuit split are amplified because the legal regime embraced by the Board and the Sixth Circuit will breed still further uncertainty and arbitrariness where it applies. In place of the bright-line distinction between private employers (covered) and public employers (not covered) established by the NLRA's "employer" definition, the Board has asserted authority to draw new lines on a case-by-case basis, leaving some tribal institutions governed by tribal law and others by the NLRA and Board regulation. See *San Manuel*, 341 NLRB at 1062 (Board will "examine the specific facts in each case to determine whether the assertion of jurisdiction over Indian

tribes will effectuate the purposes of the [NLRA]). Tribal government employers will thus face deep uncertainty about what kind of government activities and which groups of tribal employees will be deemed “too commercial” to be governed by tribal law.⁷

Third, treating Indian tribes as private employers undermines vital policy choices embodied in federal statutes.

a. *The NLRA*. Although the NLRA leaves regulation of public-employee labor relations to sovereign governments, under the decision below tribes are treated differently from all other sovereigns, undermining tribal authority to establish and enforce locally applicable conduct rules.

Virtually all sovereigns forbid public-employee strikes. Under federal law, it is an unfair labor practice for any federal-employee union to call for, or even “condone,” a strike, 5 U.S.C. § 7116(b)(7), and a *crime* for a federal employee to engage in a strike, 18 U.S.C. § 1918(3). Many states and municipalities have similar anti-strike prohibitions. In Michigan, too, “[a] public employee shall not strike,” Mich. Comp. Laws § 423.202. The Band enacted a similar prohibition. App. 159a. Yet on Michigan reservations, under *Little River*, public employees *may* strike, because the Board has decided to overrule the Band’s

⁷ To take but one example, in *Yukon Kuskokwim Health Corp.*, 341 NLRB 1075 (2004), the Board determined after years of litigation that a fee-free health clinic operated by an Alaska Native multi-tribal consortium was an “employer” covered by the NLRA, but declined jurisdiction on discretionary grounds. The result was hardly predictable, considering the Board’s first instinct was to *assert* jurisdiction. *See id.* at 1075 n.1 (citing 328 NLRB 761 (1999)).

judgment that it too cannot risk a work stoppage at its government-owned facilities. This makes no sense.

Also incongruous is the Board's decision that the Band's law contravenes the NLRA by placing "restrictions on the duty to bargain over mandatory subjects," including "subjects in conflict with tribal law." App. 55a, 78a. Unless reversed, the Band and other tribes within the Sixth Circuit will be forced, for example, to bargain over "drug and alcohol testing policies," *id.*, notwithstanding the serious public health concerns that tribes have confronted in this area. All other public employers are free to exclude such subjects from bargaining based on their assessment of the public interest.

In these ways, the decision below undermines Congress's determination that public employers are excluded from NLRB regulation and should be free to establish their own labor relations regimes.

b. *The IRA and IGRA.* Treating tribal governments that operate casinos as if they were private employers undermines the twin pillars of Congress's efforts to affirm the sovereignty and to support the self-sufficiency of tribal governments: the IRA and IGRA. The IRA (adopted contemporaneously with the NLRA) encourages tribes to "revitalize their self-government through the adoption of constitutions and bylaws and through the creation of chartered corporations, with power to conduct the business and economic affairs of the tribe." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973). And IGRA "provide[s] a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1).

Displacing tribal labor relations laws at tribal-chartered casinos undercuts both statutes. To forbid the Band from enforcing laws governing public-employee labor relations on tribal lands gravely infringes tribal authority, contrary to the IRA's purposes. And to justify that intrusion by mischaracterizing tribal government casinos as "commercial" is equally inconsistent with IGRA—the express objective of which was to enhance tribal sovereignty and the quality of self-government by creating the equivalent of tax collection to fill government coffers.⁸

The Board and the Sixth Circuit paid little heed to these congressional policies, and placed tribal governments at substantial risk. To provide but one concrete example, if—unlike most other public employees—tribal employees at the Little River Casino may lawfully strike, the Band stands to lose the revenue base that funds essential public services and must conduct collective bargaining under the tacit threat of a crippling public-employee strike. *See* Franklin D. Roosevelt, *Letter on the Resolution of Federation of Federal Employees Against Strikes in Federal Service* (Aug. 16, 1937) (stating that public-employee strikes are "unthinkable and intolerable" because they would result in "paralysis of Government").

⁸ As noted, the Band's casino supplies all funding for the Band's courts and prosecutors and roughly half of the Band's total budgetary needs. App. 153a-155a. The Band's circumstances are not unusual. *See, e.g., Soaring Eagle*, 791 F.3d at 668 ("The Casino's revenue constitutes 90% of the Tribe's income"); *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1195 (10th Cir. 2010) ("[T]he Tribe depends heavily on the Casino for revenue to fund its governmental functions").

The ruling below also undermines significant *state* interests under IGRA. Class III gaming must be “conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State.” 29 U.S.C. § 2710(d)(1)(C). These inter-governmental compacts, which take effect upon approval by the Secretary of the Interior, *id.* § 2710(d)(3)(B), may address “any ... subjects that are directly related to the operation of gaming activities,” *id.* § 2710(d)(3)(C)(vii). States have utilized the compact process to obtain substantial financial and public policy benefits. *See, e.g.*, Tribal-State Compact Between the Match-E-Be-Nash-She-Wish Band of Pottawatomie Indians of Michigan and the State of Michigan §§ 15-16 (May 9, 2007) (payments to state and local governments); Indian Gaming Compact Between the State of New Mexico and the Mescalero Apache Tribe § 11 (Apr. 13, 2015); Tribal-State Compact Between the State of California and the Karuk Tribe § 5.0 (Nov. 12, 2014). Indeed, Michigan obtains millions of dollars per year from the Band’s casino alone, and millions more from other Indian gaming operations.⁹

In addition, compacts may address and establish labor-management rules that differ from those the NLRA imposes on private employers. *See, e.g.*, Tribal-State Compact Between the State of California and the Karuk Tribe, *supra* § 12.10 (requiring Tribe to enact labor relations code); Tribal-State Compact Between the Mashpee Wampanoag Tribe and the Commonwealth of Massachusetts § 18.6 (Mar. 19,

⁹ *See* Mich. Gaming Control Bd., *Indian Gaming Section Annual Report to the Executive Director* 5 (2011), https://www.michigan.gov/documents/mgcb/Annual_Report_-_Indian_Gaming_2010_Final_proprietary_remove_353286_7.pdf.

2013) (same); N.Y. Exec. Law § 12(a) (authorizing governor to conclude IGRA compact, subject to tribe's agreement to enact labor relations provisions). Congress in IGRA established a regime that allows states to pursue their financial and policy interests, including their labor and employment law interests concerning Indian gaming, through intergovernmental compact negotiations.

The Board, however, takes the position that the NLRA displaces even compact provisions *agreed to* by states and tribes and approved by the Secretary of the Interior. *See Casino Pauma*, 363 NLRB No. 60 (2015) (affirming ALJ decision that compact provisions between California and a tribe are preempted by the NLRA). The Board's approach, embraced by the Sixth Circuit, directly threatens the states' role, as well as substantial negotiated state benefits contemplated by IGRA.

With the support of Congress, tribal governments are working to create the economic development opportunities essential to self-government and self-sufficiency. To the detriment of tribes within its jurisdiction, the Sixth Circuit has issued a decision that cannot be reconciled with Congress's duly enacted statutes and, indeed, undermines Congress's purposes and impairs achievement of its goals. That important and incorrect decision should be reviewed and reversed.

CONCLUSION

The petition should be granted.

Respectfully submitted,

CARTER G. PHILLIPS
KWAKU A. AKOWUAH
CHRISTOPHER A.
EISWERTH
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

LLOYD B. MILLER*
DOUGLAS B.L. ENDRESON
REBECCA A. PATTERSON
SONOSKY, CHAMBERS,
SACHSE, ENDRESON &
PERRY LLP
1425 K Street, N.W.,
Suite 600
Washington, D.C. 20005
(202) 682-0240
lloyd@sonosky.net

Counsel for Petitioner

February 12, 2016

* Counsel of Record

APPENDIX

1a

APPENDIX A

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

No. 14-2239

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

LITTLE RIVER BAND OF OTTAWA
INDIANS TRIBAL GOVERNMENT,
Respondent.

Decided and Filed: June 9, 2015
Rehearing En Banc Denied Sept. 18, 2015*

OPINION

Before MERRITT, GIBBONS, and McKEAGUE,
Circuit Judges.

GIBBONS, J., delivered the opinion of the court in
which MERRITT, J., joined. McKEAGUE, J. (pp. 556-
65), delivered a separate dissenting opinion.

JULIA SMITH GIBBONS, Circuit Judge.

In this case, we are called on to decide whether the
National Labor Relations Board may apply the
National Labor Relations Act (NLRA), 29 U.S.C.
§§ 151-169, to the operation of a casino resort of the

* Judge McKeague would grant rehearing for the reasons
stated in his dissent.

2a

Little River Band of Ottawa Indians. The Band's tribal council enacted an ordinance to regulate employment and labor-organizing activities of its employees, including casino employees, most of whom are not members of the Band. The Board issued an order to the Band to cease and desist from enforcing the provisions that conflict with the NLRA. We hold that because the NLRA applies to the Band's operation of the casino, the Board had jurisdiction to issue the cease and desist order. Accordingly, we grant the Board's application for enforcement of the order.

I.

The Band is a federally recognized Indian tribe with more than 4,000 enrolled members, most of whom live within or near the Band's aboriginal lands in the State of Michigan. *See* Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians Act (the Little Bands Act), 25 U.S.C. § 1300k-2(a). Pursuant to the Little Bands Act and the Indian Reorganization Act, 25 U.S.C. § 476, the Band enacted a constitution and amendments thereto, which have been approved by the Secretary of the Interior. The Band's constitution vests the Band's legislative powers in the Tribal Council and grants power to the Tribal Council to operate gaming pursuant to the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721.

Pursuant to the IGRA, the Band entered into a compact with the State of Michigan to conduct class III gaming activities, as defined by 25 U.S.C. § 2703(8), on the Band's trust lands in Manistee, Michigan. The gross revenues from the Little River Casino Resort, a tribally-chartered, subordinate organization of the Band, exceed \$20 million annually. According to the IGRA, the net revenues from the casino may be used

only to fund the Band's tribal governmental operations or programs, to provide for the general welfare of the Band and its members, to promote tribal economic development, to donate to charitable organizations, or to help support the operations of local government. *See* 25 U.S.C. § 2710(b)(2)(B). The revenues from the casino provide over fifty percent of the Band's total budget.

The record in this case shows that the casino has 905 employees—107 of whom are enrolled members of the Band, 27 of whom are members of other Indian tribes, and 771 of whom are neither members of the Band nor of any other Indian tribe. The majority of casino employees live outside the Band's trust lands, and the majority of the casino's customers are not members of Indian tribes. Apart from the casino, 245 employees currently work for the Band's other governmental departments and subordinate organizations. Of this number, 108 are members of the Band and 137 are not members of the Band. In sum, of the Band's 1,150 total employees, 908 are not members of the Band.

In 2005, the Tribal Council enacted the Band's Fair Employment Practices Code (FEPC), which it amended most recently on July 28, 2010. In pertinent part, the FEPC contains Article XVI, "Labor Organizations and Collective Bargaining," and Article XVII, "Integrity of Fair Employment Practices Code," which regulate labor-organizing activities and collective bargaining. These articles apply to casino employees and labor organizations representing or seeking to represent casino employees. As amended, Article XVI, *inter alia*, grants to the Band the authority to determine the terms and conditions under which collective bargaining may or may not occur; prohibits strikes, work stoppage, or slowdown by the Band's

employees and, specifically, by casino employees; prohibits the encouragement and support by labor organizations of employee strikes; prohibits any strike, picketing, boycott, or any other action by a labor organization to induce the Band to enter into an agreement; subjects labor organizations and employees to civil penalties for strike activity; subjects employees to suspension or termination for strike activity; subjects labor organizations to decertification for strike activity; subjects labor organizations to a ban on entry to tribal lands for strike activity; and requires labor organizations doing business within the jurisdiction of the Band to apply for and obtain a license. Article XVI also precludes collective bargaining over the Band's decisions to hire, lay off, recall, or reorganize the duties of its employees; precludes collective bargaining over any subjects that conflict with the Band's tribal laws; exempts the Band from the duty to bargain in good faith over the terms and conditions under which the Band's employees may be tested for alcohol and drug use; limits the duration of collective bargaining agreements to three years or less; provides that decisions by the Band, through its Tribal Court, over disputes involving the duty to bargain in good faith or alleged conflicts between a collective-bargaining agreement and tribal laws shall be final and not subject to appeal; and limits the period of time during which employees may file a deauthorization petition. Further, Article XVI prohibits the requirement of membership in a labor organization as a condition of employment. It also prohibits the deduction of union dues, fees, or assessments from the wages of employees unless the employee has presented, and the Band has received, a signed authorization of such deduction. As amended, Article XVII prohibits Band employers, such as the casino,

from giving testimony or producing documents in response to requests or subpoenas issued by non-tribal authorities engaged in investigations or proceedings on behalf of current or former employees, when such employees have failed to exhaust their remedies under the FEPC.

On March 28, 2008, the Teamsters, Local No. 406, filed a Charge Against Employer, asserting that the Band committed an unfair labor practice in violation of the NLRA. On December 10, 2010, the Acting General Counsel of the Board filed an unfair labor practice complaint, alleging that the above provisions of Articles XVI and XVII of the FEPC interfere with, restrain, and coerce employees in the exercise of their rights guaranteed by Section 7 of the NLRA, 29 U.S.C. § 157, and therefore violate Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1). In a proceeding before the Board, the parties stipulated that the only issues for decision were whether the Board has jurisdiction over the Band and, if so, whether the Band violated Section 8(a)(1) of the NLRA, by applying the above provisions of the FEPC. *Little River Band of Ottawa Indians Tribal Gov't*, 359 N.L.R.B. No. 84, slip op. at 2 (2013). The only argument the Band presented in its defense was that the Board lacked jurisdiction because the application of the NLRA would impermissibly interfere with the Band's inherent tribal sovereignty to regulate labor relations on its tribal lands.

The Board concluded it had jurisdiction, held that the Band violated the NLRA as alleged, and issued a cease and desist order. *Little River*, 359 N.L.R.B. No. 84, slip op. at 3-6. In reaching this decision, the Board applied its holding in *San Manuel Indian Bingo & Casino*, 341 N.L.R.B. 1055 (2004), *aff'd*, 475 F.3d 1306 (D.C.Cir.2007), in which it decided the merits of a

similar jurisdictional challenge. *Little River*, 359 N.L.R.B. No. 84, slip op. at 2-3. In *San Manuel*, the Board adopted a framework to determine whether federal Indian law or policy constrains its jurisdiction. 341 N.L.R.B. at 1059-62. That framework begins with the statement from *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), that “a general statute in terms applying to all persons includes Indians and their property interests.” 341 N.L.R.B. at 1059 (quoting *Tuscarora*, 362 U.S. at 116). In *San Manuel*, the Board noted three exceptions to the *Tuscarora* principle, which were first enumerated by the Ninth Circuit in *Donovan v. Coeur d’Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir.1985). 341 N.L.R.B. at 1059 (citing *Coeur d’Alene*, 751 F.2d at 1116). The Board followed this approach, holding that general statutes do not apply to Indian tribes if: “(1) the law ‘touches exclusive rights of self-government in purely intramural matters’; (2) application of the law would abrogate treaty rights; or (3) there is ‘proof’ in the statutory language or legislative history that Congress did not intend the law to apply to Indian tribes.” 359 N.L.R.B. No. 84, slip op. at 3 (quoting *Coeur d’Alene*, 751 F.2d at 1116). “In any of these situations, Congress must expressly apply a statute to Indians before ... it reaches them.” *Id.* (alteration in original) (citing *Coeur d’Alene*, 751 F.2d at 1116). Applying this framework, the Board determined that application of the NLRA to the casino would not interfere with the Band’s “exclusive rights of self-government in purely intramural matters.” *Id.* The Board also found the second and third *Coeur d’Alene* exceptions inapplicable. *Id.* The Board saw “no merit in [the Band’s] central contention—that Federal scrutiny of its FEP Code improperly impairs the exercise of the Tribe’s sovereign right of self-

government.” *Id.* at 4. The Board also applied a discretionary jurisdictional standard intended “to balance the Board’s interest in effectuating the policies of the [NLRA] with the need to accommodate the unique status of Indians in our society and legal culture.” *Id.* at 4 (citing *San Manuel*, 341 N.L.R.B. at 1063). The Board found “that policy considerations weigh in favor of the Board asserting its discretionary jurisdiction.” *Id.* The Board accordingly ordered the Band to cease and desist from applying specific provisions of Articles XVI and XVII of the FEPC to employees of the casino, or any labor organization that may represent those employees, and from interfering with employees in the exercise of their rights guaranteed by Section 7 of the NLRA, 29 U.S.C. § 157. *Id.* at 6. The Band petitioned for review, and the Board cross-appealed for enforcement of its order.

We heard oral argument in this case on October 8, 2013. The Board subsequently moved to vacate its order, to remand for further consideration in light of the Supreme Court’s decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014). We granted the Board’s motion. A properly constituted panel of the Board considered the case and issued a decision and order against the Band on September 15, 2014, stating that “we have ... considered de novo the stipulated record and the parties’ briefs. We have also considered the now-vacated Decision and Order, and we agree with the rationale set forth therein.” 361 N.L.R.B. No. 45, slip op. at 1 (2014).

The Board then reinitiated this appeal with an application for enforcement of its order. The application focuses our inquiry on the single issue of whether the Board may assert jurisdiction over the Band to enforce the cease and desist order. In deciding this

case, we have considered the briefs and arguments from the prior appeal (Nos. 13-1464 and 13-1583).

II.

The NLRA is a statute of general applicability and is silent as to Indian tribes. *See* 29 U.S.C. §§ 152(1)-(2), 158(a), 160(a). The NLRA prohibits “employers” from engaging in unfair labor practices. 29 U.S.C. § 158(a). The NLRA creates the Board’s jurisdiction, empowering it “to prevent any person from engaging in any unfair labor practice affecting commerce.” 29 U.S.C. § 160(a). The NLRA defines both “person” and “employer” in general and expansive terms. The definitions of both “person” and “employer” provide a list of entities which those terms cover and, in the case of “employer,” do not cover. *See* 29 U.S.C. § 152(1); § 152(2). In both cases, the lists are illustrative, not exhaustive, and neither definition mentions Indian tribes.

From one vantage, then, this case is about whether the pertinent statutory terms “employer” and “person,” which trigger the Board’s jurisdiction, encompass Indian tribes. Since Congress has not “directly spoken to the precise issue,” *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842 (1984), it would seem that Congress has implicitly delegated to the Board the authority to determine the circumstances under which the statutory term “employer” extends to Indian tribes. Under *Chevron*, if the Board’s interpretation is “a permissible construction of the statute,” 467 U.S. at 843, we give it “controlling weight,” *id.* at 844. The Board sees the case in this light: it interprets the NLRA’s definition of “employer” to cover Indian tribes and argues that its construction is reasonable.

From another angle, however, this case concerns the

limits and contours of inherent tribal sovereignty and the proper interpretation of the silence of a generally applicable congressional statute against the background of federal Indian law. The Band submits that under principles of federal Indian law the NLRA, like any other congressional enactment, cannot preempt a tribal government's exercise of its inherent sovereign authority without a clear expression from Congress. The Board responds that congressional statutes of general applicability that are silent as to Indian tribes, like the NLRA, apply to Indian tribes, unless such application abrogates rights guaranteed by Indian treaties or interferes with exclusive rights of self-governance in purely intramural matters. Central to the argument for its construction, the Board claims that the *San Manuel* standard follows from judicial opinions expounding federal Indian law and accommodates federal Indian policies. See *Little River*, 359 N.L.R.B. No. 84, slip op. at 3-4; *San Manuel*, 341 N.L.R.B. at 1063. Thus, the Board's arguments for the reasonableness of its construction of its jurisdictional terms are predicated on its analysis of federal Indian law and policy.

From this viewpoint, we find that *Chevron* does not apply. A reviewing court does not owe *Chevron* deference to an agency construction if the agency adopts the construction on the basis of a judicial opinion and not on the basis of policy considerations regarding the statute it administers. See, e.g., *Akins v. F.E.C.*, 101 F.3d 731, 740 (D.C.Cir.1996) (*en banc*), *vacated on other grounds*, 524 U.S. 11 (1998); see also Richard J. Pierce Jr., *Administrative Law Treatise*, § 3.5, at 200 (5th ed.2010). Moreover, federal Indian law and policy are areas over which the Board has no particular expertise, and so we need not defer to the Board's conclusions with respect to them. *Cf.*

Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 143-44 (2002); see also *San Manuel*, 475 F.3d at 1312. In *San Manuel*, the D.C. Circuit attempted to separate questions of tribal sovereignty, which it reviewed *de novo*, from questions about the Board's construction of the term "employer," which it reviewed under *Chevron*. See 475 F.3d at 1311-12, 1315-16. In this case, however, considerations of federal Indian law suffuse every branch of the analysis concerning the application of the NLRA to the casino. At its heart, the question before us is not one of policy, but one of law. We are asked to decide whether federal Indian law forecloses the application of the NLRA to the Band's operation of its casino and regulation of its employees, and we do so *de novo*.

III.

A.

We begin by reviewing the law governing the implicit divestiture of tribal sovereignty, which provides an important background when determining whether federal laws of general applicability also apply to Indian tribes absent an express congressional statement. Indian tribes are "distinct, independent political communities." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327 (2008) (quoting *Worcester v. Georgia*, 31 U.S. 515, 559 (1832)). The powers they possess "stem from three sources: federal statutes, treaties, and the tribe's inherent sovereignty." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 168 (1982) (Stevens, J., dissenting). Inherent tribal sovereignty preexisted the founding; it "is neither derived from nor protected by the Constitution." *Id.* Indian tribes' "incorporation within the territory of the United States, and their acceptance of

its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised.” *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (quoting *United States v. Kagama*, 118 U.S. 375, 381 (1886)). The Tenth Amendment does not refer to Indian tribes in its reservations of power not delegated to the United States. *See* U.S. Const. amend. X; *see also Merrion*, 455 U.S. at 168 n. 17 (Stevens, J., dissenting). As such, the sovereignty of Indian tribes “exists only at the sufferance of Congress and is subject to complete defeasance.” *Wheeler*, 435 U.S. at 323.

Indian tribes retain broad residual power over intramural affairs: they may determine tribal membership, regulate domestic relations among members, prescribe rules of inheritance among members, and punish tribal offenders. *Montana v. United States*, 450 U.S. 544, 564 (1981). “They may also exclude outsiders from entering tribal land.” *Plains Commerce*, 554 U.S. at 327-28 (citing *Duro v. Reina*, 495 U.S. 676, 696-97 (1990)). “Conversely, when a tribal government goes beyond matters of internal self-governance and enters into an off-reservation business transaction with non-Indians, its claim of sovereignty is at its weakest.” *San Manuel*, 475 F.3d at 1312-13 (citing *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973)).

The Supreme Court has long been suspicious of tribal authority to regulate the activities of non-members and is apt to view such power as implicitly divested, even in the absence of congressional action. *See Plains Commerce*, 554 U.S. at 328 (“[T]he tribes have, by virtue of their incorporation into the American republic, lost ‘the right of governing ... person[s] within their limits except themselves.’ ” (second and third alteration in original) (quoting

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 209 (1978)); see also COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 4.02(3), at 226-42 (Nell Jessup Newton ed., 2012) (hereinafter COHEN’S HANDBOOK). The Supreme Court has found implicit divestiture in areas of tribal criminal jurisdiction, see *Oliphant*, 435 U.S. at 195, civil legislative jurisdiction, see *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 659 (2001); *Montana*, 450 U.S. at 557, and civil adjudicative jurisdiction, see *Plains Commerce*, 554 U.S. at 336, 341; *Nevada v. Hicks*, 533 U.S. 353, 357-58 (2001); *Strate v. A-1 Contractors*, 520 U.S. 438, 456-59 (1997).

Montana charts the contemporary law of implicit divestiture of inherent tribal sovereignty. See 450 U.S. at 565-66. *Montana* held that the inherent sovereignty of the Crow Indian Tribe did not encompass regulation of non-Indian fishing and hunting on reservation land owned in fee by non-members of the tribe. See *id.* at 557. In addressing the claim that the tribe’s residual inherent sovereignty included such power, the *Montana* Court set forth “the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of non-members of the tribe.” *Id.* at 565 (citing *Oliphant*, 435 U.S. at 209). *Montana* carved out two exceptions to this rule. First, “[a] tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.” 450 U.S. at 565. Second, “[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health

or welfare of the tribe.” *Id.* at 566. *Montana* made plain that tribal power over non-members extends only as far as “necessary to protect tribal self-government or to control internal relations.” *Id.* at 564. Any exercise of tribal power over non-members beyond that point “is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.” *Id.* The Supreme Court has called *Montana* a “pathmarking case” on the subject of Indian tribes’ regulatory authority over non-members. *See Hicks*, 533 U.S. at 358 (citing *Strate*, 520 U.S. at 445).

In *Hicks* and *Plains Commerce*, the Court further demarcated the bounds on tribal sovereignty to regulate the activities of non-members. *Hicks* held that a tribe’s inherent sovereignty does not extend to the regulation of state wardens executing a search warrant for evidence of an off-reservation violation of state law. 533 U.S. at 364. The Supreme Court rejected that such regulation is essential to tribal self-government or internal relations and held that the tribe’s inherent sovereignty does not encompass regulatory and adjudicatory jurisdiction over state officers. *See id.* at 364, 374. Applying *Montana*, the *Hicks* Court “explained that what is necessary to protect tribal self-government and control internal relations can be understood by looking at the examples of tribal power to which *Montana* referred: tribes have authority ‘[to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members.’ ” *Id.* at 360-61 (alterations in original) (quoting *Strate*, 520 U.S. at 459). Thus, *Hicks* narrowly draws the boundary of residual inherent sovereignty. *See id.* “Tribal assertion of regulatory authority over non-members must be connected to

that right of the Indians to make their own laws and be governed by them.” *Id.* at 361.

Further, the *Hicks* Court diluted the claim that tribal sovereignty to regulate the activities of non-members necessarily flows from the power to exclude outsiders from entering tribal land. The Court denied “that Indian ownership suspends the ‘general proposition’ derived from *Oliphant* that ‘the inherent sovereign powers of an Indian tribe do not extend to the activities of non-members of the tribe’ except to the extent ‘necessary to protect tribal self-government or to control internal relations.’ ” *Id.* at 359 (quoting *Montana*, 450 U.S. at 564-65). As the *Hicks* court explained, “[t]he ownership status of land ... is only one factor to consider in determining whether regulation of the activities of non-members is ‘necessary to protect tribal self-government or to control internal relations.’ ” *Id.*

Similarly, in *Plains Commerce*, the Court held that a tribal court lacked jurisdiction to adjudicate a discrimination claim concerning a non-Indian bank’s sale of fee land because “regulating the sale of non-Indian fee land” is not related to the sovereign interests of protecting tribal self-government or controlling internal relations. *See* 554 U.S. at 330, 336, 341. The *Plains Commerce* Court narrowed the ambit of *Montana*’s exceptions to be congruent with those interests, noting that “[t]hese exceptions are limited ones and cannot be construed in a manner that would swallow the rule or severely shrink it.” *Id.* at 330 (citations omitted) (internal quotation marks omitted). The Supreme Court also clarified that the burden rests on the tribe to establish an exception to *Montana*’s general rule. *Id.* (citing *Atkinson*, 532 U.S. at 654).

Hicks and *Plains Commerce* demonstrate that the

application of the *Montana* framework is guided by an overarching principle: inherent tribal sovereignty has a core and a periphery. At the periphery, the power to regulate the activities of non-members is constrained, extending only so far as “necessary to protect tribal self-government or to control internal relations.” *Montana*, 450 U.S. at 564. Tribal regulations of non-member activities must “flow directly from these limited sovereign interests.” *Plains Commerce*, 554 U.S. at 335.

B.

The Supreme Court has anticipated that federal statutes of general applicability may implicitly divest Indian tribes of their sovereign power to regulate the activities of non-members. *See Tuscarora*, 362 U.S. at 115-17. In *Tuscarora*, the Supreme Court declared that “it is now well settled by many decisions of this Court that a general [federal] statute in terms applying to all persons includes Indians and their property interests.” 362 U.S. at 116. *Tuscarora* presented the question of whether a portion of the Tuscarora Indian Nation’s lands could be condemned under the eminent domain powers of § 21 of the Federal Power Act, 16 U.S.C. §§ 836, 836a (2012). *Id.* at 115. The Tuscarora Indian Nation, relying on *Elk v. Wilkins*, 112 U.S. 94 (1884), “argue[d] that § 21, being only a general act of Congress, does not apply to Indians or their lands.” 362 U.S. at 115. The Supreme Court explicitly rejected this argument, citing decisions holding that generally applicable federal statutes presumptively reach the property interests of individual members of Indians tribes where no provision “indicates that Indians are to be excepted.” *Id.* at 116-17 (citing *Okla. Tax Comm’n v. United States*, 319 U.S. 598, 607 (1943); *Superintendent of*

Five Civilized Tribes v. Comm'r, 295 U.S. 418, 419-20 (1935)). The *Tuscarora* Court extended these decisions applying general federal statutes to individual members of Indian tribes to hold that the eminent domain powers of the Federal Power Act, a statute creating a comprehensive regulatory scheme, reached lands purchased and owned in fee simple by the Tuscarora Indian Nation. *See id.* at 118.¹

Our sister circuits have long read *Tuscarora* for the proposition that a federal statute creating a comprehensive regulatory scheme presumptively applies to Indian tribes. *See, e.g., Solis v. Matheson*, 563 F.3d 425, 430 (9th Cir.2009); *United States v. Mitchell*, 502 F.3d 931, 947-48 (9th Cir.2007); *NLRB v. Chapa De Indian Health Program, Inc.*, 316 F.3d 995, 998-99 (9th Cir.2003); *Taylor v. Ala. Intertribal Council Title IV J.T.P.A.*, 261 F.3d 1032, 1034-35 (11th Cir.2001); *United States v. Wadena*, 152 F.3d 831, 841-42 (8th

¹ *Merrion* also suggests that federal statutes of general applicability may implicitly divest Indian tribes of their sovereign power to regulate the activities of non-members. *See Merrion*, 455 U.S. at 152. Before concluding that there was no indication that the tribe's power to enact an ordinance taxing non-member removal of oil and natural gas from tribal lands had been abrogated by Congress, the *Merrion* Court examined whether any particular provision in two federal statutes "deprived the Tribe of its authority to impose the severance tax." 455 U.S. at 149. After reviewing the text and legislative history of the Natural Gas Policy Act of 1978, 15 U.S.C. § 3320(a), (c)(1), *repealed by* Pub.L. No. 101-60, § 2(b), 103 Stat. 158 (1989), the Court found "no 'clear indications' that Congress has *implicitly deprived* the Tribe of its power to impose the severance tax." *Id.* at 152 (emphasis added). Although the Court held that Congress had not implicitly divested the tribe of its authority to impose a severance tax, the Court's analysis presumes that Congress could do so. *See id.* at 152; *see also Pueblo of San Juan*, 276 F.3d 1186, 1204 (10th Cir.2002) (en banc) (Murphy, J., dissenting).

Cir.1998); *Cook v. United States*, 86 F.3d 1095, 1097 (Fed.Cir.1996); *United States v. Funmaker*, 10 F.3d 1327, 1330-31 (7th Cir.1993); *E.E.O.C. v. Fond du Lac Heavy Equip. & Const. Co., Inc.*, 986 F.2d 246, 248 (8th Cir.1993); *U.S. Dep't of Labor v. Occupational Safety & Health Review Comm'n*, 935 F.2d 182, 183-84 (9th Cir.1991); *United States v. White*, 508 F.2d 453, 455 (8th Cir.1974).

We stress that the application of general federal statutes to Indian tribes is presumptive; they do not always apply. *See, e.g., Michigan v. Bay Mills Indian Cmty.*, 134 S.Ct. 2024 (2014). Our sister circuits have developed and employed a test, set forth in *Coeur d'Alene*, to determine the exceptions to the presumptive application of a general federal statute. *See* 751 F.2d at 1116. In *Coeur d'Alene*, the Ninth Circuit held that the Occupational Safety and Health Act ("OSHA") applied to commercial activities carried out by an Indian tribal farm that employed some non-member workers and was similar in its operation to other farms in the area. 751 F.2d at 1114. The court rejected the notion that "congressional silence should be taken as an expression of intent to exclude tribal enterprises from the scope of an Act to which they would be subject otherwise." *Id.* at 1115. Citing *Tuscarora*, the court applied the presumption that "federal laws generally applicable throughout the United States apply with equal force to Indians on reservations." *Id.* (quoting *United States v. Farris*, 624 F.2d 890, 893 (9th Cir.1980)). The court, however, held that this presumption is limited by three exceptions.

A federal statute of general applicability that is silent on the issue of applicability to Indian tribes will not apply to them if: (1) the law touches exclusive rights of self-governance in purely

intramural matters; (2) the application of the law to the tribe would abrogate rights guaranteed by Indian treaties; or (3) there is proof by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations.

Id. at 1116 (internal quotations omitted). “In any of these three situations, Congress must expressly apply a statute to Indians before ... it reaches them.” *Id.* (emphasis original). Because the tribe could not show that the application of OSHA regulations to its commercial farm fell within one of these three exceptions, the court held that OSHA applied. *See id.* at 1116-18.

Our sister circuits have employed the framework set forth in *Coeur d’Alene* to conclude that aspects of inherent tribal sovereignty can be implicitly divested by comprehensive federal regulatory schemes that are silent as to Indian tribes. *See, e.g., Menominee Tribal Enters. v. Solis*, 601 F.3d 669, 674 (7th Cir.2010) (holding that OSHA applied to tribe’s operation of a sawmill and related commercial activities); *Fla. Paraplegic Ass’n v. Miccosukee Tribe of Indians*, 166 F.3d 1126, 1128-30 (11th Cir.1999) (holding Title III of the Americans with Disabilities Act applied to tribe’s restaurant and gaming facility); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 177-82 (2d Cir.1996) (holding that OSHA applied to Indian tribe’s construction business which operated only within confines of reservation); *Smart v. State Farm Ins. Co.*, 868 F.2d 929, 932-36 (7th Cir.1989) (applying Employee Retirement Income Security Act to tribal employee benefits plan because statute did not affect tribe’s ability to govern itself in intramural matters); *see also Navajo Tribe v. NLRB*, 288 F.2d 162, 165

(D.C.Cir.1961) (holding that NLRA applies to employers located on reservation lands); *cf. EEOC v. Fond du Lac Heavy Equip. & Constr. Co.*, 986 F.2d 246, 249 (8th Cir.1993) (holding that Age Discrimination in Employment Act, although generally applicable to Indian tribes, does not apply to employment discrimination action involving member of Indian tribe, tribe as employer, and reservation employment because “dispute involves a strictly internal matter” and application would affect “tribe’s specific right of self-government”); *but see Pueblo of San Juan*, 276 F.3d at 1199 (holding that federal statutes of general applicability do not apply where Indian tribe has exercised its authority as sovereign).

C.

The Band contends that the *Coeur d’Alene* framework insufficiently protects inherent tribal sovereignty. According to the Band, generally applicable congressional statutes cannot preempt any exercise of a tribal government’s inherent sovereign authority without a clear expression from Congress. We are not persuaded.

The Band principally cites *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987), and *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), for its contention. In *Iowa Mutual*, the Supreme Court refused to read the statute granting federal diversity jurisdiction, 28 U.S.C. § 1332, which is silent as to Indian tribes, to nullify the requirement that tribal court remedies must be exhausted before a federal district court could assert jurisdiction. *See* 480 U.S. at 18. The Court cited the absence of clear congressional intent to the contrary. *Id.* at 17-18. And in *Santa Clara Pueblo*, the Supreme Court held that Title I of the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302, does not implicitly authorize a private cause of action for

declaratory and injunctive relief against a tribal officer. 436 U.S. at 72. There, a female member brought an action in federal district court, alleging that a tribal ordinance denying membership to children of female members who married outside of the tribe, but not to similarly situated children of male members, violated Title I. *Id.* at 52-53. The Court found that construing § 1302 to create an implicit private right of action would interfere with tribal self-government beyond the interference expressly called for by the statute. *Id.* at 59. Out of respect for tribal sovereignty and the plenary power of Congress, the Court reasoned that the statutory scheme and legislative history suggested that Congress's refusal to provide remedies other than *habeas corpus* was deliberate. *Id.* at 61.

To be sure, each decision declined to read a congressional statute in a way that would undermine central aspects of tribal self-government absent a clear statement that it was Congress's intent to do so. But these decisions hardly show that *every* congressional statute of general applicability that would conflict with *any* tribal regulation of the activities of nonmembers must be accompanied by a clear statement if that federal statute is to apply. We do not even accord the sovereign powers of the several states—which, unlike the sovereign powers of Indian tribes, are constitutionally protected—with such solicitude. *See, e.g., Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) (discussing doctrine of implied preemption); *Gibbons v. Ogden*, 22 U.S. 1, 211 (1824) (“[A]cts of the State Legislatures ... enacted in the execution of acknowledged State powers, [that] interfere with, or are contrary to the laws of Congress ... must yield to [the latter].”).

Comprehensive federal regulatory schemes that are silent as to Indian tribes can divest aspects of inherent tribal sovereignty to govern the activities of non-members. We do not doubt that “Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.” *Wheeler*, 435 U.S. at 323. Yet, such residual sovereignty is “unique and limited.” *Id.* As explained above, the Supreme Court has held several aspects of tribal sovereignty to regulate the activities of non-members to be implicitly divested, even in the absence of congressional action, and it is axiomatic that tribal sovereignty is “subject to complete defeasance” by Congress. It would be anomalous if certain aspects of tribal sovereignty—namely, specific powers to regulate some non-member activities—are implicitly divested in the absence of congressional action, *see generally* COHEN’S HANDBOOK § 4.02(3), at 226-42, but those same aspects of sovereignty could not be implicitly divested by generally applicable congressional statutes.

For these reasons, we do not agree with the Band’s reliance on *NLRB v. Pueblo of San Juan*, 276 F.3d 1186 (10th Cir.2002) (*en banc*), in which the Tenth Circuit held that federal statutes of general applicability do not presumptively apply “where an Indian tribe has exercised its authority as a sovereign ... rather than in a proprietary capacity such as that of employer or landowner.” *Id.* at 1199. The Band reads *Pueblo of San Juan* to suggest that Indian tribes may avoid the presumptive application of a comprehensive federal regulatory scheme by enacting an ordinance regulating the activities of non-members that directly conflicts with the federal statute. But, again, this cannot be the rule. Tribal regulations of the activities of non-members are enacted at the frontier of tribal

sovereignty. See *Plains Commerce*, 554 U.S. at 328; *Montana*, 450 U.S. at 564. Again, not even the states—whose sovereign powers are explicitly protected by the Tenth Amendment—may avoid the application of federal law by enacting directly conflicting legislation. See U.S. Const. art. VI, cl. 2; *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985); see also *Pueblo of San Juan*, 276 F.3d at 1205 (Murphy, J., dissenting). “The tribes’ retained sovereignty reaches only that power ‘needed to control ... internal relations[,] ... preserve their own unique customs and social order[, and] ... prescribe and enforce rules of conduct for [their] own members.’” *Mashantucket Sand & Gravel*, 95 F.3d at 178 (alterations in original) (quoting *Duro*, 495 U.S. at 685-86). A clear statement is required for a statute to undermine central aspects of tribal self-government—that is, a tribe’s ability to govern its own members. See *Iowa Mut.*, 480 U.S. at 17-18; *Santa Clara Pueblo*, 436 U.S. at 59-61; see also *Bay Mills*, 134 S.Ct. at 2031-32 (describing the “enduring principle of Indian law” that “courts will not lightly assume that Congress in fact intends to undermine Indian self-government,” and holding that tribal immunity from suit is a central aspect of self-government that requires a clear statement by Congress if it is to be abrogated). A clear statement is not required, however, for a federal statute of general applicability creating a comprehensive regulatory scheme to apply to a tribe’s regulation of the activities of non-members where such regulation is not necessary to the preservation of tribal self-government. The Band suggests that every federal statute that fails to expressly mention Indian tribes would not apply to them. Contrary to the Band’s proposed rule, the nature and limits of residual tribal sovereignty entail the presumption that federal

statutes apply to Indian tribes' regulation of the activities of nonmembers where such tribal regulation is not "necessary to protect tribal self-government or to control internal relations." *See Montana*, 450 U.S. at 564.

The Band also points to the separate canon of construction that ambiguities in a federal statute must be resolved in favor of Indians. *See Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); *Grand Traverse Band of Ottawa & Chippewa Indians v. Office of U.S. Atty. for W. Div. of Mich.*, 369 F.3d 960, 971 (6th Cir.2004). But "canons are not mandatory rules[;] they are guides that 'need not be conclusive.'" *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001) (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001)). The Band asserts that this canon is "rooted in the unique trust relationship between the United States and the Indians." *See Grand Traverse Band*, 369 F.3d at 971 (quoting *Blackfeet Tribe*, 471 U.S. at 766). But it does not undermine that trust relationship to presumptively apply a federal statute of general applicability to a tribe's regulation of the activities of non-members where the tribal regulation is not necessary to the preservation of tribal self-government. *See Montana*, 450 U.S. at 564; *Wheeler*, 435 U.S. at 323. Furthermore, the cases the Band cites in support of the canon that statutory ambiguities must be construed in favor of Indians involved a statute or provision of a statute that Congress enacted specifically for the benefit of Indians or for the regulation of Indian affairs. *See, e.g., Blackfeet*, 471 U.S. at 766 (Indian Mineral Leasing Acts of 1924 and 1938); *Grand Traverse Band*, 369 F.3d at 971 (IGRA). Like the D.C. Circuit, we have found no case in which the Supreme Court applied this canon to resolve an ambiguity in a statute of general

application silent as to Indians, like the NLRA. *See San Manuel*, 475 F.3d at 1312.

D.

We find that the *Coeur d'Alene* framework accommodates principles of federal and tribal sovereignty. *See Mashantucket Sand & Gravel*, 95 F.3d at 179; *Pueblo of San Juan*, 276 F.3d at 1206 (Murphy, J., dissenting) (“A limited notion of tribal self-governance preserves federal supremacy over Indian tribes while providing heightened protection for tribal regulation of purely intramural matters. Any concerns about abrogating tribal powers ... are fully addressed by the *Coeur d'Alene* exceptions.”). The *Coeur d'Alene* framework reflects the teachings of *Montana*, *Iowa Mutual*, and *Santa Clara Pueblo*: there is a stark divide between tribal power to govern the identity and conduct of its membership, on the one hand, and to regulate the activities of non-members, on the other. The *Coeur d'Alene* framework begins with a presumption that generally applicable federal statutes also apply to Indian tribes, reflecting Congress’s power to modify or even extinguish tribal power to regulate the activities of members and non-members alike. *See* 751 F.2d at 1115; *cf. Montana*, 450 U.S. at 557. The exceptions enumerated by *Coeur d'Alene* then supply Indian tribes with the opportunity to show that a generally applicable federal statute should not apply to them. The first exception incorporates the teachings of *Iowa Mutual* and *Santa Clara Pueblo* that if a federal statute were to undermine a central aspect of tribal self-government, then a clear statement would be required. By this mechanism, the *Coeur d'Alene* framework preserves “the unique trust relationship between the United States and the Indians.” *Grand Traverse Band*, 369 F.3d at 971 (quoting

Tribe, 471 U.S. at 766). We therefore adopt the *Coeur d'Alene* framework to resolve this case.

IV.

The NLRA is a generally applicable, comprehensive federal statute. It prohibits “employers” from engaging in unfair labor practices and empowers the Board to prevent such practices. 29 U.S.C. §§ 158(a), 160(a). Congress has said that “[t]his power shall not be affected by any other means of adjustment or prevention that has been or may be established by law, or otherwise.” § 160(a). The Supreme Court “has consistently declared that in passing the [NLRA], Congress intended to and did vest in the Board the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause.” *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963) (citing *Guss v. Utah Labor Relations Bd.*, 353 U.S. 1, 3 (1957)). Under the *Coeur d'Alene* framework, since there is no treaty right at issue in this case, the NLRA applies to the Band’s operation of the casino unless the Band can show either that the Board’s exercise of jurisdiction “touches exclusive rights of self-governance in purely intramural matters” or that “there is proof by legislative history or some other means that Congress intended [the NLRA] not to apply to Indians on their reservations.” 751 F.2d at 1116.

A.

The Band cannot show that application of the NLRA to the casino undermines “tribal self-governance in purely intramural matters.” *Id.* The Band underscores the provisions of Articles XVI and XVII that regulate non-member employee strikes, the Band’s duty to bargain in good faith over the terms and conditions under which the Band’s employees may be tested for

alcohol and drug use, and the licensing of non-member labor organizations seeking to organize Band employees. The Band argues that these regulations in particular implicate its “right of self-governance in purely intramural affairs.” *Coeur d’Alene*, 751 F.2d at 1116. The Band forwards two arguments for its contention that application of the NLRA undermines its right of self-governance: first, the regulations targeted by the Board’s order protect the net revenues of the casino, which, pursuant to the IGRA, fund its tribal government. Second, the Band stresses that application of the NLRA would invalidate a regulation enacted and implemented by its Tribal Council.

The tribal self-governance exception is designed to except internal matters such as the conditions of tribal membership, inheritance rules, and domestic relations from the general rule that otherwise applicable federal statutes also apply to Indian tribes. *Id.* (citing *Farris*, 624 F.2d at 893); *cf. Montana*, 450 U.S. at 564 (holding that Indian tribes retain sovereign power to determine tribal membership, to regulate domestic relations among members, to prescribe rules of inheritance among members, and to punish tribal offenders). Intramural matters concern conduct the immediate ramifications of which are felt primarily within the reservation by members of the tribe. *Mashantucket Sand & Gravel*, 95 F.3d at 181. We find that Articles XVI and XVII, even the provisions the Band underscores, do not regulate purely intramural matters; rather, they principally regulate the labor-organizing activities of Band employees, and specifically of casino employees, most of whom are not Band members. For this reason, the Band’s enactment of Articles XVI and XVII is unlike those exercises of tribal government that our sister circuits have found to concern purely intramural affairs. *See, e.g., Reich v. Great Lakes*

Indian Fish & Wildlife Comm’n, 4 F.3d 490, 495 (7th Cir.1993); *Fond du Lac*, 986 F.2d at 249.

In *Fond du Lac*, the court refused to apply ADEA to an employment discrimination action involving a tribe member, employed by the tribe on the reservation, because the “dispute involve[d] a strictly internal matter.” 986 F.2d at 249. In *Great Lakes*, the court refused to apply the overtime requirements of the Fair Labor Standards Act to tribal law-enforcement officers. 4 F.3d at 495. The *Great Lakes* court distinguished tribal law-enforcement employees from tribal employees in other cases who “were engaged in routine activities of a commercial or service character, namely lumbering and health care, rather than of a governmental character.” *Id.* Further, the court explicitly did “not hold that employees of Indian agencies are exempt from the Fair Labor Standards Act.” *Id.* Because Articles XVI and XVII regulate the activities of non-member, non-officer employees, the Band’s reliance on *Fond du Lac* and *Great Lakes* is unavailing. Articles XVI and XVII are far removed from regulations of intramural matters envisioned by courts applying the first *Coeur d’Alene* exception. See, e.g., *Mashantucket Sand & Gravel*, 95 F.3d at 181; *Coeur d’Alene*, 751 F.2d at 1116.

The Band responds that Article XVI targets those non-member activities—particularly casino employee strikes and labor-organizing efforts—that jeopardize the revenues of its tribal government and thus threaten its tribal self-sufficiency. This argument overreaches. “A statute of general application will not be applied to an Indian Tribe when the statute threatens the Tribe’s ability to govern its intramural affairs, but not simply whenever it merely affects self-governance as broadly conceived.” *Smart*, 868 F.2d at

935. The right to conduct commercial enterprises free of federal regulation is not an aspect of tribal self-government. *See, e.g., Fla. Paraplegic Ass’n*, 166 F.3d at 1129 (finding tribal gaming facility “does not relate to the governmental functions of the Tribe”); *U.S. Dep’t of Labor v. Occupational Safety & Health Review Comm’n (OSHRC)*, 935 F.2d 182, 184 (9th Cir.1991) (citing *Coeur d’Alene*, 751 F.2d at 1116). And Indian tribes are not shielded from general federal statutes because the application of those statutes may incidentally affect the revenue streams of tribal commercial operations that fund tribal government. *See Coeur d’Alene*, 751 F.2d at 1116 (rejecting the argument that applying OSHA to tribal farm would interfere with right of self-government because “it would bring within the embrace of ‘tribal self-government’ all tribal business and commercial activity”); *see also Solis*, 601 F.3d at 671 (rejecting argument that tribal sawmill involved right of self-governance in purely intramural affairs because “[t]he Menominees’ sawmill is just a sawmill, a commercial enterprise”); *OSHRC*, 935 F.2d at 184 (holding that although revenue from tribal lumber mill, which employed significant number of non-members and sold its products broadly in interstate commerce, was “critical to the tribal government, application of [OSHA] does not touch on the Tribe’s ‘exclusive rights of self-governance in purely intramural matters’ ” (quoting *Coeur d’Alene*, 751 F.2d at 1116)). Moreover, the Band’s contention inverts the presumption of the applicability of federal statutes, which, as explained above, is grounded on the *Montana* presumption that tribes lack the inherent power to govern the activities of nonmembers. *See* 450 U.S. at 565.

The Band emphasizes that the tribal commercial activity at issue is not a farm, sawmill, or lumber mill,

but a sophisticated casino gaming operation, operated in accordance with federal approval under the IGRA, funding approximately fifty percent of the Band's tribal government. We do not find that the IGRA renders commercial gaming an untouchable aspect of tribal self-governance, leaving the Band to operate gaming enterprises free from all other federal regulations. We recognize that Congress's explicit goal in enacting the IGRA is "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal government." 25 U.S.C. § 2702(1) (policy statement). Indeed, under the IGRA, the net revenue from the Band's gaming operations is not to be used for other purposes. *See* 25 U.S.C. § 2710(b)(2). The IGRA protects gaming as a source of tribal revenue from organized crime and other corrupting influences. 25 U.S.C. § 2702(2)-(3) (policy statement). It does not, however, immunize the operation of Indian commercial gaming enterprises from the application of other generally applicable congressional statutes. *See Chickasaw Nation*, 534 U.S. at 86-89 (holding that the IGRA section providing that Indian gaming operations, like state gaming operations, must report certain player winnings to the federal government, and must likewise withhold federal taxes if players' winnings exceed certain level, did not give rise to negative inference that Congress intended to exempt Indian tribes from federal wagering excise taxes imposed by chapter 35 of the Internal Revenue Code); *see also Chickasaw Nation v. United States*, 208 F.3d 871, 881-84 (10th Cir.2000), *aff'd*, 534 U.S. 84 (2001). In *Chickasaw Nation*, the Tenth Circuit directly addressed the import of the IGRA's policy statement. The court held that "the statute's statement of purpose does not, in and of itself, demonstrate any type of

Congressional intent to place tribal gaming revenues beyond the reach of federal wagering excise or federal occupational taxes.” *Id.* at 881. The same may be said of the NLRA, the application of which affects the net tribal revenue from the IGRA gaming operations in a more tangential and less certain way than the application of title 35 of the Internal Revenue Code. *Cf. San Manuel*, 475 F.3d at 1315 (finding that “[t]he total impact ... at issue here amounts to some unpredictable, but probably modest, effect on tribal revenue”). The IGRA provides a statutory basis to regulate tribal gaming activities, but from that fact it does not follow that Congress intended that no other federal regulations apply to a tribe’s operation of a commercial gaming facility. *See San Manuel*, 475 F.3d at 1318.

We do not read *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), or *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983), to require a contrary result. Those cases, decided before the enactment of the IGRA, held that state regulatory jurisdiction did not reach Indian tribes because federal interests in tribal self-government and economic development predominate. *See Cabazon*, 480 U.S. at 216-22; *Mescalero*, 462 U.S. at 341-344. But the relationship between the federal government and the Indian tribes is vastly different than the relationship between the states and the Indian tribes. *Cabazon* and *Mescalero* cannot be stretched to suggest that comprehensive, *federal* regulatory schemes do not presumptively apply to tribal commercial enterprises, even where those enterprises are both regulated by and fund tribal governments.

The Band also argues that because the Board’s exercise of jurisdiction undermines a general enactment of its

tribal government, application of the NLRA would undermine its right of self-governance in purely intramural matters. But again, it cannot be the rule that, unlike states, a tribal government may avoid application of a generally applicable federal statute by enacting a regulation governing the activities of non-members and members alike. *See Pueblo of San Juan*, 276 F.3d at 1205 (Murphy, J., dissenting). The Band rejoins that the enactment and implementation of Articles XVI and XVII to govern labor relations of its own citizens is “inextricably intertwined” with its ability to apply identical legal standards to non-member employees. We reject the notion that the Band’s authority to govern the activities of its own citizens is coextensive with the Band’s authority to govern the activities of non-members. *See Montana*, 450 U.S. at 564-66; *Fletcher*, 10 U.S. at 87. We also doubt that the Band’s Tribal Council lacks the ability to enact legislation exclusively governing the labor and organizing rights of Band members if it saw fit to do so. At bottom, the Band’s “inextricably intertwined” argument is a rule-swallower. *Cf. Plains Commerce*, 554 U.S. at 330 (stating that the exceptions permitting an Indian tribe’s regulation of non-member activities “cannot be construed in a manner that would swallow the rule” expressed in *Montana* that tribal power over non-members is implicitly divested). Tribal regulation that targets the activities of both members and nonmembers does not *ipso facto* trump a generally applicable federal regulation. To establish a contrary rule would swallow the presumption that federal statutes of general applicability also apply to Indian tribes.

B.

The Band submits that there is proof that Congress

intended the NLRA not to apply to Indians on their reservations and, hence, this case falls within the third *Coeur d'Alene* exception. See *Coeur d'Alene*, 751 F.2d at 1116. The “proof” the Band offers is Congress’s decision not to include Indian nations within Section 301 of the NLRA, which provides a private right of action for “violation of contracts between an employer and a labor organization.” 29 U.S.C. § 185(a). The Band argues that since Congress did not waive tribal sovereign immunity when it created a private right of action to enforce collective-bargaining agreements, it must be that no provision in the NLRA applies to Indian tribes.

We cannot agree. We recognize that Indian tribes are immune from suit in both state and federal court unless “Congress has authorized the suit or the tribe has waived its immunity.” *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998). Indian tribes, however, have no sovereign immunity against the United States. *Fla. Paraplegic Ass’n*, 166 F.3d at 1135 (citing *Mashantucket Sand & Gravel*, 95 F.3d at 182); see also *United States v. Red Lake Band of Chippewa Indians*, 827 F.2d 380, 382 (8th Cir.1987). Furthermore, Congress may choose to impose an obligation on Indian tribes without subjecting them to the enforcement of that obligation through a private right of action. See *Santa Clara Pueblo*, 436 U.S. at 65 (finding that although the Indian Civil Rights Act of 1968 did not waive tribal immunity, the act nevertheless imposes obligations on tribes which may be enforced through vehicles other than private right of action); *Fla. Paraplegic Ass’n*, 166 F.3d at 1134. That choice, however, simply does not evince Congress’s intent that a statute not impose obligations on Indian tribes or that those obligations not be enforced by other means, for example, by agency action. See *Santa Clara Pueblo*,

436 U.S. at 65; *Fla. Paraplegic Ass’n*, 166 F.3d at 1134. The fact that Congress did not waive tribal sovereign immunity from private suits to enforce collective-bargaining agreements under Section 301 in no way suggests that the Band is immune from suits by the Board to enforce other requirements imposed by NLRA.

In sum, we find that this case does not fall within the exceptions to the presumptive applicability of a general statute outlined in *Coeur d’Alene*. The NLRA does not undermine the Band’s right of self-governance in purely intramural matters, and we find no indication that Congress intended the NLRA not to apply to a tribal government’s operation of tribal gaming, including the tribe’s regulation of the labor-organizing activities of non-member employees.

C.

The NLRA excepts “any State or political subdivision thereof” from the definition of “employer.” *See* 29 U.S.C. § 152(2). The Band’s final contention is that, in light of comity principles, we must interpret the NLRA to treat Indian tribes exercising sovereign functions within their reservation and trust lands the same way that the NLRA treats states. But the Band is not a state, and tribal sovereignty and state sovereignty are built on different foundations and are accorded different protections in our constitutional order. *See Plains Commerce*, 554 U.S. at 337; *Lara*, 541 U.S. at 212 (Kennedy, J., concurring); *Merrion*, 455 U.S. at 172-73 (Stevens, J., dissenting). Thus we do not presume that when Congress excepted the states from the coverage of the term “employer” under § 152(2), it necessarily also intended to except the Indian tribes. Furthermore, if Congress intended to include Indian tribes within its explicit list of exceptions to “employer,”

it would have done so. *See San Manuel*, 475 F.3d at 1317 (holding that “the Board could reasonably conclude that Congress’s decision not to include an express exception for Indian tribes in the NLRA was because no such exception was intended or exists”). We do not interpret the NLRA’s exception for the states and their political subdivisions to encompass the Band. Accordingly, we hold that the Act applies.

V.

The application for enforcement is granted.

McKEAGUE, Circuit Judge, dissenting.

DISSENT

The sheer length of the majority’s opinion, to resolve the single jurisdictional issue before us, betrays its error. Under governing law, the question presented is really quite simple. Not content with the simple answer, the majority strives mightily to justify a different approach. In the process, we contribute to a judicial remaking of the law that is authorized neither by Congress nor the Supreme Court. Because the majority’s decision impinges on tribal sovereignty, encroaches on Congress’s plenary and exclusive authority over Indian affairs, conflicts with Supreme Court precedent, and unwisely creates a circuit split, I respectfully dissent.

I

All agree that Indian tribes are sovereign political entities that retain their sovereignty. All agree that Congress has plenary authority over Indian affairs and that tribal sovereignty is subject to complete defeasance by Congress. All agree that federal law will not be deemed to limit tribal sovereignty absent

evidence of congressional intent to do so. All agree that the National Labor Relations Act, the exclusive basis for the National Labor Relations Board's exercise of jurisdiction in this case, is silent as to Indian tribes. The Board's order, prohibiting the Little River Band of Ottawa Indians from enforcing its Fair Employment Practices Code, clearly impinges on an exercise of the Band's tribal sovereignty. No one denies that the record is devoid of evidence of congressional intent, express or implied, to authorize such an interference with tribal sovereignty. The proper inference to be drawn from Congress's silence, I submit, is that tribal sovereignty is preserved and the Board's incursion is unauthorized by law.

The majority, however, approves the Board's adoption of a different way of construing congressional silence, a way that has never been approved by the Supreme Court or applied in any circuit to justify federal intrusion upon tribal sovereignty under the NLRA. In my opinion, under current governing law, the Board's exercise of jurisdiction is simply beyond its authority, an arrogation of power that Congress has not granted. Hence, the Board's action not only impinges impermissibly on tribal sovereignty, but also encroaches on Congress's exclusive and plenary authority over Indian affairs. By failing to so hold, we neglect our duty to preserve the constitutionally mandated balance of power among the coordinate branches of government.

II

A. The NLRB's Evolving Approach

The majority recognizes that our review of the Board's assessment of its jurisdiction is *de novo*. *Chevron* deference plays no role. The majority also

acknowledges that the NLRA is silent as to Indian tribes and that the Board's exercise of jurisdiction in this case is premised fundamentally, not on any other act of Congress or governing judicial decision, but on principles effectively announced in its own prior decision in *San Manuel Indian Bingo and Casino*, 341 NLRB 1055 (2004), *aff'd on alternate grounds*, 475 F.3d 1306 (D.C.Cir.2007). Until just prior to its *San Manuel* decision, the NLRB had consistently held that Indian tribes and their enterprises were exempt from regulation under the NLRA. *Id.* at 1055. The NLRB's earlier approach was based on respect for the traditional view that Indian tribes are generally free from federal intervention "unless Congress has specifically provided to the contrary." *Id.* at 1059. Indeed, the NLRB's earlier precedents were entirely consistent with the established jurisprudence. See *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991) ("Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories."); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978) ("[A] proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent."); *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (recognizing that sovereignty retained by tribes is subject to complete defeasance by Congress, but that "until Congress acts, the tribes retain their existing sovereign powers"). Indeed, the Supreme Court recently reaffirmed the "enduring principle of Indian law" that tribal sovereignty is retained unless and until Congress clearly indicates intent to limit it. *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024, 2030-32 (2014).

So what changed to justify the NLRB's new approach? Congress has not amended the NLRA or in any other way signaled its intent to subject Indian tribes to NLRB regulation. Nor has the Supreme Court recognized any such implicit intent. The NLRB "adopted a new approach" and "established a new standard" based on its recognition that some courts had begun to apply *other* generally applicable federal laws to Indian tribes notwithstanding Congress's silence. *San Manuel*, 341 NLRB at 1055, 1057, 1059. These courts, the NLRB observed, found support for this new approach in a single statement in a 1960 Supreme Court opinion, *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960): "[I]t is now well-settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests." The statement buttressed the Court's holding, but was not essential to it. While the *Tuscarora* statement has blossomed into a "doctrine" in some courts in relation to some federal laws, closer inspection of the *Tuscarora* opinion reveals that the statement is in the nature of dictum and entitled to little precedential weight. In reality, the *Tuscarora* "doctrine," here deemed to grant the NLRB "discretionary jurisdiction," is used to fashion a house of cards built on a fanciful foundation with a cornerstone no more fixed and sure than a wild card.

In *Tuscarora*, the Federal Power Act, "a complete and comprehensive plan" which by its terms addressed "tribal lands embraced within Indian reservations," was held to sufficiently *express congressional intent* to authorize an exercise of eminent domain over land owned by individual Indians or even by a tribe if the land was not "within a reservation." *Id.* at 118. The *Tuscarora* Court did not have to define the scope of

Federal Power Commission jurisdiction in the face of congressional silence; it declared and enforced Congress's *manifest* intent. Moreover, inasmuch as the Indian-owned land at issue in *Tuscarora* was not within the reservation, no interest of tribal sovereignty was implicated, but only tribal proprietary interests. And finally, the notion that the *Tuscarora* statement, independent of the Court's actual holding, has any controlling or persuasive weight is negated by subsequent Supreme Court rulings applying traditional Indian law principles and upholding tribal sovereignty in the face of generally applicable federal laws—without even mentioning *Tuscarora*. See *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987) (tribal sovereignty upheld in the face of assertion of the generally applicable federal diversity statute because no indication of congressional intent to impair tribal sovereignty); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149 (1982) (congressional silence deemed insufficient to justify preemption of tribal sovereign power to tax). Indeed, in *Bay Mills*, the Court's most recent treatment of tribal sovereignty, *Tuscarora* played absolutely no role as the Court adhered to the same traditional Indian law principles in holding Michigan's attempt to restrain casino gaming barred by tribal sovereign immunity, a core aspect of tribal sovereignty. *Bay Mills*, 134 S.Ct. at 2030-39.

The *Tuscarora* statement, properly understood, thus offers little authoritative guidance on the present jurisdictional question. Yet, the NLRB noted in *San Manuel* that the *Tuscarora* "seed" had germinated in *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir.1985), in relation to the Occupational Safety and Health Act. In *Coeur d'Alene*, the Ninth Circuit recognized that the *Tuscarora* statement was dictum, but nonetheless applied it to (1) reject the proposition

that Indian tribes are subject only to those laws expressly made applicable to them; and (2) hold that tribes and their members are subject to generally applicable laws unless expressly excluded. *Id.* at 1115-16. In one fell swoop, the *Coeur d'Alene* court thus used the twenty-five year old *Tuscarora* statement to reverse the established presumption arising from congressional silence. According to the *Coeur d'Alene* innovation, congressional silence in a generally applicable law would now give rise to a reversed presumption: the law applies to Indian tribes *unless* one of three exceptions is shown to apply.

Seventeen years later, the NLRB first invoked this *Tuscarora-Coeur d'Alene* approach to justify its assertion of jurisdiction to bar enforcement of a tribal right-to-work law in *NLRB v. Pueblo of San Juan*, 276 F.3d 1186 (10th Cir.2002) (en banc). In *Pueblo of San Juan*, the NLRB advanced all the same arguments that are presented here. In a comprehensive opinion, the Tenth Circuit, sitting en banc, upheld traditional Indian law principles; required the NLRB to present evidence of Congress's intent to divest tribal power through the NLRA; and, finding none, held the tribal law was not preempted by the NLRA. *Id.* at 1190-98.

In response to the NLRB's reliance on *Tuscarora*, the Tenth Circuit refused to read the *Tuscarora* statement in isolation. It refused to give the statement independent significance apart from the controversy actually decided in *Tuscarora*. The court recognized that the application of the Federal Power Act in *Tuscarora* only impacted the tribe's proprietary interests as landowner; it did not impair tribal sovereign authority to govern, as was clearly implicated by the Pueblo of San Juan's labor regulation. Citing the Supreme Court's ruling in *Merrion*, 455 U.S. at 137,

the Tenth Circuit recognized that enactment of Pueblo's right-to-work ordinance was in furtherance of its strong interest in regulating economic activity involving its own members within its own territory, "a fundamental attribute of sovereignty" and "a necessary instrument of self-government and territorial management." *Pueblo of San Juan*, 276 F.3d at 1200. The Tenth Circuit reiterated and enforced the well-established traditional Indian law principles, holding that *Tuscarora* may not be applied by the NLRB to divest a tribe of its sovereign authority without clear indications of congressional intent to do so. *Id.* at 1199-1200.

In 2002, the Tenth Circuit thus squarely rejected the NLRB's innovative attempt to overrule its own prior precedents based on dictum appearing in a 1960 Supreme Court opinion. Undeterred, the NLRB tried again in *San Manuel*, 341 NLRB 1055. Employing the *Tuscarora-Coeur d'Alene* standard, the NLRB again posited that, because the NLRA is silent and *does not preclude* exercise of jurisdiction, it follows that the NLRB *has* discretionary authority to balance interests of Indian sovereignty with interests of federal labor policy on a case-by-case basis. *Id.* at 1062-63. Again, the NLRB, in a tortured twist of logic, reasoned that because Congress, the branch of federal government with exclusive and plenary authority to divest Indian tribes of their retained sovereign powers, said nothing about Indian tribes in the NLRA, Congress must have meant to grant the NLRB discretionary authority to intrude upon Indian sovereignty as it sees fit. Extraordinary. In overruling its own prior precedents, the NLRB barely mentioned the Tenth Circuit's contrary analysis in *Pueblo of San Juan*, the only court to have addressed (and definitively rejected) the

NLRB's new approach. The NLRB summarily dismissed *Pueblo of San Juan* in a footnote, characterizing it as "the opinion of a single court of appeals." *Id.* at 1060 n. 16.¹

The NLRB's *San Manuel* decision was affirmed on appeal; but its rationale was not. *San Manuel Indian Bingo and Casino v. NLRB*, 475 F.3d 1306 (D.C. Cir.2007). The D.C. Circuit recognized the tension between the *Tuscarora* statement, which it characterized as "possibly dictum," and traditional Indian law principles prohibiting interference with tribal sovereignty except upon clear expression of congressional intent. *Id.* at 1311. The court expressly refrained from endorsing the NLRB's *Tuscarora-Coeur d'Alene* approach. Yet, despite congressional silence, the D.C. Circuit allowed the NLRB's exercise of jurisdiction to stand, reasoning that the tribal interests impacted were "primarily commercial" and the impact on tribal sovereignty would be "unpredictable, but probably modest." *Id.* at 1315.²

¹ Secondly, the NLRB suggested *Pueblo of San Juan* is factually distinguishable in that it implicated an exercise of tribal sovereign power; whereas in *San Manuel*, the NLRB asserted jurisdiction only to regulate commercial activities of the tribe in its proprietary capacity. 341 NLRB at 1060 n. 16. As pointed out by the dissent in *San Manuel*, this distinction does not withstand scrutiny. In both cases, the NLRB asserted jurisdiction under the NLRA to preempt analogous tribal labor relations ordinances. *Id.* at 1067.

² The court reached this conclusion by focusing on the specific dispute at issue, competition between two unions to organize employees at a casino owned and operated by the tribe. The NLRB had ordered the tribe to grant equal access to both unions. Even though the court noted that employment relations at the casino were subject to a tribal labor ordinance, which represented an act of governance, the court held the ordinance was only

The D.C. Circuit thus steered a middle course, departing from established principles of Indian law, but refraining from adopting the *Tuscarora-Coeur d'Alene* approach. In doing so, the D.C. Circuit did not try to reconcile its ruling with, or distinguish it from, the Tenth Circuit's *Pueblo of San Juan* ruling. In fact, it conspicuously avoided any reference to the Tenth Circuit's analysis. The NLRB thus obtained a favorable result, but the D.C. Circuit's *San Manuel* decision falls far short of vindication for the NLRB. Far from establishing a new way of understanding the reach of the NLRA in relation to Indian tribes, the D.C. Circuit's ruling is distinctly pragmatic and fact-specific.³

“ancillary” and “secondary” to the commercial undertaking at issue. The D.C. Circuit thus focused on the tribe's proprietary interest as owner of a commercial enterprise, rather than its status as sovereign of the territory where the casino was located.

³ The facts of this case are materially distinguishable from those presented in *San Manuel*. The nature of the NLRB's instant intrusion—not simply resolving a particular dispute between unions at a casino, but asserting the NLRA's preemptive effect to bar enforcement of numerous provisions of the Band's comprehensive FEP Code indefinitely—threatens a much more substantial impairment of the Band's sovereign authority. *See also Pueblo of San Juan*, 276 F.3d at 1200 (recognizing that NLRA preemption of a tribe's legislative enactment regulating labor and employment relations within the reservation is a unique threat to “a fundamental attribute of sovereignty and a necessary instrument of self-government and territorial management”). Moreover, the D.C. Circuit's notion that tribal interests of a commercial nature warrant only diminished tribal-sovereignty respect has been squarely rejected by the Supreme Court in *Bay Mills*, 134 S.Ct. at 2039 (reasoning that any such limitation of tribal sovereignty in relation to commercial activity is not for the courts to decide, but is a matter for Congress's policy judgment).

B. The Board's Present Assertion of Jurisdiction

These are the relevant judicial precursors to the Board's present assertion of jurisdiction under the NLRA. Relying on the "*Tuscarora* doctrine" and the new "discretionary jurisdictional standard" it adopted in its *San Manuel* decision, the Board exercised its discretion to hold the Little River Band's Fair Employment Practices Code preempted by the NLRA. *Little River Band of Ottawa Indians Tribal Gov't*, 359 NLRB No. 84 at *4 (2013). The Board concluded, in the discharge of its newly created interest-balancing duties, that the FEP Code need not be respected as an exercise of tribal sovereign authority because the Code governs, among other things, employment relations at a commercial enterprise operated by the Band, the Little River Casino Resort. Although the Resort is located and operated entirely within the reservation, non-Indians are employed there and non-Indians are customers there, and the Resort's operation affects interstate commerce. *Id.* at *4-6. These factors were deemed sufficient to justify preemption by the NLRA and assertion of jurisdiction by the NLRB.

The Board rejected the Band's reliance on *Pueblo of San Juan* in challenging its assertion of jurisdiction. The Board characterized the Tenth Circuit's decision as narrow and inapposite because it did not involve a federal law of general applicability—even though it involved application of the NLRB's assertion of the very same NLRA to preempt a closely analogous tribal employment relations law. *Id.* at *5. In further explanation, the Board also noted its prerogative, pursuant to its "nonacquiescence policy," to respectfully disagree with the Tenth Circuit. *Id.* at *5 n. 8.

In my opinion, the analysis employed by the Tenth Circuit in *Pueblo of San Juan* is true to the governing

law and should be adopted in the Sixth Circuit as well. It is not necessary to recapitulate that reasoning here. Neither the Board nor the majority has identified error in the Tenth Circuit's analysis. Tellingly, the Board has not asked us to apply the D.C. Circuit's *San Manuel* hybrid approach in this case. Rather, it continues to pursue judicial approval of its new *Tuscarora-Coeur d'Alene* approach. The Tenth Circuit considered it and definitively rejected it. The D.C. Circuit considered it and demurred. Today, in the Sixth Circuit, the Board finds a sympathetic ear ... notwithstanding Congress's silence, notwithstanding the suspect origins of the *Tuscarora-Coeur d'Alene* "doctrine," and notwithstanding the lack of any persuasive reason to depart from the traditional Indian law principles that the Supreme Court has consistently applied. This sympathy seems particularly ill-timed in view of the Supreme Court's recent reaffirmation of the traditional principles in *Bay Mills*.

C. Particular Objections

But before considering the significance of *Bay Mills*, several elements of the majority's approval of the Board's innovation deserve particular mention. First, my colleagues purport to find legitimacy for the Board's new approach in two Supreme Court opinions that are said to "anticipate" this evolution in traditional Indian law principles. The first of these is the *Tuscarora* opinion itself. *Tuscarora*, of course, speaks for itself. The grounds for my conclusion that some courts, and now the Board, have read much more into the *Tuscarora* statement than was ever intended are adequately stated above. Not least of these is the fact that the *Tuscarora* statement (much less the *Tuscarora* "doctrine") has been ignored by the Supreme Court ever since. Moreover, even those courts that have

viewed the statement as significant have recognized it to be in the nature of dictum. Lastly, the holding in *Tuscarora*, on the reach of the Federal Power Act: (a) did not result in any impairment of tribal sovereignty; and (b) hinged not on the generally-applicable nature of the Act, but on the Court's discernment of Congress's *manifest* intent. The *holding* of *Tuscarora*, then, is entirely consonant with traditional Indian law principles. The *Tuscarora* holding gave effect to the clear indications of congressional intent, just as we should here ... to the extent there are any.

The majority also cites *Merrion* as signaling the Supreme Court's willingness to find implicit divestiture of tribal sovereignty in a federal law of general applicability. Majority Op. at 547 n. 1. Yet, the *Merrion* Court *held* that just such a generally applicable law, the Natural Gas Policy Act, did *not* effect a divestiture precisely because the text and legislative history did not evidence such a congressional intent. *Merrion*, 455 U.S. at 152. *Merrion*, too, thus confirms traditional Indian law principles: absent some clear indication from Congress, a federal law will not be deemed to implicitly impair tribal sovereignty simply because it is generally applicable.

Nonetheless, my colleagues note that the FEP Code affects non-Indians who obtain employment within the Band's trust lands. Without denying that the FEP Code is a generally applicable and comprehensive regulatory scheme in exercise of the Band's tribal sovereignty, the majority prefers to characterize the Code narrowly (and disparagingly) as a mere "regulation of activities of non-members." Hence, the majority opinion cites several Supreme Court decisions that recognized limitations on tribal sovereign authority to regulate non-Indians even in the absence of

congressional action or indications of congressional intent to divest tribal power. Majority Op. at 544-46. The cited decisions are inapposite.

In *Montana v. United States*, 450 U.S. 544, 564-66 (1981), for instance, the Court held not that tribal sovereign power had been implicitly divested by Congress, but that the tribe did not have authority in the first place via “retained inherent sovereignty” to regulate hunting and fishing by nonmembers of the tribe on lands no longer owned by the tribe—unless the nonmembers entered consensual relationships with the tribe through commercial dealing, contracts, leases, or other arrangements; or unless the conduct of nonmembers on fee lands within the reservation threatened or had some direct effect on the political integrity, economic security, or health and welfare of the tribe. To similar effect are the decisions in *Plains Commerce Bank v. Long Family Land and Cattle Co., Inc.*, 554 U.S. 316, 341 (2008), and *Nevada v. Hicks*, 533 U.S. 353, 358-60 (2001). That is, all three cases, *Montana*, *Plains Commerce* and *Hicks*, deal with the bounds of retained inherent sovereignty, not the implicit divestiture thereof.

Here, in contrast to those cases, there is no real dispute that the Little River Band’s enactment of the FEP Code, regulating employment relations between the tribe and tribal members and nonmembers alike, on tribal lands within the Tribal Government’s jurisdiction, is a bona fide exercise of inherent sovereign authority. See *Merrion*, 455 U.S. at 137 (recognizing that a tribe’s authority to regulate economic activity within its territory is among its retained sovereign powers). To the extent that nonmembers are subject to regulation under the FEP Code, the regulation flows directly from the Band’s inherent sovereign interests

in tribal self-government and management of internal relations. See *Plains Commerce*, 554 U.S. at 335; *Montana*, 450 U.S. at 564. In the language of *Hicks*, the FEP Code is a “[t]ribal assertion of regulatory authority over nonmembers ... connected to that right of the Indians to make their own laws and be governed by them.” *Hicks*, 533 U.S. at 361. Yes, the Band’s interest in regulating nonmembers may be weaker, but the nonmembers that come within the FEP Code’s regulation have entered into consensual contractual (employment) relationships with the Band and are therefore properly subject to the Code’s requirements. See *Montana*, 450 U.S. at 565.

While these decisions address questions regarding the scope of retained inherent tribal sovereignty, the instant appeal, as the majority recognizes, presents a different question. Majority Op. at 543-44. The Band’s authority to enact the FEP Code is unquestioned. We must instead decide whether, under traditional Indian law principles, the *Board* has authority, per its “new approach,” to interfere with the Band’s legitimate exercise of tribal sovereignty, and specifically, whether there are clear indications that Congress has authorized such interference, explicitly or implicitly. Because there are no such clear indications, as the majority must concede, we should stay the Board’s overreaching hand—unless and until Congress acts or the Supreme Court alters the governing law. See *Bay Mills*, 134 S.Ct. at 2037 (recognizing “it is fundamentally Congress’s job, not ours,” to determine the nature and extent of tribal sovereignty).

D. Teaching of *Bay Mills*

Indeed, *Bay Mills* clearly illustrates the Court’s steadfast deference to Congress’s plenary and exclusive role in defining tribal sovereignty: “Although Congress

has plenary authority over tribes, courts will not lightly assume that Congress intends to undermine Indian self-government.” *Bay Mills*, 134 S.Ct. at 2031-32. The Court enforced the “enduring principle of Indian law” requiring that Congress “unequivocally express” its intent to limit tribal sovereignty. *Id.* Thus, where Congress had expressly abrogated tribal immunity from suit for illegal gaming *on Indian lands*, the Court refused to expand the abrogation to allow suit for illegal gaming *outside Indian country*, even though the resulting anomaly was arguably nonsensical. *Id.* at 2033-34. The Court reasoned that “Congress should make the call whether to curtail a tribe’s immunity for off-reservation commercial conduct—and the Court should accept Congress’s judgment.” *Id.* at 2038.

Moreover, the Court expressly declined to draw the distinction, here urged by the Board as well, between actions of tribal self-governance and commercial activities of the tribe. The court gave one “simple reason: because it is fundamentally Congress’s job, not ours.” *Id.* at 2037. Congress, the Court observed, “has the greater capacity to weigh and accommodate the competing policy concerns.” *Id.* at 2037-38 (internal quotation marks omitted).

Bay Mills is not controlling, but it highlights the incorrectness of the majority’s analysis. A couple of particular examples further illustrate the point. One sentence that typifies the majority’s opinion reads as follows: “The tribes’ retained sovereignty reaches only that power needed to control internal relations, preserve their own unique customs and social order, and prescribe and enforce rules of conduct for their own members.” Majority Op. at 550 (internal alterations omitted). The statement simply cannot be reconciled

with *Bay Mills*, for we know that a tribe’s sovereignty encompasses all historic “core aspects” of its sovereignty—more than just controlling internal relations (and including immunity from suit). *Bay Mills*, 134 S.Ct. at 2030; see also *Kiowa Tribe of Oklahoma v. Mfg. Technologies, Inc.*, 523 U.S. 751, 758 (1998) (“[T]ribal [sovereignty] extends beyond what is needed to safeguard tribal self-governance.”). Or consider another sentence from the majority opinion: “[W]hen a tribal government goes beyond matters of internal self-governance and enters into an off-reservation business transaction with non-Indians, its claim of sovereignty is at its weakest.” Majority Op. at 544 (internal citations omitted). But such a transaction in *Bay Mills* did not weaken the tribe’s sovereignty whatsoever; the Supreme Court required a clear congressional statement to abrogate the tribe’s immunity.

The majority opinion reads as if *Bay Mills* doesn’t exist. It relies on *Montana* as “chart[ing] the *contemporary* law of implicit divestiture of inherent tribal sovereignty.” *Id.* at 545 (emphasis added). Yet, as explained above, *Montana* is not a divestiture case at all; *Bay Mills* is. And in the debate between the justices in *Bay Mills*, thirty-three years after *Montana*, we find a truly contemporary clarification of Indian sovereignty. The dissent in *Bay Mills* would have applied a “modest scope of tribal sovereignty ... limited only to ‘what is necessary to protect tribal self-government or to control internal relations.’ ” *Bay Mills*, 134 S.Ct. at 2048 (Thomas, J., dissenting) (quoting *Montana*, 450 U.S. at 564). That sounds like the majority opinion. But the Court *rejected* that modest scope of tribal sovereignty in favor of a more robust one. *Bay Mills*, 134 S.Ct. at 2031-32. Even though neither the Court nor any party “suggested that immunity from the isolated suits that

may arise out of extraterritorial commercial dealings is somehow fundamental to protecting tribal government or regulating a tribe's internal affairs," *id.* at 2048 (Thomas, J., dissenting), the Court upheld the tribe's sovereignty.

In sum, the majority's sympathy for the Board's assertion of jurisdiction in this case not only finds precious little support in, but is affirmatively undercut by, the Supreme Court's most recent pronouncements on Indian sovereignty.

III

To be clear, my difference with the majority opinion has nothing to do with the wisdom of applying the NLRA's provisions to employment relations on Indian lands. Such a matter of policy is within Congress's exclusive and plenary authority. There simply is no indication that the NLRB's new approach is harmonious with congressional intent. In fact, the best indications are actually to the contrary.

Congress has been committed to a policy of promoting tribal self-government by encouraging tribal self-sufficiency and economic development. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334-35 (1983). The Band's FEP Code, regulating labor and employment relations within its territory, is an exercise of sovereign authority entirely consonant with congressional policy. A majority of the labor and employment relations governed by the FEP Code apply to operations at the Little River Casino Resort. The Resort was established under the Indian Gaming Regulatory Act, effectuating Congress's express purpose of "promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). This purpose is consonant with the Supreme

Court's recognition that Indian gaming is an instrument of tribal sovereignty not unlike the taxing power, because it provides revenues for the operation of tribal government and provision of essential tribal services. *Cabazon Band*, 480 U.S. at 218-20. *See also Bay Mills*, 134 S.Ct. at 2043 (Sotomayor, J., concurring) (recognizing that "tribal gaming operations cannot be understood as mere profit-making ventures that are wholly separate from the Tribes' core governmental functions" because "tribal business operations are critical to the goals of tribal self-sufficiency").

There are thus manifest reasons to conclude that Congress's silence regarding application of the NLRA to Indian tribes should *not* be read as implicitly authorizing divestment of tribal sovereignty. At the same time, there are sound reasons to abide by traditional Indian law principles and view Congress's silence as reflective of intent to uphold tribal sovereignty. As the Supreme Court recently observed, "Congress of course may always change its mind—and we would readily defer to that new decision." *Bay Mills*, 134 S.Ct. at 2039. But where Congress has had the opportunity to reflect on an issue of tribal sovereignty and declined to change settled law, proper respect for its plenary authority cautions against viewing Congress's silence as anything other than continuing approval of settled law. *Id.*

Disregarding these reasons, and armed with no legal support other than the "new approach" it adopted in *San Manuel* in 2004, the Board insists that it now has "discretionary jurisdiction" under the NLRA. Under governing law, the Board's assertion of jurisdiction, wise or not, is plainly beyond its authority. The majority having identified no persuasive reason for complicity in the Board's usurpation of Congress's

authority, I must dissent.

IV

How does one statement of dictum, in a 1960 Supreme Court opinion, grow into a “doctrine,” contrary to traditional principles of Indian law, yet justifying federal intrusion upon tribal sovereignty in 2015? It starts with litigants urging lower courts to adopt the dictum as a guiding rationale for extending the reach of federal law. Once one court agrees and, in the name of reasonableness, invents its own exceptions, other courts find it convenient to follow suit. Why not? It’s a handy standard, and other courts are using it without disastrous consequences. And so it begins. Then the alert federal agency, sensing a shift in momentum and judicial receptivity to expansion of regulatory power, seizes the opportunity and completely inverts its preexisting approach. Now, despite congressional silence, the courts and executive are playing in unison. Never mind one setback in the Tenth Circuit; the dictum is now become a doctrine.

But it’s also a house of cards. It should—and does—collapse when we notice what’s inexplicably overlooked in the fifty-five years of adding card upon card to “a thing said in passing.” Not only has the Supreme Court conspicuously refrained from approving it, but the “doctrine” is exactly 180-degrees backward. It presumes intent to limit tribal sovereignty when Congress is silent, even though congressional silence traditionally, and still, has been deemed insufficient to authorize limitation. *Bay Mills*, 134 S.Ct. at 2031-32. Our adding to, rather than blowing down, the house of cards at once usurps Congress’s power, ignores Supreme Court precedent, creates a needless circuit split and, not least of all, impermissibly intrudes on tribal sovereignty. I respectfully dissent.

53a

APPENDIX B

NATIONAL LABOR RELATIONS BOARD (N.L.R.B.)

Case 07-CA-051156

LITTLE RIVER BAND OF OTTAWA INDIANS
TRIBAL GOVERNMENT AND LOCAL 406,
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS

September 15, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS
HIROZAWA, AND SCHIFFER

On March 18, 2013, the Board issued a Decision and Order in this proceeding, which is reported at 359 NLRB No. 84. Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the Sixth Circuit, and the General Counsel filed a cross-application for enforcement.

At the time of the Decision and Order, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. Thereafter, the court of appeals vacated the Board's Decision and Order, and remanded this case for

further proceedings consistent with the Supreme Court's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

In view of the decision of the Supreme Court in *NLRB v. Noel Canning*, supra, we have considered de novo the stipulated record and the parties' briefs. We have also considered the now-vacated Decision and Order, and we agree with the rationale set forth therein. Accordingly, to the extent and for the reasons stated in the Decision and Order reported at 359 NLRB No. 84, which is incorporated herein by reference, we assert jurisdiction over the Respondent and find that the Respondent violated the National Labor Relations Act as alleged in the complaint.

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has interfered with, restrained, and coerced employees of the Little River Casino Resort in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act, by publishing and maintaining provisions of the Fair Employment Practices Code and related regulations that are expressly applicable to the Resort, Resort employees, and labor organizations that may represent those employees, and:

(a) Grant the Respondent exclusive authority to regulate the terms and conditions under which collective bargaining may or may not occur,

thereby preempting application of the Act and interfering with access to the Board's processes.

(b) Prohibit strikes and other protected concerted activity and subject employees and labor organizations to fines, injunctions, and civil penalties for strike activity.

(c) Require labor organizations to obtain a license to organize employees or conduct other business and subject them to fines, penalties, and injunctions if they fail to obtain a license.

(d) Place restrictions on the duty to bargain over mandatory subjects, including "management decisions to hire, to layoff, to recall or to reorganize duties,"; the duration of a collective-bargaining agreement; drug and alcohol testing policies; and any subjects in conflict with tribal laws.

(e) Limit or restrict access to the Board's processes by requiring labor organizations to notify the Respondent of any alleged unfair labor practices and attempt to resolve such disputes through grievance and arbitration, and precluding review of arbitration decisions and awards by the Board or courts; permitting contractual interest arbitration, but precluding review of any allegedly unlawful award by the Board or the courts; providing that decisions by the Tribal Court over disputes involving the duty to bargain in good faith or alleged conflicts between a collective-bargaining agreement and tribal laws shall be final and not subject to appeal; and discouraging labor organizations and employees from invoking procedures or remedies outside of the Fair Employment Practices Code.

(f) Limit the period of time that employees may file a deauthorization petition to the first 3 months of a collective-bargaining agreement, thereby interfering with employees' right under Section 9(e) of the Act to file such a petition during the entire term of a collective-bargaining agreement.

4. The unfair labor practices set out in paragraph 3 affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has maintained in its Fair Employment Practices Code and regulations certain provisions that violate Section 8(a)(1) of the Act, we shall order the Respondent to refrain from applying the unlawful provisions of its Fair Employment Practices Code and regulations to the Little River Casino Resort, employees of the Resort, or any labor organization that may represent those employees. We shall also require the Respondent to notify all current and future employees of the Resort that the unlawful provisions of the Fair Employment Practices Code and regulations do not apply to the Resort, its employees, or any labor organization that may represent those employees. We shall leave the manner in which the Respondent complies with these notice requirements to the Respondent's reasonable discretion, subject to approval in compliance proceedings. The Respondent may, if it chooses, effect the required notice to employees by leaving the attached notice marked "Appendix" posted in conspicuous places, including all places where notices to Resort

employees are customarily posted, and, if applicable, in electronic form, after the required 60-day posting period has expired. Alternatively, the Respondent may obviate the need for such continuing notice by taking such legislative and regulatory action as is necessary to rescind the application of the unlawful provisions of the Fair Employment Practices Code and regulations to the Resort.

ORDER

The National Labor Relations Board orders that the Respondent, Little River Band of Ottawa Indians Tribal Government, Manistee, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Applying to the Little River Casino Resort, employees of the Resort, or any labor organization that may represent those employees, provisions of its Fair Employment Practices Code and regulations that: (i) grant the Respondent exclusive authority to regulate the terms and conditions under which collective bargaining may or may not occur; (ii) prohibit employees from engaging in strikes or other protected concerted activity and subject employees and labor organizations to fines, injunctions, and civil penalties for striking; (iii) require labor organizations seeking to represent employees of the Resort to obtain a license and subject labor organizations to fines, injunctions, and civil penalties for failing to obtain a license; (iv) place restrictions on the Respondent's duty to bargain over mandatory subjects; (v) interfere with, restrict, or discourage employees from filing charges with the National Labor

Relations Board; (vi) discourage labor organizations and employees from invoking procedures or remedies outside of the Fair Employment Practices Code; or (vii) limit the period of time during which employees may file a deauthorization petition.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Notify all current and future employees of the Resort that it will not apply to the Resort, the employees of the Resort, or any labor organization that may represent those employees, provisions of its Fair Employment Practices Code and regulations that: (i) grant the Respondent exclusive authority to regulate the terms and conditions under which collective bargaining may or may not occur; (ii) prohibit employees from engaging in strikes or other protected concerted activity and subject employees and labor organizations to fines, injunctions, and civil penalties for striking; (iii) require labor organizations seeking to represent employees of the Resort to obtain a license and subject labor organizations to fines, injunctions, and civil penalties for failing to obtain a license; (iv) place restrictions on the Respondent's duty to bargain over mandatory subjects; (v) interfere with, restrict, or discourage employees from filing charges with the National Labor Relations Board; (vi) discourage labor organizations and employees from invoking procedures or remedies outside of the Fair

Employment Practices Code; or (vii) limit the period of time during which employees may file a deauthorization petition. Alternatively, the Respondent may rescind the application of the unlawful provisions of the Fair Employment Practices Code and regulations to the Resort.

(b) Within 14 days after service by the Region, post at its Manistee, Michigan facility, copies of the attached notice marked "Appendix."¹ Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees of the Little River Casino Resort are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a

¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted and Mailed by Order of the National Labor Relations Board" shall read "Posted and Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

60a

copy of the notice to all current employees and former employees employed by the Respondent at any time since September 28, 2008.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 15, 2014

Mark Gaston Pearce

Chairman

Kent Y. Hirozawa

Member

Nancy Schiffer

Member

61a

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL
LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT apply to the Little River Casino Resort, employees of the Resort, or any labor organization that may represent those employees, provisions of our Fair Employment Practices Code and regulations that: (i) grant us the exclusive authority to regulate the terms and conditions under which collective bargaining may or may not occur; (ii) prohibit employees and labor organizations from engaging in strikes or other protected concerted activity and subject employees and labor organizations to fines, injunctions, and civil penalties for striking; (iii) require labor organizations seeking to represent employees of the Resort to obtain a license and subject them to fines, injunctions, and civil penalties for failing to obtain a license; (iv) place restrictions on our duty to bargain in good faith over terms and conditions

of employment; (v) interfere with, restrict, or discourage employees from filing charges with the National Labor Relations Board; (vi) discourage labor organizations and employees from invoking procedures or remedies outside of the Fair Employment Practices Code; or (vii) limit the period of time during which employees may file a deauthorization petition.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL notify all current and future employees of the Little River Casino Resort that the unlawful provisions of our Fair Employment Practices Code and regulations set forth above do not apply to them or any labor organization that seeks to represent them *or* we will rescind the application of the unlawful provisions of the Fair Employment Practices Code and regulations to the Little River Casino Resort.

LITTLE RIVER BAND OF OTTAWA INDIANS
TRIBAL GOVERNMENT

The Board's decision can be found at www.nlr.gov/case/07-CA-051156 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

63a

APPENDIX C

NATIONAL LABOR RELATIONS BOARD (N.L.R.B.)

Case 07-CA-051156

LITTLE RIVER BAND OF OTTAWA INDIANS
TRIBAL GOVERNMENT AND LOCAL 406,
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS.

March 18, 2013

DECISION AND ORDER

**BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN
AND BLOCK**

At issue in this case is whether the Respondent, Little River Band of Ottawa Indians Tribal Government (the Respondent or the Band), is subject to the Board's jurisdiction and, if so, whether it violated Section 8(a)(1) of the Act by maintaining and publishing certain provisions of its Fair Employment Practices (FEP) Code and related regulations which, by their express terms, apply to employees of the Little River Casino Resort (the Resort) and govern the rights of those employees to organize and bargain collectively.¹ We answer both questions in the affirmative.

¹ Upon a charge filed on March 28, 2008, by Local 406, International Brotherhood of Teamsters, the Acting General Counsel of the National Labor Relations Board issued an 8(a)(1) complaint on December 10, 2010, against the Respondent. The Respondent filed a timely answer admitting in part and denying

As discussed below, this is not a case of first impression. Rather, in almost every respect, it is very much like *San Manuel Indian Bingo & Casino*, 341 NLRB 1055 (2004), *affd.* 475 F.3d 1306 (D.C. Cir. 2007), rehearing *en banc* denied (2007), which we find dispositive of the jurisdictional issue before us. On the merits, the Respondent concedes that, if the Board has jurisdiction over the Resort, its conduct violated the Act as alleged in the complaint.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a federally recognized Indian Tribe, with an office and facilities in Manistee, Michigan, is engaged in the operation of a casino and resort. During 2010, the Respondent, in conducting its business operations, derived gross revenues in excess of \$20 million, and purchased and received at its Manistee facilities supplies and services valued in excess of \$50,000 directly from points outside the State of Michigan for use in connection with the casino and resort.

in part the allegations of the complaint and asserting as an affirmative defense that the Board lacks jurisdiction in this matter.

On August 3, 2011, the Respondent, the Union, and the Acting General Counsel filed with the Board a stipulation of facts. The parties agreed that the charge, the complaint, the answer, the stipulation, and the exhibits attached to the stipulation shall constitute the entire record in this proceeding and they waived a hearing before and decision by an administrative law judge. On December 20, 2011, the Board approved the stipulation and transferred the proceeding to the Board for issuance of a decision and order. The Acting General Counsel and the Respondent filed briefs.

For the reasons discussed below, we find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The parties stipulated, and we find, that the Union, Local 406, International Brotherhood of Teamsters, is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

The Little River Band of Ottawa Indians Tribe has approximately 4000 enrolled members. The Tribe has the use of over 1200 acres of land in and near Manistee and Mason Counties, Michigan (tribal lands). Three hundred and eighty members live in or near tribal lands.

The Tribe has a constitution and three branches of government: (1) an executive branch known as the office of the Tribal Ogema; (2) a legislative branch known as the Tribal Council; and (3) a judicial branch known as the Tribal Court.

The Tribe has no significant base within its jurisdiction upon which to levy taxes. In order to raise revenue, the Tribal Council established the Resort under the authority of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701, et seq. The Resort is owned and controlled by the Respondent and is located on tribal land. Its facilities include 1500 slot machines, gaming tables, a high limits gaming area, bingo facilities, a 292-room hotel, a 95-space RV park, 3 restaurants, a lounge, and a 1700-seat event center.

The Resort has 905 employees, including 107 tribal members and 27 members of other Native American tribes. The majority of Resort employees (771) are

neither enrolled members of the Band nor Native Americans.² The majority of the Resort's customers are also non-Indians who come from Michigan outside of tribal lands, other States, and Canada. The Resort competes with other Indian and non-Indian casinos in Michigan, other States, and Canada.

The gross revenues of the Resort exceed \$20 million annually. Pursuant to the IGRA, net revenues generated by the Resort may be used only for governmental services, the general welfare of the Tribe and its members, tribal economic development, or to support local governmental or charitable organizations.³ The Resort provides over half of the Tribe's total budget, and substantially funds the Tribe's Department of Natural Resources, Department of Public Safety, mental health and substance abuse services, Department of Family Services, Housing Department, Tribal prosecutor's office, and Tribal Court.

The Tribal Council has delegated authority to a Gaming Enterprise Board of Directors to manage the Resort. However, the Tribal Ogema and the Tribal Council maintain strict oversight of Resort operations.

Through the Tribal Council, the Respondent enacted the FEP Code and regulations to govern a variety of employment and labor matters. The FEP Code by its express terms applies to the Resort, Resort employees, and the unions that seek to represent those employees. Articles XVI and XVII of the FEP Code govern labor

² The Tribal government employs 1150 employees overall (including 905 at the Resort). Qualified enrolled members of the Tribe are given preference over non-Indians for employment positions within governmental departments and subordinate organizations, including the Resort.

³ 25 U.S.C. § 2710(b)(2)(B).

organizations and collective bargaining. The parties have stipulated that Article XVI, among other things, grants to the Respondent the authority to determine the terms and conditions under which collective bargaining may or may not occur; prohibits strikes by the Respondent's employees and labor organizations; requires labor organizations doing business within the jurisdiction of the Band to apply for and obtain a license; and excepts from the duty to bargain in good faith any matter that would conflict with the laws of the Band, the duration of a collective-bargaining agreement (which must be 3 years), drug and alcohol testing, and decisions to hire, layoff, recall, or reorganize the work duties of employees.

B. Contentions of the Parties

The Respondent contends that the Board lacks jurisdiction in this matter. The Respondent contends that, as a federally-recognized Indian tribe, it exercises inherent sovereign authority over labor relations within its reservation pursuant to established principles of Federal Indian law. The Respondent further contends that application of the Act would impermissibly interfere with its tribal sovereignty and internal self-governance. The Respondent's defense rests entirely on its jurisdictional challenge.

The Acting General Counsel contends that the Board's exercise of jurisdiction over the Respondent is appropriate under the principles set forth in *San Manuel Indian Bingo & Casino*, 341 NLRB 1055 (2004), *affd.* 475 F.3d 1306 (D.C. Cir. 2007), rehearing *en banc* denied (2007), in which the Board asserted jurisdiction over a casino that was owned and controlled by an Indian tribe and located entirely on reservation land. The Acting General Counsel asserts that the activity at issue, the operation of a casino that

employs significant numbers of non-Indians and caters to a non-Indian clientele, is commercial in nature—not governmental. In these circumstances, the Acting General Counsel contends that the Board’s assertion of jurisdiction over the Respondent and the application of the Act to the Resort will not impinge upon the Respondent’s traditional sovereign authority and right to self-govern.

On the merits, the Acting General Counsel contends that the challenged provisions of the FEP Code and related regulations explicitly interfere with the Section 7 rights of Resort employees by, among other things, prohibiting lawful strikes and other protected concerted activities, subjecting employees and unions to severe penalties for engaging in such activities, requiring unions seeking to organize Resort employees to obtain licenses, narrowly circumscribing the Respondent’s duty to bargain with recognized unions, and otherwise preempting, restricting, and limiting the rights and remedies provided in the Act. The Respondent does not argue that the challenged provisions of the FEP Code are lawful if the Board has jurisdiction and the Act applies.

III. ANALYSIS

The parties have stipulated that the issues to be decided are (1) whether the Board has jurisdiction over the Respondent and, if so (2) whether the Respondent has violated Section 8(a)(1) of the Act by applying certain provisions of the FEP Code and related regulations which, by their express terms, apply to Resort employees and labor organizations that may represent them. We conclude that the Board has jurisdiction and that the Respondent has violated the Act as alleged.

A. *Jurisdiction*

1.

The jurisdictional defense raised by the Respondent presents the same issue that was decided in *San Manuel*, supra. In *San Manuel*, the Board held that the jurisdiction of the Act generally extends to Indian tribes and tribal enterprises.⁴ In determining whether Federal Indian policy nevertheless requires the Board to decline jurisdiction in a specific case, the Board adopted the *Tuscarora* doctrine, which establishes that Federal statutes of general application apply to Indians absent an explicit exclusion. See *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960). The Federal courts have recognized several exceptions to the *Tuscarora* doctrine to limit jurisdiction over Indian tribes. The exceptions were enumerated by the Ninth Circuit in *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985), where the court held that general statutes do not apply to Indian tribes if: (1) the law “touches exclusive rights of self-government in purely intramural matters”; (2) application of the law would abrogate treaty rights; or (3) there is “proof” in the statutory language or legislative history that Congress did not intend the law to apply to Indian tribes. “In any of these three situations, Congress must *expressly* apply a statute to Indians before . . . it reaches them.” *Id.* (emphasis in original).

⁴ In so holding, the Board overruled prior Board decisions to the extent they held that Indian tribes and their enterprises were implicitly exempt as governmental entities within the meaning of Sec. 2(2) of the Act. See, e.g., *Fort Apache Timber Co.*, 226 NLRB 503 (1976), and *Southern Indian Health Council*, 290 NLRB 436 (1988).

In *San Manuel*, the Board stated that it would apply the three exceptions articulated in *Coeur d'Alene* in assessing whether Federal Indian law and policy precludes the Board's assertion of jurisdiction over Indian tribes and their commercial enterprises. The Board also adopted a discretionary jurisdictional standard. The Board explained that the discretionary jurisdictional standard is intended to balance the Board's interest in effectuating the policies of the Act with the need to accommodate the unique status of Indians in our society and legal culture. Thus, "when the Indian tribes are acting with regard to this particularized sphere of traditional tribal or governmental functions, the Board should take cognizance of its lessened interest in regulation and the tribe's increased interest in its autonomy" and decline to assert its discretionary jurisdiction. 341 NLRB at 1063. Conversely, the Board observed that "[w]hen Indian tribes participate in the national economy in commercial enterprises, when they employ substantial numbers of non-Indians, and when their businesses cater to non-Indian clients and customers, the tribes affect interstate commerce in a significant way" such that the Board should assert jurisdiction. *Id.* at 1062.

2.

We apply the Board's holding in *San Manuel* and find it to be dispositive in the present case. Consistent with *San Manuel*, the first step in our analysis is to assess whether the Board's assertion of jurisdiction is foreclosed under one of the three exceptions identified in *Coeur d'Alene*. As to the first exception, we find that application of the NLRA to the Resort would not interfere with the Respondent's "exclusive rights of self-government in purely intramural matters," *San Manuel*, 341 NLRB at 1059 (quoting *Coeur d'Alene*,

751 F.2d at 1116), such as “tribal membership, inheritance rules, and domestic relations.” Id. at 1061 fn. 19 (quoting *Coeur d’Alene*, 751 F.2d at 1116). Like the casino at issue in *San Manuel*, the Resort is a typical commercial enterprise operating in, and substantially affecting, interstate commerce, and the majority of the Resort’s employees and patrons are non-Indians. See *San Manuel*, 341 NLRB at 1061 (“[T]he operation of a casino—which employs significant numbers of non-Indians and that caters to a non-Indian clientele—can hardly be described as ‘vital’ to the tribes’ ability to govern themselves or as an ‘essential attribute’ of their sovereignty.”)⁵

The second and third *Coeur d’Alene* exceptions are also inapplicable. The Respondent does not allege the existence of any treaties covering the tribe. Application of the NLRA would therefore not abrogate treaty rights. Further, as the Board found in *San Manuel*, nothing in the statutory language or legislative history of the Act suggests that Congress intended to foreclose the Board from asserting jurisdiction over Indian tribes.⁶ *San Manuel*, supra, 341 NLRB at 1058–1059.

⁵ Contrary to the Respondent’s argument on brief, the fact that the tribe derives revenue from the Resort which it uses to address the tribe’s intramural needs does not render the operation of the Resort a traditional governmental function or an exercise in self-governance in purely intramural matters. As the Board noted in *San Manuel*, under this definition of intramural, the first *Coeur d’Alene* exception would swallow the *Tuscarora* rule. 341 NLRB at 1063.

⁶ Although the Respondent argues that Indian tribes have sovereign immunity against actions by private parties to enforce contractual rights under Sec. 301 of the LMRA, evincing a Congressional intent to exempt tribes and their enterprises from the Act, it cites no authority for that proposition. In any event,

The Respondent urges that the *Tuscarora-Coeur d'Alene* line of cases is inapposite here, where the validity of tribal law is questioned. The Respondent relies on *NLRB v. Pueblo of San Juan*, 276 F.3d 1186 (10th Cir. 2002), in which the Tenth Circuit upheld a tribal “right-to-work” law, rejecting the Board’s contention that Section 14(b) of the Act implicitly allows only States and territories, not Indian tribes, to enact such legislation.⁷ Accordingly, the Respondent reasons, the Acting General Counsel’s challenge to the FEP Code and regulations must be dismissed.

We find this argument unpersuasive. The court’s reasoning in *Pueblo of San Juan* was limited to the unique facts and issues in that case. The court explicitly noted that—unlike in this case—“the general applicability of federal labor law is not at issue. . . . Furthermore, the Pueblo does not challenge the supremacy of federal labor law. The ordinance . . . does not attempt to nullify the NLRA or any other

we find it unnecessary to decide the issue. Indian tribes have no sovereign immunity against the United States. See *id.* at 1061, citing *Florida Paralegic Assn. v. Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126, 1135 (11th Cir. 1999) (immunity doctrines do not apply to the Federal Government); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 182 (2d Cir. 1996) (“tribal sovereignty does not extend to prevent the federal government from exercising its superior sovereign power”). Thus, even assuming that the Respondent can raise a sovereign immunity claim against a private party in a Sec. 301 suit, this would not affect the Board’s authority to effectuate the public policies of the Act.

⁷ Although Sec. 8(a)(3) permits employers and unions to enter into contractual union-security arrangements requiring union membership as a condition of employment, Sec. 14(b) allows States and territories to enact laws, commonly called “right-to-work” laws, prohibiting such arrangements.

provision of federal law.” Id. at 1191. Rather, the question was only “whether the Pueblo continues to exercise the same authority to enact right-to-work laws as do states and territories[.]” Id. The court answered in the affirmative. It reasoned that although Section 8(a)(3) of the Act otherwise permits union-security arrangements, the exception for State and territorial “right-to-work” laws in Section 14(b) clearly indicates that Congress did not intend that Federal law in this regard should be paramount. Id. at 1200. (Indeed, the court found that, because of the 14(b) exception, 8(a)(3) is not a “generally applicable” statute insofar as it permits union security, and therefore that *Tuscarora* did not apply. Id. at 1199.) In those circumstances, the court was unwilling to find that Congress implicitly intended to divest the tribe of its sovereign authority to enact the “right-to-work” ordinance. Because the court’s reasoning in *Pueblo of San Juan* addressed only the narrow issue presented in that case, it is inapposite here.⁸

In any event, we find no merit in the Respondent’s central contention—that Federal scrutiny of its FEP Code improperly impairs the exercise of the Tribe’s sovereign right of self-government. As stated above, the provisions of the Code at issue here are not directed toward tribal intramural matters over which the Respondent retains exclusive rights of self-government, such as tribal membership, inheritance rules, or domestic relations. Nor are they addressed

⁸ Consistent with its nonacquiescence policy, the Board respectfully continues to disagree with the court of appeals decision in *Pueblo of San Juan*. See, e.g., *Arvin Industries*, 285 NLRB 753, 756–757 (1987). For purposes of this case, however, it is sufficient that the court’s decision is inapposite to the issues presented here.

exclusively to employment relationships between the Tribe and its governmental employees, such as employees of the Tribal Court system or Tribal police personnel. Cf. *Reich v. Great Lakes Indian Fish & Wildlife Comm'n*, 4 F.3d 490, 495 (7th Cir. 1993) (exempting law enforcement employees of Indian agencies from the Fair Labor Standards Act). They are, instead, as we discuss below, a set of rules purporting to limit or deny the rights given under Federal law to (mostly non-Indian) employees of a tribal commercial enterprise operating in interstate commerce. Because *Tuscarora* requires Indian tribes to submit to Federal regulation of such enterprises (with the exceptions already discussed), it would make little sense to hold that a tribe could avoid that responsibility merely by enacting statutes or ordinances that were inconsistent with Federal law.⁹

⁹ The Tribe is, of course, free to enact employment regulations that do not conflict with Federal law. See *Reich v. Mashantucket Sand & Gravel*, supra, 95 F.3d at 181.

The Tenth Circuit has held that Indian tribes are exempt from certain other Federal workplace statutes. *Donovan v. Navajo Forest Products Industries*, 692 F.2d 709 (1982) (OSHA); *EEOC v. Cherokee Nation*, 871 F.2d 937 (10th Cir. 1989) (ADEA). In those cases, however, the court relied extensively on statements in Supreme Court decisions to the effect that ambiguities in statutes and treaties should be resolved in favor of tribal self-government. E.g., “All doubtful expressions contained in Indian treaties should be resolved in the Indians’ favor.” *Donovan*, supra, 692 F.2d at 712, citing *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970); “[I]f there [is] ambiguity . . . the doubt would benefit the tribe, for ‘ambiguities in federal law have been construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence.’” *Cherokee Nation*, supra, 871 F.2d at 939, quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 152 (1982). With all due respect, we think that those decisions are not

Finally, we find that policy considerations weigh in favor of the Board asserting its discretionary jurisdiction. See *San Manuel*, supra, 341 NLRB at 1063. The Respondent provides no basis to distinguish the policy considerations at issue in *San Manuel*.

B. The Unfair Labor Practice Issues

As stated previously, the Respondent concedes that, if it is found to be subject to the Act, the provisions of the tribal FEP Code at issue are unlawful as alleged, because they either explicitly restrict Section 7 activity or employees would reasonably construe them to restrict such activity.¹⁰ Because we have found that

conclusive authority for the results reached by the Tenth Circuit. In the first place, many of the cited decisions addressed conflicts between tribal sovereignty and *State* law. Unlike the United States, however, States are not superior sovereigns to Indian tribes. Thus, it is not surprising that the Supreme Court was reluctant to conclude that tribal sovereignty (itself encouraged by established Federal policy) should be trumped by State law or policy. That similar considerations should apply to conflicts between tribal sovereignty and *Federal* law seems to us a less than self-evident proposition. And in the few decisions that even arguably addressed conflicts between general Federal law and the rights of Indian tribes, the Court upheld the former. See *U.S. v. Dion*, 476 U.S. 734 (1986) (although Indians possessed general treaty rights to hunt and fish, Federal statutes divested them of the right to kill eagles); *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978) (tribal courts lack criminal jurisdiction over non-Indians); *U.S. v. Wheeler*, 435 U.S. 393 (1978) (no double jeopardy for U.S. to prosecute defendant under Federal law after tribal court ruled under tribal law); cf. *U.S. v. Mazurie*, 419 U.S. 544 (1975) (U.S. had authority to regulate introduction of alcohol into Indian country, and validly delegated that authority to tribal council).

¹⁰ *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Thus:

Secs. 16.02, 16.03, 16.06(b) and (c), 16.15(b)(5), and 16.24(a) of the FEP Code prohibit strikes and other protected concerted activities. Secs. 16.06(a) and 16.15(b)(1), which prohibit activity that has the effect of “interfer[ing] with, threaten[ing] or undermin[ing] the Governmental Operations of the Band,” would reasonably be interpreted as prohibiting protected concerted activity, such as striking or engaging in communications critical of the Respondent or its agents.

Secs. 16.08(a) and 16.24(c) and related regulations require labor unions to obtain a license before seeking to organize employees working for the Respondent, including employees of the Resort, and create an enforcement system, which includes reporting requirements and penalties. In order to obtain a license, a union seeking to represent casino employees must agree to abide by the unlawful provisions of the FEP Code and to forgo rights and remedies guaranteed under the Act. Failure to obtain the license exposes the union to court injunctions and substantial civil fines.

Several provisions of the FEP Code expressly exclude from the required scope of good-faith bargaining mandatory bargaining subjects including “management decisions to hire, to layoff, to recall or to reorganize duties” (Sec. 16.12(a)(1)(B)); the duration of a collective-bargaining agreement (Sec. 16.18); drug and alcohol testing policies (Sec. 16.20(b)); and any other matter that would conflict with tribal law (Sec. 16.12(b)). Moreover, Sec. 16.01 states, contrary to Sec. 8(d) of the Act, that the Respondent has “inherent authority” to determine “the terms and conditions under which collective bargaining may or may not occur within its territory.”

Secs. 16 and 17 establish that the tribal code is the primary authority in establishing and adjudicating the collective-bargaining rights of all employees of the Respondent. When read in conjunction, Secs. 16.01, 16.03, 16.06, 16.12(b), 16.24(d), and 17.1(c) convey the message that the laws of the Respondent and not the NLRA govern the collective-bargaining rights of Resort employees. By suggesting that labor disputes must be brought before the Tribal Court, from which there can be no appeal to the Board, these provisions interfere with the access of unions and employees to the Board.

the Respondent is subject to the Act, we find that the Respondent has violated the Act, as alleged in the complaint.

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent has interfered with, restrained, and coerced employees of the Little River Casino Resort in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act, by publishing and maintaining provisions of the FEP Code and related regulations that are expressly applicable to the Resort, the Resort employees, and labor organizations that may represent those employees, and:

Sec. 16.16 contains a mandatory arbitration procedure for resolving unfair labor practice allegations, contrary to the settled principle that arbitration is a matter of consent, not compulsion. Under that provision, the arbitrator's decision is final and binding, except for limited review by the Tribal Court, in violation of employees' right to have unfair labor practice charges decided by the Board.

Sec. 16.17 contains an impasse resolution procedure, which includes mandatory interest arbitration at the request of either party, again contrary to Federal law.

Sec. 16.13(e) requires that an employee petition for an election to rescind a "fair share" union-security provision in a collective-bargaining agreement be filed within 90 days after execution of the agreement, contrary to Sec. 9(e) of the Act, which allows employees to file a deauthorization petition with the Board any time during the term of a collective-bargaining agreement.

(a) Grant the Respondent exclusive authority to regulate the terms and conditions under which collective bargaining may or may not occur, thereby preempting application of the Act and interfering with access to the Board's processes.

(b) Prohibit strikes and other protected concerted activity and subject employees and labor organizations to fines, injunctions, and civil penalties for strike activity.

(c) Require labor organizations to obtain a license to organize employees or conduct other business and subject them to fines, penalties, and injunctions if they fail to obtain a license.

(d) Place restrictions on the duty to bargain over mandatory subjects, including "management decisions to hire, to layoff, to recall or to reorganize duties"; the duration of a collective-bargaining agreement; drug and alcohol testing policies; and any subjects in conflict with tribal laws.

(e) Limit or restrict access to the Board's processes by requiring labor organizations to notify the Respondent of any alleged unfair labor practices and attempt to resolve such disputes through grievance and arbitration, and precluding review of arbitration decisions and awards by the Board or courts; permitting contractual interest arbitration, but precluding review of any allegedly unlawful award by the Board or the courts; providing that decisions by the Tribal Court over disputes involving the duty to bargain in good faith or alleged conflicts between a collective-bargaining agreement and tribal laws shall be final and not subject to appeal; and discouraging labor

organizations and employees from invoking procedures or remedies outside of the Fair Employment Practices Code.

(f) Limit the period of time that employees may file a deauthorization petition to the first 3 months of a collective-bargaining agreement, thereby interfering with employees' right under Section 9(e) of the Act to file such a petition during the entire term of a collective-bargaining agreement.

4. The unfair labor practices set out in paragraph 3 affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has maintained in its Fair Employment Practices (FEP) Code and regulations certain provisions that violate Section 8(a)(1) of the Act, we shall order the Respondent to refrain from applying the unlawful provisions of its FEP Code and regulations to the Little River Casino Resort (the Resort), employees of the Resort, or any labor organization that may represent those employees. We shall also require the Respondent to notify all current and future employees of the Resort that the unlawful provisions of the FEP Code and regulations do not apply to the Resort, its employees, or any labor organization that may represent those employees. We shall leave the manner in which the Respondent complies with these notice requirements to the Respondent's reasonable discretion, subject to approval in compliance proceedings. The Respondent may, if it

chooses, effect the required notice to employees by leaving the attached notice marked "Appendix" posted in conspicuous places, including all places where notices to Resort employees are customarily posted, and, if applicable, in electronic form, after the required 60-day posting period has expired. Alternatively, the Respondent may obviate the need for such continuing notice by taking such legislative and regulatory action as is necessary to rescind the application of the unlawful provisions of the FEP Code and regulations to the Resort.

ORDER

The National Labor Relations Board orders that the Respondent, Little River Band of Ottawa Indians Tribal Government, Manistee, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Applying to the Little River Casino Resort, employees of the Resort, or any labor organization that may represent those employees, provisions of its Fair Employment Practices Code and regulations that: (i) grant the Respondent exclusive authority to regulate the terms and conditions under which collective bargaining may or may not occur; (ii) prohibit employees from engaging in strikes or other protected concerted activity and subject employees and labor organizations to fines, injunctions, and civil penalties for striking; (iii) require labor organizations seeking to represent employees of the Resort to obtain a license and subject labor organizations to fines, injunctions, and civil penalties for failing to obtain a license; (iv) place restrictions on the Respondent's duty to bargain over mandatory subjects; (v) interfere with, restrict, or discourage employees from filing charges with the

National Labor Relations Board; (vi) discourage labor organizations and employees from invoking procedures or remedies outside of the Fair Employment Practices Code; or (vii) limit the period of time during which employees may file a deauthorization petition.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Notify all current and future employees of the Resort that it will not apply to the Resort, the employees of the Resort, or any labor organization that may represent those employees, provisions of its Fair Employment Practices Code and regulations that: (i) grant the Respondent exclusive authority to regulate the terms and conditions under which collective bargaining may or may not occur; (ii) prohibit employees from engaging in strikes or other protected concerted activity and subject employees and labor organizations to fines, injunctions, and civil penalties for striking; (iii) require labor organizations seeking to represent employees of the Resort to obtain a license and subject labor organizations to fines, injunctions, and civil penalties for failing to obtain a license; (iv) place restrictions on the Respondent's duty to bargain over mandatory subjects; (v) interfere with, restrict, or discourage employees from filing charges with the National Labor Relations Board; (vi) discourage labor organizations and employees from invoking procedures or remedies outside of the Fair Employment Practices Code; or (vii) limit the period of time during which employees may file a deauthorization petition.

Alternatively, the Respondent may rescind the application of the unlawful provisions of the Fair Employment Practices Code and regulations to the Resort.

(b) Within 14 days after service by the Region, post at its Manistee, Michigan, facility, copies of the attached notice marked "Appendix."¹¹ Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees of the Little River Casino Resort are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 28, 2008.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a

¹¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted and Mailed by Order of the National Labor Relations Board" shall read "Posted and Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

83a

responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 18, 2013

Mark Gaston Pearce, Chairman

Richard F. Griffin, Jr., Member

Sharon Block, Member

84a

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT apply to the Little River Casino Resort, employees of the Resort, or any labor organization that may represent those employees, provisions of our Fair Employment Practices Code and regulations that: (i) grant us the exclusive authority to regulate the terms and conditions under which collective bargaining may or may not occur; (ii) prohibit employees and labor organizations from engaging in strikes or other protected concerted activity and subject employees and labor organizations to fines, injunctions, and civil penalties for striking; (iii) require labor organizations seeking to represent employees of the Resort to obtain a license and subject them to fines, injunctions, and civil penalties for failing to obtain a license; (iv)

85a

place restrictions on our duty to bargain in good faith over terms and conditions of employment; (v) interfere with, restrict, or discourage employees from filing charges with the National Labor Relations Board; (vi) discourage labor organizations and employees from invoking procedures or remedies outside of the Fair Employment Practices Code; or (vii) limit the period of time during which employees may file a deauthorization petition.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL notify all current and future employees of the Little River Casino Resort that the unlawful provisions of our Fair Employment Practices Code and regulations set forth above do not apply to them or any labor organization that seeks to represent them *or* WE WILL rescind the application of the unlawful provisions of the Fair Employment Practices Code and regulations to the Little River Casino Resort.

LITTLE RIVER BAND OF OTTAWA INDIANS
TRIBAL GOVERNMENT

86a

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed Sep 18, 2015]

No. 14-2239

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

LITTLE RIVER BAND OF
OTTAWA INDIANS TRIBAL GOVERNMENT,
Respondent.

Before: MERRITT, GIBBONS,
and McKEAGUE, *Circuit Judges*

ORDER

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision on the case. The petition then was circulated to the full court. Less than a majority of the judges voted in favor of rehearing en banc.

Therefore, the petition is denied. Judge McKeague would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt

Deborah S. Hunt, Clerk

APPENDIX E

FEDERAL STATUTES

25 U.S.C. § 2702. Declaration of policy

The purpose of this chapter is—

(1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments;

(2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and

(3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

25 U.S.C. § 2703. Definitions

For purposes of this chapter—

(1) The term “Attorney General” means the Attorney General of the United States.

(2) The term “Chairman” means the Chairman of the National Indian Gaming Commission.

(3) The term “Commission” means the National Indian Gaming Commission established pursuant to section 2704 of this title.

(4) The term “Indian lands” means—

(A) all lands within the limits of any Indian reservation; and

(B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

(5) The term “Indian tribe” means any Indian tribe, band, nation, or other organized group or community of Indians which—

(A) is recognized as eligible by the Secretary for the special programs and services provided by the United States to Indians because of their status as Indians, and

(B) is recognized as possessing powers of self-government.

(6) The term “class I gaming” means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations.

(7)(A) The term “class II gaming” means—

(i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)—

89a

(I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,

(II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and

(III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards,

including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and

(ii) card games that—

(I) are explicitly authorized by the laws of the State, or

(II) are not explicitly prohibited by the laws of the State and are played at any location in the State,

but only if such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games.

(B) The term “class II gaming” does not include—

(i) any banking card games, including baccarat, chemin defer, or blackjack (21), or

(ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.

(C) Notwithstanding any other provision of this paragraph, the term “class II gaming” includes those card games played in the State of Michigan, the State of North Dakota, the State of South Dakota, or the State of Washington, that were actually operated in such State by an Indian tribe on or before May 1, 1988, but only to the extent of the nature and scope of the card games that were actually operated by an Indian tribe in such State on or before such date, as determined by the Chairman.

(D) Notwithstanding any other provision of this paragraph, the term “class II gaming” includes, during the 1-year period beginning on October 17, 1988, any gaming described in subparagraph (B)(ii) that was legally operated on Indian lands on or before May 1, 1988, if the Indian tribe having jurisdiction over the lands on which such gaming was operated requests the State, by no later than the date that is 30 days after October 17, 1988, to negotiate a Tribal-State compact under section 2710(d)(3) of this title.

(E) Notwithstanding any other provision of this paragraph, the term “class II gaming” includes, during the 1-year period beginning on December 17, 1991, any gaming described in subparagraph (B)(ii) that was legally operated on Indian lands in the State of Wisconsin on or before May 1, 1988, if the Indian tribe having jurisdiction over the lands on which such gaming was operated requested the State, by no later than November 16, 1988, to negotiate a Tribal-State compact under section 2710(d)(3) of this title.

(F) If, during the 1-year period described in subparagraph (E), there is a final judicial

determination that the gaming described in subparagraph (E) is not legal as a matter of State law, then such gaming on such Indian land shall cease to operate on the date next following the date of such judicial decision.

(8) The term “class III gaming” means all forms of gaming that are not class I gaming or class II gaming.

(9) The term “net revenues” means gross revenues of an Indian gaming activity less amounts paid out as, or paid for, prizes and total operating expenses, excluding management fees.

(10) The term “Secretary” means the Secretary of the Interior.

25 U.S.C. § 2710. Tribal gaming ordinances

(a) Jurisdiction over class I and class II gaming activity

(1) Class I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribes and shall not be subject to the provisions of this chapter.

(2) Any class II gaming on Indian lands shall continue to be within the jurisdiction of the Indian tribes, but shall be subject to the provisions of this chapter.

(b) Regulation of class II gaming activity; net revenue allocation; audits; contracts

(1) An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if—

(A) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is

92a

not otherwise specifically prohibited on Indian lands by Federal law), and

(B) the governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman.

A separate license issued by the Indian tribe shall be required for each place, facility, or location on Indian lands at which class II gaming is conducted.

(2) The Chairman shall approve any tribal ordinance or resolution concerning the conduct, or regulation of class II gaming on the Indian lands within the tribe's jurisdiction if such ordinance or resolution provides that—

(A) except as provided in paragraph (4), the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity;

(B) net revenues from any tribal gaming are not to be used for purposes other than—

(i) to fund tribal government operations or programs;

(ii) to provide for the general welfare of the Indian tribe and its members;

(iii) to promote tribal economic development;

(iv) to donate to charitable organizations; or

(v) to help fund operations of local government agencies;

(C) annual outside audits of the gaming, which may be encompassed within existing independent tribal audit systems, will be provided by the Indian tribe to the Commission;

93a

(D) all contracts for supplies, services, or concessions for a contract amount in excess of \$25,000 annually (except contracts for professional legal or accounting services) relating to such gaming shall be subject to such independent audits;

(E) the construction and maintenance of the gaming facility, and the operation of that gaming is conducted in a manner which adequately protects the environment and the public health and safety; and

(F) there is an adequate system which—

(i) ensures that background investigations are conducted on the primary management officials and key employees of the gaming enterprise and that oversight of such officials and their management is conducted on an ongoing basis; and

(ii) includes—

(I) tribal licenses for primary management officials and key employees of the gaming enterprise with prompt notification to the Commission of the issuance of such licenses;

(II) a standard whereby any person whose prior activities, criminal record, if any, or reputation, habits and associations pose a threat to the public interest or to the effective regulation of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices and methods and activities in the conduct of gaming shall not be eligible for employment; and

(III) notification by the Indian tribe to the Commission of the results of such background check before the issuance of any of such licenses.

(3) Net revenues from any class II gaming activities conducted or licensed by any Indian tribe may be used to make per capita payments to members of the Indian tribe only if—

(A) the Indian tribe has prepared a plan to allocate revenues to uses authorized by paragraph (2)(B);

(B) the plan is approved by the Secretary as adequate, particularly with respect to uses described in clause (i) or (iii) of paragraph (2)(B);

(C) the interests of minors and other legally incompetent persons who are entitled to receive any of the per capita payments are protected and preserved and the per capita payments are disbursed to the parents or legal guardian of such minors or legal incompetents in such amounts as may be necessary for the health, education, or welfare, of the minor or other legally incompetent person under a plan approved by the Secretary and the governing body of the Indian tribe; and

(D) the per capita payments are subject to Federal taxation and tribes notify members of such tax liability when payments are made.

(4)(A) A tribal ordinance or resolution may provide for the licensing or regulation of class II gaming activities owned by any person or entity other than the Indian tribe and conducted on Indian lands, only if the tribal licensing requirements include the requirements described in the subclauses of subparagraph

(B)(i) and are at least as restrictive as those established by State law governing similar gaming within the jurisdiction of the State within which such Indian lands are located. No person or entity, other than the Indian tribe, shall be eligible to receive a tribal license to own a class II gaming activity conducted on Indian lands within the jurisdiction of the Indian tribe if such person or entity would not be eligible to receive a State license to conduct the same activity within the jurisdiction of the State.

(B)(i) The provisions of subparagraph (A) of this paragraph and the provisions of subparagraphs (A) and (B) of paragraph (2) shall not bar the continued operation of an individually owned class II gaming operation that was operating on September 1, 1986, if—

(I) such gaming operation is licensed and regulated by an Indian tribe pursuant to an ordinance reviewed and approved by the Commission in accordance with section 2712 of this title,

(II) income to the Indian tribe from such gaming is used only for the purposes described in paragraph (2)(B) of this subsection,

(III) not less than 60 percent of the net revenues is income to the Indian tribe, and

(IV) the owner of such gaming operation pays an appropriate assessment to the National Indian Gaming Commission under section 2717(a)(1) of this title for regulation of such gaming.

(ii) The exemption from the application of this subsection provided under this subparagraph may not be transferred to any person or entity and shall remain in effect only so long as the gaming activity remains within the same nature and scope as operated on October 17, 1988.

(iii) Within sixty days of October 17, 1988, the Secretary shall prepare a list of each individually owned gaming operation to which clause (i) applies and shall publish such list in the Federal Register.

(c) Issuance of gaming license; certificate of self-regulation

(1) The Commission may consult with appropriate law enforcement officials concerning gaming licenses issued by an Indian tribe and shall have thirty days to notify the Indian tribe of any objections to issuance of such license.

(2) If, after the issuance of a gaming license by an Indian tribe, reliable information is received from the Commission indicating that a primary management official or key employee does not meet the standard established under subsection (b)(2)(F)(ii)(II) of this section, the Indian tribe shall suspend such license and, after notice and hearing, may revoke such license.

(3) Any Indian tribe which operates a class II gaming activity and which—

(A) has continuously conducted such activity for a period of not less than three years, including at least one year after October 17, 1988; and

97a

(B) has otherwise complied with the provisions of this section¹

may petition the Commission for a certificate of self-regulation.

(4) The Commission shall issue a certificate of self-regulation if it determines from available information, and after a hearing if requested by the tribe, that the tribe has—

(A) conducted its gaming activity in a manner which—

(i) has resulted in an effective and honest accounting of all revenues;

(ii) has resulted in a reputation for safe, fair, and honest operation of the activity; and

(iii) has been generally free of evidence of criminal or dishonest activity;

(B) adopted and is implementing adequate systems for—

(i) accounting for all revenues from the activity;

(ii) investigation, licensing, and monitoring of all employees of the gaming activity; and

(iii) investigation, enforcement and prosecution of violations of its gaming ordinance and regulations; and

(C) conducted the operation on a fiscally and economically sound basis.

(5) During any year in which a tribe has a certificate for self-regulation—

¹ So in original. Probably should be followed by a comma.

(A) the tribe shall not be subject to the provisions of paragraphs (1), (2), (3), and (4) of section 2706 (b) of this title;

(B) the tribe shall continue to submit an annual independent audit as required by subsection (b)(2)(C) of this section and shall submit to the Commission a complete resume on all employees hired and licensed by the tribe subsequent to the issuance of a certificate of self-regulation; and

(C) the Commission may not assess a fee on such activity pursuant to section 2717 of this title in excess of one quarter of 1 per centum of the gross revenue.

(6) The Commission may, for just cause and after an opportunity for a hearing, remove a certificate of self-regulation by majority vote of its members.

(d) Class III gaming activities; authorization; revocation; Tribal-State compact

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are—

(A) authorized by an ordinance or resolution that—

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b) of this section, and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

(2)(A) If any Indian tribe proposes to engage in, or to authorize any person or entity to engage in, a class III gaming activity on Indian lands of the Indian tribe, the governing body of the Indian tribe shall adopt and submit to the Chairman an ordinance or resolution that meets the requirements of subsection (b) of this section.

(B) The Chairman shall approve any ordinance or resolution described in subparagraph (A), unless the Chairman specifically determines that—

- (i) the ordinance or resolution was not adopted in compliance with the governing documents of the Indian tribe, or
- (ii) the tribal governing body was significantly and unduly influenced in the adoption of such ordinance or resolution by any person identified in section 2711(e)(1)(D) of this title.

Upon the approval of such an ordinance or resolution, the Chairman shall publish in the Federal Register such ordinance or resolution and the order of approval.

(C) Effective with the publication under subparagraph (B) of an ordinance or resolution adopted by the governing body of an Indian tribe that has been approved by the Chairman under subparagraph (B), class III gaming activity on the Indian lands of the Indian tribe shall be fully subject to the terms and conditions of the Tribal-State compact entered into under paragraph (3) by the Indian tribe that is in effect.

(D)(i) The governing body of an Indian tribe, in its sole discretion and without the approval of the Chairman, may adopt an ordinance or resolution revoking any prior ordinance or resolution that authorized class III gaming on the Indian lands of the Indian tribe. Such revocation shall render class III gaming illegal on the Indian lands of such Indian tribe.

(ii) The Indian tribe shall submit any revocation ordinance or resolution described in clause (i) to the Chairman. The Chairman shall publish such ordinance or resolution in the Federal Register and the revocation provided by such ordinance or resolution shall take effect on the date of such publication.

(iii) Notwithstanding any other provision of this subsection—

(I) any person or entity operating a class III gaming activity pursuant to this paragraph on the date on which an ordinance or resolution described in clause (i) that revokes authorization for such class III gaming activity is published in the Federal Register may, during the 1-year period beginning on the date on which such revocation ordinance or resolution is published under clause (ii), continue to operate such activity in conformance with the Tribal-State compact entered into under paragraph (3) that is in effect, and

(II) any civil action that arises before, and any crime that is committed before, the close of such 1-year period shall not be affected by such revocation ordinance or resolution.

101a

(3)(A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

(B) Any State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register.

(C) Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to—

- (i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;
- (ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;
- (iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;
- (iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;
- (v) remedies for breach of contract;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

(4) Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. No State may refuse to enter into the negotiations described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

(5) Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by any Tribal-State compact entered into by the Indian tribe under paragraph (3) that is in effect.

(6) The provisions of section 1175 of Title 15 shall not apply to any gaming conducted under a Tribal-State compact that—

(A) is entered into under paragraph (3) by a State in which gambling devices are legal, and

(B) is in effect.

(7)(A) The United States district courts shall have jurisdiction over—

(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,

(ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and

(iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).

(B)(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

(ii) In any action described in subparagraph (A)(i), upon the introduction of evidence by an Indian tribe that—

(I) a Tribal-State compact has not been entered into under paragraph (3), and

(II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith,

the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.

(iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe² to conclude such a compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court—

(I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and

(II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

(iv) If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands subject to the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this chapter and any other applicable Federal law and with the findings and order of the court.

² So in original. Probably should not be capitalized.

(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).

(vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).

(vii) If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures—

(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this chapter, and the relevant provisions of the laws of the State, and

(II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

(8)(A) The Secretary is authorized to approve any Tribal-State compact entered into between an Indian tribe and a State governing gaming on Indian lands of such Indian tribe.

(B) The Secretary may disapprove a compact described in subparagraph (A) only if such compact violates—

(i) any provision of this chapter,

(ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or

(iii) the trust obligations of the United States to Indians.

(C) If the Secretary does not approve or disapprove a compact described in subparagraph (A) before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this chapter.

(D) The Secretary shall publish in the Federal Register notice of any Tribal-State compact that is approved, or considered to have been approved, under this paragraph.

(9) An Indian tribe may enter into a management contract for the operation of a class III gaming activity if such contract has been submitted to, and approved by, the Chairman. The Chairman's review and approval of such contract shall be governed by the provisions of subsections (b), (c), (d), (f), (g), and (h) of section 2711 of this title.

(e) Approval of ordinances

For purposes of this section, by not later than the date that is 90 days after the date on which any tribal gaming ordinance or resolution is submitted to the Chairman, the Chairman shall approve such ordinance or resolution if it meets the requirements of this section. Any such ordinance or resolution not acted upon at the end of that 90-day period shall be considered to have been approved by the Chairman,

but only to the extent such ordinance or resolution is consistent with the provisions of this chapter.

29 U.S.C. § 152. Definitions

When used in this subchapter—

(1) The term “person” includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in cases under Title 11, or receivers.

(2) The term “employer” includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act [45 U.S.C. § 151 et seq.], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term “employee” shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. § 151 et seq.],

as amended from time to time, or by any other person who is not an employer as herein defined.

(4) The term “representatives” includes any individual or labor organization.

(5) The term “labor organization” means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(6) The term “commerce” means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term “affecting commerce” means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(8) The term “unfair labor practice” means any unfair labor practice listed in section 158 of this title.

(9) The term “labor dispute” includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or

conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

(10) The term “National Labor Relations Board” means the National Labor Relations Board provided for in section 153 of this title.

(11) The term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

(12) The term “professional employee” means—

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study

described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

(13) In determining whether any person is acting as an “agent” of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

(14) The term “health care institution” shall include any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged person.¹

29 U.S.C. § 157. Right of employees as to organization, collective bargaining, etc.

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

29 U.S.C. § 158. Unfair labor practices

(a) Unfair labor practices by employer

¹ So in original. Probably should be “persons”.

111a

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided*

further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

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

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) Unfair labor practices by labor organization

It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or

113a

terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be

114a

construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the

primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a)(3) of this section the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title,

116a

(B) where within the preceding twelve months a valid election under section 159(c) of this title has been conducted, or

(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c)(1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this subsection.

(c) Expression of views without threat of reprisal or force or promise of benefit

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the

provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

(d) Obligation to bargain collectively

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to

mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159, and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

119a

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

(e) Enforceability of contract or agreement to boycott any other employer; exception

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible¹ and void:

¹ So in original. Probably should be "unenforceable".

Provided, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection and subsection (b)(4)(B) of this section the terms “any employer”, “any person engaged in commerce or an industry affecting commerce”, and “any person” when used in relation to the terms “any other producer, processor, or manufacturer”, “any other employer”, or “any other person” shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

(f) Agreement covering employees in the building and construction industry

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2)

121a

such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

(g) Notification of intention to strike or picket at any health care institution

A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of subsection (d) of this section. The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

29 U.S.C. § 185. Suits by and against labor organizations**(a) Venue, amount, and citizenship**

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized

officers or agents are engaged in representing or acting for employee members.

(d) Service of process

The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency

For the purposes of this section, in determining whether any person is acting as an “agent” of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

29 U.S.C. § 187. Unlawful activities or conduct; right to sue; jurisdiction; limitations; damages

(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.

(b) Whoever shall be injured in his business or property by reason or¹ any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

¹ So in original. Probably should read “of”.

124a

APPENDIX F

LOCAL ORDINANCE

Fair Employment Practices Code Ordinance
#05-600-03

* * * *

Article XVI. Labor Organizations and Collective Bargaining

16.01 Purpose.

The Little River Band of Ottawa Indians exercises powers of self-government over its members and territory. The Tribe has inherent authority to govern labor relations within its jurisdiction, and this includes regulating the terms and conditions under which collective bargaining may or may not occur within its territory. The Tribe's inherent authority further includes the right to protect the health, welfare, and political integrity of the Tribe from being harmed or threatened by the activities of non-members within the Tribe's territory. The purpose of this Article is to protect essential attributes of tribal self-government and the health and welfare of the members of the Tribe if labor organizations conduct operations within the jurisdiction of the Tribe.

16.02 Public Policy.

The Tribal Council declares that it is the policy of the Tribe to promote harmonious and cooperative relationships between tribal government and its employees by permitting employees within the Governmental Operations of the Band to organize and bargain collectively; to protect orderly Governmental Operations of the Band to provide for the health, safety, and welfare of the Band and its members; to

prohibit and prevent all strikes by employees within the Governmental Operations of the Band; to protect the rights of employees within the jurisdiction of the Band to join or refuse to join, and to participate in or refuse to participate in, labor organizations; to protect the rights of tribal members to employment preferences; and to ensure the integrity of any labor organization doing business within the jurisdiction of the Band by requiring any such labor organization to obtain a license.

* * * *

16.05 Freedom of Choice Guaranteed

Except as otherwise provided in section 16.13, addressing fair share contributions to labor organizations by nonmember public employees, with respect to employment or the terms or conditions of employment within any public employer:

- a. The right to work must be protected and maintained free from undue restraints and coercion. The right of persons to work shall not be denied or abridged by any public employer or by any labor organization on account of membership or non-membership in any labor union, labor organization, or association.
- b. No person shall be required to become or remain a member of any labor union or labor organization as a condition of employment or continuation of employment.
- c. No person shall be required, as a condition of employment or continuation of employment to be recommended, approved, referred, or cleared by or through a labor organization.

- d. It shall be unlawful to deduct from the wages, earnings or compensation of an employee any union dues, fees, assessments, or other charges to be held for, transferred to, or paid over to a labor organization, unless the employee has first presented, and the public employer has received, a signed written authorization of such deductions, which authorization may be revoked by the employee at any time by giving written notice of such revocation to the public employer.
- e. No person shall be required by any public employer to abstain or refrain from membership in any labor union or labor organization as a condition of employment or continuation of employment.
- f. It shall be unlawful for any person, labor organization, or officer, agent or member thereof, or public employer, or officer or agent thereof, by any threatened or actual intimidation of an employee or prospective employee or his parents, spouse, children, grandchildren, or any other persons residing in the employee's or prospective employee's home, or by any damage or threatened damage to his property, to compel or attempt to compel such employee or prospective employee to join, affiliate with, or financially support a labor organization or to refrain from doing so, or to otherwise forfeit his rights as guaranteed by provisions of this Article. It shall be unlawful to cause or attempt to cause such employee to be denied employment or discharged from employment because of support or nonsupport of a labor organization by inducing or attempting to induce any other person to refuse to work with such employee.

- g. Any agreement, understanding or practice, written or oral, implied or expressed, between any labor organization and any public employer which violates the rights of employees as guaranteed by the provisions of this Article is hereby declared to be against public policy, an illegal combination or conspiracy in restraint of trade, null and void and of no legal effect. Any strike, picketing, boycott, or other action by a labor organization for the sole purpose of inducing or attempting to induce any public employer to enter into any agreement prohibited by this Article is hereby declared to be for an illegal purpose and is a violation of this Article.

16.06 Strikes Affecting the Governmental and Operations of the Band Prohibited.

(a) *Declaration and Findings.* The Governmental Operations of the Band are critical to the public health, safety, and welfare of the Tribe and its members. No employee or labor organization shall interfere with, threaten or undermine the Governmental Operations of the Band.

(b) *No Right to Strike.* Employees within the Governmental departments and agencies of the Operations of the Band, including the Little River Casino Resort, have no right to strike.

(c) *Strikes Prohibited.* Strikes, work stoppages, or slowdowns against the Governmental Operations of the Band are contrary to the health, safety and welfare of the Tribe and its members, and are therefore prohibited. No employee or labor organization shall engage in a strike, work stoppage or slowdown with respect to any Governmental Operation of the Band.

No labor organization shall cause, instigate, encourage or support an employee strike against a public employer.

16.07 Lock Outs Prohibited.

A public employer shall not engage in any action constituting a lock out.

16.08 Licensing and Registration of Labor Organizations.

(a) No labor organization shall engage in organizing employees working for any public employer without a license issued by the Little River Band of Ottawa Indians Gaming Commission, which shall provide as follows:

- (1) the right of such labor organization to conduct business within the Tribe's jurisdiction is a privilege, subject to the consent and regulatory authority of the Tribe;
- (2) the consent of the Tribe to allow such labor organization to conduct business within the jurisdiction of the Tribe is conditioned upon such labor organization's agreement to be subject to the laws of the Tribe and its regulatory authority, including this Code;
- (3) in consideration of the Tribe's consent to such labor organization's conduct of business within the jurisdiction of the Tribe, such labor organization agrees to (A) comply with all rules, regulations, and laws of the Tribe, (B) submit to the jurisdiction of the Tribe, including its Tribal Court, and (C) pay an annual business license fee in the amount of \$500.00;
- (4) such labor organization agrees that a license issued by the Tribe for conducting business within

the territorial jurisdiction of the Tribe may be revoked by the Tribe at any time, with or without hearing, for any failure to comply with the laws of the Tribe; and

(5) such other requirements as the Gaming Commission may require under its regulations.

(b) Subject to the requirements of subsection 16.08(a), the Gaming Commission is hereby authorized by the Tribal Council of the Little River Band of Ottawa Indians to enact such regulations as it sees fit to investigate and license any labor organization seeking to conduct business within the jurisdiction of the Tribe.

(c) Any person who intentionally makes a false statement to the Gaming Commission shall be deemed to be in violation of this Article XVI.

* * * *

16.14 Rights of Public Employees.

It shall be lawful for public employees to organize together or to form, join or assist in labor organizations, to engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection, or to negotiate or bargain collectively with their public employers through representatives of their own free choice.

Public employees also have the right to refuse to join or participate in the activities of labor organizations and to represent themselves individually in their employment relations with public employers.

16.15 Unfair Labor Practices.

(a) A public employer is prohibited from:

- (1) Interfering with, restraining, or coercing public employees in the exercise of their rights guaranteed under section 16.14.
- (2) Encouraging or discouraging membership in any labor organization by discrimination in regard to hiring, tenure, or other conditions of employment.
- (3) Refusing to bargain collectively, failing to bargain collectively in good faith, or refusing to sign a final agreement agreed upon with the exclusive bargaining representative.
- (4) Discharging or discriminating against a public employee because he or she has exercised rights guaranteed under section 16.14 or signed or filed an affidavit, petition, or complaint or given any information or testimony in any proceeding provided by this Article XVI.
- (5) Dominating, interfering with, or assisting in the formation, existence, or administration of, any labor organization or contributing financial support to such an organization.
- (6) Refusing to discuss grievances in good faith pursuant to the terms of the collective bargaining agreement with either the exclusive bargaining representative or the employee involved.

(b) A labor organization or anyone acting in its behalf or its officers, representatives, agents, or members are prohibited from:

- (1) interfering with, restraining, or coercing public employees in the exercise of any rights

guaranteed them under this Article XVI or interfering with, restraining, or coercing management by reason of its performance of duties or other activities undertaken in the interests of the Governmental Operations of the Band.

(2) Causing or attempting to cause a public employer to discriminate against a public employee because of the employee's membership or non-membership in a labor organization or attempting to cause a public employer to violate any of the provisions of this Article XVI.

(3) Refusing to bargain collectively or failing to bargain collectively in good faith with management.

(4) Discriminating against a public employee because he or she has exercised rights guaranteed under section 16.14 or signed or filed an affidavit, petition, or complaint or given any information or testimony in any proceeding provided for in this Article XVI.

(5) Participating in a strike against the Governmental Operations of the Band by instigating or supporting, in any positive manner, a strike. Any violation of this paragraph shall subject the violator to the civil penalties provided in this Article XVI.

(c) Notwithstanding the provisions of subsections (a) and (b), the parties' shall have the right to voice their views consistent with the protections afforded by the Tribe's Constitution, and the expression of any arguments or opinions shall not constitute, or be evidence of, an unfair labor practice or of any other violation of this Article XVI, if such expression

contains no promise of benefits or threat of reprisal or force.

16.16 Resolution of Charges of Unfair Labor Practices; Breach of Duty of Fair Representation.

(a) *Charges Involving Management or an Exclusive Representative*

(1) Charges, Notice, Good Faith Effort to Reach Early Resolution

(A) Should either management or an exclusive representative become aware of perceived conduct constituting an unfair labor practice, it shall notify the other party, in writing (which shall be transmitted electronically or by telecopier as well as via hard copy), of the charge and the alleged factual basis for the charge. The recipient party shall respond in writing (which shall be transmitted electronically or by telecopier well as via hard copy), within 10 days of receipt of such written allegations. Management and the exclusive bargaining representative shall then make a good faith effort to resolve the alleged violation. This good faith effort shall include each party providing the other with unprivileged information relevant to the charge upon request.

(B) If such good faith efforts do not result in resolution of the charge, the objecting party may proceed to request arbitration.

(2) Arbitration

- (A) If a claim is not resolved under subsection (a), charges of violations of unfair labor practices, including the duty to bargain in good faith, provided by this Article XVI shall, within 15 days of the receipt by either party of a written demand for arbitration (or such later time as the arbitrator may promptly schedule a hearing) be brought before an arbitrator, mutually agreed to by the exclusive bargaining representative and the public employer. If the parties are unable to agree upon an arbitrator, they shall use the American Arbitration Association (AAA) labor arbitrator selection procedure, provided that any arbitrator selected through the AAA labor arbitrator selection procedure shall be a member of the National Academy of Arbitrators.
- (B) The selected arbitrator shall apply the law of the Band to resolve the charge, but in the absence of such law, the arbitrator shall apply persuasive authority governing public sector labor relations.
- (C) The arbitrator's decision shall be in writing and mailed to the parties, return receipt requested within 30 days of the completion of arbitration. Except as provided by subsection (3), the arbitrator's decision shall be final and binding upon the parties.
- (D) Unless otherwise agreed to in writing by the public employer and the exclusive

bargaining representative, if the arbitrator's decision is in favor of the public employer on every issue, the exclusive bargaining representative shall pay the fee of the arbitrator and if the arbitrator's decision is in favor of the exclusive bargaining representative on every issue, the public employer shall pay the fee of the arbitrator. Otherwise, the arbitrator shall allocate the cost of the arbitrator's services between the parties in accordance with the issues on which they have prevailed or not prevailed, and they shall pay their respective share of the arbitrator's fee in accordance with the arbitrator's decision.

(3) Judicial Review

- (A) A party who claims that the arbitrator's decision is in violation of, or conflicts with, the laws of the Band or procured by corruption, fraud or other undue or illegal means, may, within 10 days of receipt of the arbitrator's decision, bring a petition for review of the arbitrator's decision to the Tribal Court for resolution by that member of the Tribal Court who is licensed to practice law.
- (B) In any such review, the Tribal Court shall be limited to review for errors of law and the issuance of an order affirming the arbitrator's decision or correcting it for legal error as is necessary to render it in compliance with the law of the Band.

- (C) Should the Tribal Court find that a party's petition for review is frivolous or imposed solely for delay, it may impose sanctions upon such party, which may include paying for the attorney fees and costs incurred by the other party as a result of the petition.
- (D) The decision of the Tribal Court shall be final and there shall be no right of appeal to the Court of Appeals.

(4) Time Limits

No unfair labor practice charge shall proceed to Arbitration or Judicial review under section 16.16(a) unless a demand is made under subsection 16.16(a)(2)(A) no later than 180 days after the alleged action constituting the alleged unfair labor practice.

(b) *Charges of Discrimination by Public Employees*

A public employee who believes he or she has been subjected to unlawful discrimination in violation of section 16.15(a)(4) or section 16.15(b)(4) may proceed to seek relief for such discrimination under the procedures and remedies provided by Article VI, provided, however, that (i) damages under 6.05(b) may not be awarded, (ii) in the event that the Charge is against a labor organization, the labor organization shall be treated in the same manner as an employer, subject to a Charge of Discrimination under Article VI, and (iii) no complaint may be filed in the Tribal Court unless a Charge of Discrimination has first been filed within 180 days of the asserted violation of section 16.15(a)(4) or section 16.15(b)(4).

(c) *Claims for Breach of Duty of Fair Representation*

(1) Action in Tribal Court

A public employee within a bargaining unit, who claims that an exclusive bargaining representative has breached its duty of fair representation, may bring an action in the Tribal Court, no later than 180 days after the alleged breach, against the exclusive bargaining representative.

(2) Remedies

If the Tribal Court finds that an exclusive bargaining representative has breached its duty of fair representation to a public employee, the Court shall award the employee such relief as will make the employee whole.

16.17 Resolution of Bargaining Impasse.

(a) *Agreement to Resolve Negotiation Impasse.*

As the first step in the performance of their duty to bargain, management and the exclusive bargaining representative shall endeavor to agree upon impasse procedures. Such procedures shall define the conditions under which an impasse exists. Any such agreement with respect to the resolution of impasse issues shall not conflict with the provisions of this section.

(b) *Subjects Not Within Procedures for Resolving Bargaining Impasse.*

Nonmandatory subjects of bargaining shall not be subject to the impasse procedures of this section. Unless mutually agreed to by the parties, the impasse procedures of this section shall not be invoked during

the pendency of any charge regarding the required scope of good faith bargaining under section 16.12.

(c) *Mediation and Fact Finding.*

(1) *Mediation.* Following the commencement of negotiations, if management and the exclusive bargaining representative reach an impasse, and they do not otherwise agree to proceed directly to fact finding, they shall jointly retain a mediator to assist them in resolving the impasse issues. In the absence of an agreement on the mediator, either party may request the Election Official to appoint a mediator, and the Election Official's appointment of such mediator shall be binding on the parties. It shall be the function of the mediator to bring the parties together to effectuate a settlement of the dispute, but the mediator may not compel the parties to agree. Any appointed mediator shall be experienced in labor mediation, and shall be drawn from lists of such mediators maintained by the American Arbitration Association.

(2) *Fact Finding and Recommendation.* If the parties agree to proceed directly to fact finding in substitute for mediation or, if mediation under subsection (c)(1) does not result in an agreement on all impasse issues within 21 days of the appointment of the mediator, the parties shall jointly retain a fact finder. In the absence of an agreement on the fact finder, either party may request the Election Official to appoint a fact finder, and the Election Official's appointment of such fact finder shall be binding on the parties. The appointed fact finder shall be experienced in public sector labor relations, shall be drawn from lists of similar fact finders maintained by the American

Arbitration Association, and shall be a member of the National Academy of Arbitrators.

Within 5 days of the appointment of the fact finder, the parties shall file with the fact finder a joint list of the issues as to which an impasse has been reached, provided that if such filing is not made jointly, each party shall file a list and serve a copy of the filing on the other party.

The fact finder shall conduct a hearing at a location agreed to by the parties or, failing agreement, at a location chosen by the fact finder that is convenient to the parties. The fact finder may administer oaths, may issue subpoenas (under the same terms that subpoenas may issue from the Tribal Court), and may petition the Tribal Court to enforce any subpoena compelling the attendance of witnesses and the production of records, subject to such protection order any party may obtain from the Tribal Court to protect against the disclosure of confidential or privileged information. The fact finder may request briefs, stipulations, or other written submissions from the parties to aid in reaching findings and recommendations. The fact finder shall make written findings of facts and recommendations for resolution of each dispute not later than 15 days from the close of hearing, and shall serve, by certified mail, return receipt requested, such findings upon the public employer, the exclusive bargaining representative, and the Election Official. In issuing said findings and recommendations, the fact finder shall redact any factual material deemed confidential pursuant to an agreement of the parties or pursuant to a protective order issued on behalf of a party.

Management and the exclusive bargaining representative shall immediately agree to accept the

fact finder's recommendations or, commence further negotiations in a good faith effort to reach agreement. If, upon the expiration of 20 days after the Election Official's receipt of the fact finder's recommendations, the parties fail to jointly inform the Election Official that they have fully resolved all impasse issues, the Election Official shall make the fact finders findings and recommendations public to the membership of the Tribe by arranging for publication on the Tribe's website, in the Tribe's newsletter to members, or both[.]

(d) *Binding Arbitration.*

If the parties fail to resolve their disputes within 30 days of receipt of the fact finder's findings and recommendations, they may mutually agree in writing to proceed to binding arbitration, Absent agreement, either party may request that the impasse issues proceed to resolution by binding arbitration, and such request shall be served upon the other party, in writing, return receipt requested.

Within 10 days of the parties' written agreement or the receipt by one party of a request for binding arbitration, the parties shall jointly select an arbitrator, who shall not be the same individual who served as the fact finder. If the parties fail to agree on an arbitrator within the 10 day period, the selection shall be made using the procedures under the voluntary labor arbitration rules of the American Arbitration Association. Any arbitrator shall be drawn from lists of such arbitrators maintained by the American Arbitration Association, and shall be a member of the National Academy of Arbitrators.

The submission of the impasse items to the arbitrator shall be limited to those issues that had been

considered by the fact finder and upon which the parties have not reached agreement. Within 10 days of the appointment of the arbitrator, management and the exclusive bargaining representative shall each submit to the arbitrator their respective recommendations for settling the dispute on each unresolved issue, the draft collective bargaining agreement to the extent that agreement has been reached, and the fact finder's findings of fact and recommendations.

The arbitrator shall conduct a hearing at a location agreed to by the parties or, failing agreement, at a location chosen by the arbitrator that is convenient to the parties. The arbitrator may administer oaths, may issue subpoenas (under the same terms that subpoenas may issue from the Tribal Court), and may petition the Tribal Court to enforce any subpoena compelling the attendance of witnesses and the production of records, subject to such protection order any party may obtain from the Tribal Court to protect against the disclosure of confidential or privileged information. The arbitrator shall issue a decision on each issue remaining at impasse not later than 30 days from the day of appointment. In issuing said findings and recommendations, the fact finder shall redact any factual material deemed confidential pursuant to an agreement of the parties or pursuant to a protective order issued on behalf of a party. The parties may continue to negotiate all offers until an agreement is reached or a decision is rendered by the arbitrator.

The arbitrator shall consider, in addition to any other relevant factors, the following factors:

- (1) Past collective bargaining contracts between the parties including the bargaining that led up to such contracts.

- (2) Comparison of wages, hours and conditions of employment of the involved public employees with those of other public employees doing comparable work, giving consideration to factors peculiar to the area and the classifications involved[.]

The arbitrator shall select the most reasonable offer of the parties' respective final offers on each impasse item or the recommendations of the fact finder on each impasse item. The arbitrator shall provide a written summary of the selected provisions and agreed-upon provisions to each party and to the Election Official, return receipt requested.

Said selections of the arbitrator, together with the items already agreed upon by the management and the exclusive bargaining representative shall be deemed to be the collective bargaining agreement between the parties, provided, however, that, subject to subsection (e), provisions related to the public employer's obligation to pay wages, salaries, bonuses, insurance, pension or retirement contributions shall not be binding upon the parties.

- (e) *Limited Review by Tribal Council of Economic Terms Recommended by Arbitrator Upon Rejection by Public Employer.*

If a public employer rejects an arbitrator's decision issued under section 16.17(d) regarding the public employer's obligation to pay wages, salaries, bonuses, insurance, pension or retirement contributions, it shall so inform (i) the exclusive bargaining representative and (ii) the Tribal Council Speaker, in writing, within five (5) days of receipt of the arbitrator's decision.

Thereafter, the Tribal Council Recorder shall schedule a closed session meeting of the Tribal Council at which the public employer shall appear and show cause for why it has rejected the arbitrator's decision regarding its obligation to pay wages, salaries, bonuses, insurance, pension or retirement contributions. If the public employer is the Little River Casino Resort, any member of the Tribal Council that may have served on the Board of Directors of the Resort during the time that decisions were made about the Resort's bargaining position on any impasse issue addressed by an arbitrator's decision under section 16.17(d) shall abstain from voting and deliberating in accordance with the Tribe's Constitution and applicable law.

In advance of the Tribal Council meeting, the public employer shall submit to the Tribal Council the decision of the arbitrator, together with a written statement setting forth the reasons for its rejection of the decision, and it shall, at the same time, mail a copy of said written statement to the exclusive bargaining representative. In advance of the Tribal Council meeting, the exclusive bargaining representative shall be given the opportunity to submit a written statement setting forth the reasons why the Arbitrator's decision is appropriate and, upon submission of such a written statement to the Tribal Council, the exclusive bargaining representative shall mail a copy to the public employer.

At the scheduled meeting of the Tribal Council, both the public employer and the exclusive bargaining representative shall have the opportunity to be heard.

The Tribal Council shall decide only whether (a) the public employers final offer regarding any impasse over wages salaries, bonuses, insurance, pension or retirement shall become part of the parties' collective

bargaining agreement or (b) the arbitrator's decision on any such impasse issue shall become part of the parties' collective bargaining agreement.

(f) *Costs of Impasse Resolution Proceedings*

Unless otherwise agreed to in writing, the public employer and the exclusive bargaining representative shall share equally all fees and costs of mediation, neutral arbitration, and binding arbitration provided for by this section.

(g) *Status of Terms and Conditions of Employment Pending Impasse Resolution*

At all times when an impasse remains unresolved, the status quo regarding wages and working conditions shall remain in effect even if a prior collective bargaining agreement governing the bargaining unit has expired. In such event, the status quo or the terms of any prior collective bargaining agreement shall continue in force and effect, until a new agreement shall be executed; provided, however, that for the purposes of this paragraph, the status quo, or continuing terms, shall not include fair share provisions, or increases to wages, increases in employer contributions to insurance, or increases in employer contributions to pensions.

(h) *Judicial Review*

(1) A party who claims that the arbitrator's decision is in violation of, or conflicts with, the laws of the Band or procured by corruption, fraud or other undue or illegal means, may, within 10 days of receipt of the arbitrator's decision, bring a petition for review of the arbitrators decision to the

Tribal Court for resolution by that member o[f] the Tribal Court who is licensed to practice law.

(2) In any such review, the Tribal Court shall be to limited to review for errors of law and the issuance of an order affirming the arbitrator's decision or correcting it for legal error as is necessary to render it in compliance with the law of the Band.

(3) Should the Tribal Court find that a party's petition for review is frivolous or imposed solely for delay, it may impose sanctions upon such party, which may include paying for the attorney fees and costs incurred by the other party as a result of the petition.

(4) The decision of the Tribal Court shall be final and there shall be no right of appeal to the Court of Appeals.

* * * *

16.24 Enforcement.

(a) *Strikes: Civil Actions, Penalties, Decertification and Exclusion[.]* Any public employee or labor organization, and any employee or agent of any labor organization, that violates, or seeks to violate, the prohibition against strikes set forth In section 16.06 of Article XVI shall be subject to a civil action by the affected public employer for declaratory and injunctive relief in the Little River Band of Ottawa Indians Tribal Court. Upon a finding of any such violation by a labor organization or any person acting on behalf of a labor organization, the Court may impose a civil fine against the labor organization, not to exceed \$5,000 for each violation. Upon a finding of any such violation by a public employee, the Court may impose a civil fine against the employee not to exceed \$1,000 for each and

the employer of such public employee shall have the right to suspend or terminate the employment of such public employee. Any labor organization found by the Tribal Court to be in violation of the prohibition against strikes shall be deemed decertified from representing any public employees and shall further be deemed not legally entitled to be present on tribal lands and subject to exclusion on a temporary or permanent basis.

(b) *Lock Outs: Civil Actions.* A public employee or labor organization shall have the right to seek declaratory and injunctive relief in the Little River Band of Ottawa Tribal Court against public employers to enforce the prohibition against lock outs set forth in Section 16.07 of this Article XVI.

Upon a finding by the Tribal Court that a public employer has violated section 16.07, the Tribal Court may award such employee or labor organization attorney fees and costs.

(c) *Licenses: Civil Actions, Penalties, Exclusions.* Any labor organization that (1) engages in activities that require a license under this Article XVI without such a license or (2) violates the terms of a license issued by the Gaming Commission in accordance with this Article XVI shall be subject to an action in the Tribal Court by the Gaming Commission or by the Band, through its General Counsel, for declaratory and injunctive relief. Any labor organization found by the Tribal Court to have violated the licensing requirements of this Article XVI or the terms of a license shall be subject to such civil penalty, not to exceed \$5,000. Any labor organization found by the Tribal Court to be in violation the licensing requirements of this Article XVI or the terms of a license issued by the Gaming Commission shall be deemed not legally entitled to be

present on tribal lands and subject to exclusion on a temporary or permanent basis.

(d) *Other Tribal Court Declaratory Authority.*

(1) Unresolved disputes between management and an exclusive bargaining representative over the duty to bargain in good faith, involving a controversy over whether a subject conflicts with the laws of the Tribe, may be brought by either party (or by the affected public employer or labor organization) to the Tribal Court for resolution by that member of the Tribal Court who is licensed to practice law by declaratory judgment.

(2) Unresolved disputes regarding an alleged conflict between a provision of a collective bargaining agreement and the laws of Tribe may brought [sic] by a party with standing (including the affected public employer or labor organization, an affected public employee, the Gaming Commission, the Tribal Council, or the Ogema) to the Tribal Court for resolution by that member of the Court who is licensed to practice law by declaratory judgment.

(3) Should the Tribal Court find theta party's request for declaratory judgment under subsection d(1) or d(2) of this section is frivolous or imposed solely for delay, it may impose sanctions upon such party, which may include paying for the attorney fees and costs incurred by the other party as a result of the action.

(4) A decision of the Tribal Court under subsection d(1) or d(2) of this section shall be final, and there shall be no right of appeal to the Court of Appeals.

* * * *

16.26 Limited Waiver of Sovereign Immunity.

The waiver of sovereign immunity set forth in Article II, Sec. 2.06 is of no effect with respect to this Article XVI. With respect to this Article XVI, the Tribe hereby waives the sovereign immunity of public employers solely for (1) actions for declaratory and injunctive relief and attorney fees and costs under subsection 16.24(b) and 16.24(d); (2) actions for judicial review and for the specific remedies and sanctions provided for by subsections 16.16(a), 16.16(b), and 16.17(g); and (3) actions in the Little River Band Tribal Court to enforce a collective bargaining agreement.

* * * *

148a

APPENDIX G

UNITED STATES OF AMERICA
BEFORE THE NATIONAL
LABOR RELATIONS BOARD
WASHINGTON, D.C.

Case 7-CA-51156

LITTLE RIVER BAND OF
OTTAWA INDIANS TRIBAL GOVERNMENT

Respondent

and

LOCAL 406,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Charging Union

* * * *

II. STATEMENT OF STIPULATED FACTS

The parties stipulate as follows:

1. The Little River Band of Ottawa Indians (*Gaá Čhing Ziibi Daáwaa Aníshinaábek*) (the “Band” or the “Tribe”) is a federally recognized Indian tribe. 25 U.S.C. § 1300k-2(a).

2. The Tribe has over 4,000 enrolled members (or “tribal members”), most of whom live within or near the Tribe’s aboriginal lands in the State of Michigan. Approximately 380 tribal members reside in Manistee County, Michigan, the principal location of the Band’s government.

3. Pursuant to Congress’s 1994 Act reaffirming the Band’s federal recognition, 25 U.S.C. §§ 1300k to

1300k-7 (the “Reaffirmation Act”), the Band has enacted a Constitution (“LRBOI Const.”), and amendments thereto, in accordance the Indian Reorganization Act, 25 U.S.C. § 476 (the “IRA”), which have been approved by the Secretary of the Interior. (Joint Exhibit 1)

4. Article II, section 1 of the Tribe’s Constitution restricts tribal membership to certain individuals who possess at least one-fourth (1/4) degree Indian blood, of which at least one-eighth (1/8) degree must be Grand River Ottawa or Michigan Ottawa, (Joint 1 Ex. 1, LRBOI Const, Art. II, § 1)

5. Pursuant to the Band’s Constitution, the Band is governed by an executive branch, through the office of the Tribal Ogema; a legislative branch, through the office of the Tribal Council; and a judicial branch, through the Tribal Court. (Joint Exhibit 1, LRBOI Const. Articles IV-VI)

6. The Band’s Constitution provides, that “[t]he Tribe’s jurisdiction over its members and territory shall be exercised to fullest extent consistent with this Constitution, the sovereign powers of the Tribe, and federal law.” (Joint Exhibit I, Art. I, § 2.)¹

¹ The Band publishes its Constitution, laws, and regulations, including those referenced in these stipulations, on its public website at <https://www.lrboi-nsn.gov/council/ordinances.html>. The Band’s laws and regulations are regularly updated and amended, and such changes are reflected in the materials posted on said website. The Tribal laws and regulations that have been made Joint Exhibits and a part of the Stipulated Record are the current tribal laws and regulations of the Band. It is understood that the Band’s website and any future changes made to the Constitution, laws and regulations posted on the website are not a part of the Stipulated Record.

7. Since the passage of the Reaffirmation Act, the United States, through the Secretary of Interior, has taken over 1,200 acres of the Tribe's ancestral lands in and near Manistee and Mason Counties into trust on behalf of the Tribe (said lands are referred to herein as "trust lands").

8. The Band exercises governmental authority over the activities of tribal members, other Native Americans, and non-Indians on these trust lands.

9. The Little River Casino Resort ("LRCR") is a tribally chartered instrumentality and a subordinate organization of the Band established by the Tribal Council pursuant to Article IV, Section 7 of the Band's Constitution to operate gaming pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2710-2721 ("IGRA"). The LRCR is overseen by a Gaming Enterprise Board of Directors, which is subject to the oversight of the Tribal Council and the Tribal Council as described below. (Joint Exhibit 1, LRBOI Const. Art., IV, § 7).

10. Pursuant to the IGRA, the Band has entered into a compact with the State of Michigan in order to conduct class III gaming activities, as defined by 25 U.S.C. § 2703(8), on the Band's trust lands in Manistee Michigan. (See Joint Exhibit 25, Compact and Amended Compact, with Department Interior Letter on Amended Compact). Further, as mandated by IGRA and the Band's Gaming Ordinance (Chapter 400, Title 1 of the Tribal Code of the Band), (a) the Band has the sole proprietary interest in, and responsibility for gaming at LRCR and (b) the net revenues generated from gaming at LRCR are the governmental revenues of the Band, which may be used only for the Band's governmental services, the general welfare of the Band and its members, tribal

economic development, to support local governmental organizations, or to donate to charitable organizations. See 25 U.S.C. §§ 2710(b)(2)(A), 2710(b)(2)(B), 2710(d)(2)(A); LRBOI Gaming Ordinance, Chapter 400 §§ 5.01, 6.01 (Joint Exhibit 20);

11. The facilities of the LRCCR include: (1) a casino with more than 1500 slot machines, as well as gaming tables, a high limits gaming area, and bingo facilities, (2) a 292 room hotel, (3) a 95 space RV park, (4) a 1700 seat events center, which is rented for business conferences and weddings and is used for entertainment events featuring nationally known acts, (5) three restaurants, and (6) a lounge. The gross revenues for the LRCCR exceed \$20,000,000 annually. During the 2010 fiscal year, ending December 31, the Band earned in excess of \$20,000,000 from its LRCCR gaming operation. During the 2010 fiscal year, the Band purchased and received at its Manistee facilities gaming supplies, services, and other supplies directly from suppliers located outside of the State of Michigan valued in excess of \$50,000 for use in connection with the LRCCR. During the same period of time, the Band received in excess of \$50,000 from the federal government to fund various programs for its tribal members.

12. The LRCCR currently has 905 employees, including 107 employees who are enrolled members of the Band and 27 who are other Native Americans. The majority of employees employed at the LRCCR are neither enrolled members of the Band nor Native Americans. The majority of the LRCCR employees live outside of the Band's trust lands. The majority of LRCCR customers are non-Native American, and come from Michigan outside of the Tribe's trust lands, other states, and Canada. The LRCCR competes with other

Indian-owned casinos and non-Indian owned casinos located in Michigan, other states, and Canada. The LRCR advertises for customers using various media in Michigan and in other states.

13. The Band's governmental services and programs for its members and community include: health services, including clinic and community health, behavioral health, and treatment programs provided through the Band's Health Clinic; educational services to support tribal members pursuing, or enrolled in, higher education programs through the Band's Department of Education; family services through the Band's Department of Family Services; housing services for tribal members and elders through the Band's Housing Department; the provision of police and other public safety services within the Tribe's territory through the Band's Department of Public Safety; conservation, restoration, and monitoring of natural resources within the Tribe's territories through the Band's Department of Natural Resources; reservation economic development and the provision of employment opportunities for the Band's members through the Band's Department of Commerce and its subordinate organizations, including the Band's reservation gaming operations (LRCR) under the IRGA; the administration of justice through a prosecutor's office and Tribal Court system; the maintenance of the Band's legislative, judicial, and executive branches of government; and infrastructure support for all of these activities.

14. The Band's Housing Department, for example, has built, and is continuing to build, reservation homes for low income and elderly tribal members. The Band's Health Department provides direct health care services to many tribal members and their families. It

is upgrading its clinic to include a fitness center and has plans for pharmacy to better serve the tribal community. The Band's *Bedabin* services (meaning "coming of the dawn") support tribal members in need of mental health counseling, including substance abuse counseling. Through its Department of Natural Resources, the Band is engaged in restoring sturgeon fish populations within the reservation. The Tribe is preserving its language through *Anishinaabemowin* language programs for tribal member youths and elders, and it recently completed construction of a new Community Center on the reservation to unify, and enhance services to, the tribal community.

15. The Band has no significant base within its jurisdiction upon which to levy taxes.

16. The Band's governmental programs and services are jointly funded by (a) the Band's generation of revenues through its gaming operations (LRCR) pursuant to the IGRA, and (b) federal government support, principally through contracts entered into by the Band with federal agencies through Congress's Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450 *et seq.* (known as "P.L. 638"), Indian Health Care Improvement Act of 1976, 25 U.S.C. §§ 1601, *et seq.*, administered by the U.S Department of Health and Human Services, Indian Health Service ("IHS"), and Native American Housing Assistance and Self-Determination Act of 1996, 25 U.S.C. §§ 4101-4212 ("NAHASDA"). The Band's IGRA gaming revenues from the LRCR generally provide in the order of \$20 million per year in support of tribal government, which is over 50% of the Bands total budget. The remainder is covered primarily through a combination of the above-referenced federal programs.

17. For example, under the Band's fiscal year 2011 Government Services Budget, the Band combines federal funds with its IGRA gaming revenues from the LRCR to support the activities of its Department of Natural Resources with about 60% of the budget funded from IGRA gaming revenues from the LRCR and 40% from P.L. 638 funds from the federal government; its Department of Public Safety, with 62% of the budget funded from IGRA gaming revenues and 38% from P.L. 638 funds from the federal government; its behavioral health (*Bedabin*) services, with about 80% of that budget funded from IGRA gaming revenues from the LRCR and 20% from IHS funds from the federal government; maintenance and overhead for its Health Clinic building, with about 80% of those costs covered by IGRA gaming revenues from the LRCR and 20% from P.L. 638 funds from the federal government; its Department of Family Services, with 77% of the budget funded from IGRA gaming revenues and 23% from P.L. 638 funds from the federal government; its Housing Department, with 60% of the budget funded from IGRA gaming revenues from the LRCR and 40% from NAHASDA, (apart from 2011 "stimulus" funds). In that same budget, the Band's IGRA gaming revenues from the LRCR provide 100% of the funds to support the Tribal Prosecutor's office and the Tribal Court. All of these percentages of funding sources for the Band's governmental services have remained the same, on average, from year to year since 2007.

18. The Band's current funding agreement with the IHS (see Joint Exhibit 3, selected pages of the agreement) is a good example of the method by which the Band supports its services to tribal members with both federal funds and LRCR gaming revenues. Under that agreement, which covers all aspects of health

services, ranging from clinical services to behavioral, family, and home care services, the Band is required to merge its own revenues sources with those provided by INS in order to supplement funds provided by IHS. (Joint Exhibit 3 at page 8 of 18.)

19. A total of 1,150 employees (including 905 at LRCR) currently work for the Tribe's governmental departments and subordinate organizations. This includes tribal members and members of their immediate family, members of other Indian tribes, and non-Indians. Under the Tribe's laws, qualified enrolled members of the Tribe are given preferences over non-Indians for employment positions within the Tribe's governmental departments and subordinate organizations, including the LRCR. In addition to the 107 tribal members currently working at the Band's IGRA gaming operations (LRCR), 108 tribal members work for the Band's other operations. For example, thirteen tribal members provide health care services, with three providing *Bedabin* services; five tribal members work for the Band's Tribal Court (including three Judges and two probation officers); five tribal members work for its Family Services Department; and four work for its Public Safety Department.

20. The Band's Constitution vests the Tribal Council with the legislative authority of the Tribe and provides that the Tribal Council has the power "[t]o exercise the inherent powers of the Little River Band by establishing laws through the enactment of ordinances and adoption of resolutions not inconsistent with this Constitution ... to govern the conduct of members of the Little River Band and other persons within its jurisdiction" and "to promote, protect and provide for the public health, peace, morals, education,

and general welfare” of the Tribe and its members. (Joint Exhibit 1, LRBOI Const. Art. IV, § 7).

* * * *

24. Pursuant to its authority to create regulatory commissions and subordinate organizations under Article IV, Section 7(f) of the Band’s Constitution, the Tribal Council has delegated authority to a Gaming Enterprises Board of Directors (“Gaming Enterprise Board”) to oversee the Band’s IGRA gaming operations (including the LRCR and future gaming operations) pursuant to the Gaming Enterprise(s) Board of Directors Act of 2010, Chapter 800, Title 3 of the Tribal Code of the Band (“GEBDA”). (Joint Exhibit 1, LRBOI Const. Art. IV, § 7(f); Joint Exhibit 5, GEBDA §§ 1.02 and 4.01). Currently, the Band’s only gaming operations are at the LRCR.

25. The Gaming Enterprise Board is comprised of five Directors, all of whom must be enrolled members of the Band. Two are elected officials of the Band and three are “at large” (not elected officials). The first seat for an elected official may be held by the Tribal Ogema, and if the Ogema declines to serve, the Ogema shall appoint a sitting member of the Tribal Council to serve in his place with approval of the Tribal Council. The second seat for an elected official is held by a sitting member of the Tribal Council, appointed by the Ogema and approved by the Tribal Council. The three at large directors are appointed by the Ogema and approved by the Tribal Council. If the Ogema decides to serve as a member of the Board, the Ogema may serve as the Chairperson of the Gaming Enterprise Board of Directors, and if he declines to serve then the member of the Tribal Council that he appoints to serve in his stead becomes the Chairperson. (Joint Exhibit 5, GEBDA § 4.02).

27. The Gaming Enterprise Board is charged with responsibility “[to] ensure compliance with the laws and resolutions enacted by the Tribal Council”; to ensure that the Band’s IGRA gaming operations at LRCR comply with the provisions of the IGRA, the Band’s gaming compact with the State of Michigan, the laws of the Band, and all applicable laws; and to ensure that all revenues from the Band’s IGRA gaming operations are accounted for and transferred to the accounts of the Band controlled by the Tribal Council as directed by the laws of the Band and procedures approved by the Tribal Council. (Joint Exhibit 5, GEBDA § 9.01(a)-(c)[I]).

28. The Gaming Enterprise Board is also charged with responsibility to increase the number of enrolled members of the Band employed by LRCR in accordance with the Band’s Indian Preference in Employment Ordinance, Chapter 600, Title 2 of the Tribal Code. (Joint Exhibit 5, GEBDA § 9.01(d)-(e), Joint Exhibit 23, Indian Preference in Employment Ordinance).

29. The Band’s Tribal Council has delegated to the Gaming Enterprise Board limited authority to execute collective bargaining agreements for the LRCR and to execute a waiver of sovereign immunity on behalf of the Tribe in such an agreement, but only to the extent that such a waiver is consistent with the waiver of sovereign immunity provided by Article XVI of the Band’s Fair Employment Practices Code, Chapter 600, Title 3 of the Tribal Code of the Band (“FEP Code”). Except as specifically delegated, the ability to waive sovereign immunity rests with the Tribal Council. (Joint Exhibit 5, GEBDA §§ 10.02(a), 10.03; Joint Exhibit 4, FEP Code).

30. The Band's Tribal Council has delegated to the Gaming Enterprise Board additional limited authority to waive the sovereign immunity of LRCR only in contracts for "essential daily operational needs," and any such waiver must be by Board resolution. (Joint Exhibit 5, GEBDA §§ 10.02(b); 10.04(a)).

* * * *

32. The Gaming Enterprise Board accounts to the Band's Tribal Council for all revenues generated by LRCR and transfers those funds to the accounts of the Band under the control of the Tribal Council, excluding authorized operating funds. (Joint Exhibit 5, GEDBA § 9.01(c)).

* * * *

35. In 2005 following the legislative processes described in paragraphs 20-22 above, the Tribal Council permanently enacted the Band's Fair Employment Practices Code, Chapter 700, Title 3 of the Tribal Code, to govern a variety of employment and labor matters within its jurisdiction, including rights and remedies for employment discrimination, minimum wages, and other matters. (Joint Exhibit 4, FEP Code, Art. I.).

36. In 2007, following the above-referenced legislative processes, the Tribal Council permanently enacted Article XVI of the FEP Code ("Article XVI") to govern labor organizations and collective bargaining within public employers. Section 16.01 of the FEP Code provides:

The Little River Band of Ottawa Indians exercises powers of self-government over its members and territory, The Tribe has inherent authority to govern labor relations within its jurisdiction, and

this includes regulating the terms and conditions under which collective bargaining may or may not occur within its territory. The Tribe's inherent authority further includes the right to protect the health, welfare, and political integrity of the Tribe from being harmed or threatened by the activities of nonmembers within the Tribe's territory. The purpose of this Article is to protect essential attributes of tribal self-government and the health and welfare of the members of the Tribe if labor organizations conduct operations within the jurisdiction of the Tribe. (Joint Exhibit 4, FEP Code § 16.01).

37. In furtherance of that purpose, the Tribal Council decided that it was in the best interest of the Band to allow collective bargaining by employees within its public sector, subject to regulations that would protect the integrity of its governmental operations, the Band's governmental revenues, and the economic welfare of its members.

38. To this end, the Tribal Council considered examples of public sector labor laws of the state and federal governments and enacted provisions to, among other things, prohibit strikes against its governmental operations; ensure that if a labor organization was elected to represent a bargaining unit of employees within the Band's governmental operations, no employee would be required to join the union or to pay union dues; and establish jurisdiction within the Band's Tribal Court to enforce certain provisions of Article XVI. (Joint Exhibit 4, FEP Code §§ 16.05, 16.06, 16.24).

39. Pursuant to Article XVI, Section 16.03 of the FEP Code, a “Public Employer” is defined as “a subordinate economic organization, department, commission, agency, or authority of the Band engaged in any Governmental Operation of the Band,” and “Governmental Operations of the Band” are defined as:

the operations of the Little River Band of Ottawa Indians exercised pursuant to its inherent self-governing authority as a federally recognized Indian tribe or pursuant to its governmental activities expressly recognized or supported by Congress, whether through a subordinate economic organization of the Band or through a department, commission, agency, or authority of the Band including, but not limited to (1) the provision of health, housing, education, and other governmental services and programs to its members; (2) the generation of revenue to support the Band’s governmental services and programs, including the operation of. . . gaming through the Little River Casino Resort; and (3) the exercise and operation of its administrative, regulatory, and police power authorities within the Band’s jurisdiction. (Joint Exhibit 4, FEP Code § 16.03).

Section 16.03 of the FEP Code also states:

Little River Casino Resort means the Band’s gaming enterprise, including related hotel and restaurant services, located at 2700 Orchard Highway, Manistee, Michigan, wherein the Tribe operates Class II and Class III gaming to generate governmental revenue for the Tribe pursuant to the Indian Gaming Regulatory Act. (Joint Exhibit 4, FEP Code § 16.03).

In accordance with these provisions of the FEP Code, the Band considers the LRCR to be a public employer within the meaning of the FEP Code, and the Band at all material times has applied and continues to apply the provisions of the FEP Code, as amended, to the LRCR, to the employees of the LRCR, and to labor organizations seeking to represent employees of the LRCR, including the provisions of the FEP Code alleged in paragraphs 8(a)-(q) in the Complaint in the instant case. The Band at all material times has also applied Labor Organization Licensing Regulations described below to the LRCR, to the employees of the LRCR and to labor organizations seeking to represent employees of the LRCR. (See Joint Exhibits 4, 6, 7, 8 and 9).

40. In early 2008, the Tribal Council adopted permanent amendments to Article XVI of the FEP Code to, among other things, require labor organizations doing business within the jurisdiction of the Band to apply for and obtain a license; prohibit lock-outs by the Band's public employers; and expand the enforcement powers of the Band's Tribal Court with respect to said licensing requirement and prohibition against lock-outs and strikes. (Joint Exhibit 4, FEP Code §§ 16.07, 16.08(a)-(c) and 16.24).

41. In enacting these 2008 amendments, the Tribal Council decided that it was in the best interest of the Band, and would promote fairer labor relations, if public employers were prohibited from engaging in lock-outs in the same manner that public employees are prohibited from engaging in strikes under the labor organization laws of most states.

42. In enacting these 2008 amendments, the Tribal Council also decided to delegate authority to the Band's Gaming Commission (the "Gaming Commission" or "Commission") to license labor organizations operating within any of the governmental operations of the Band because the Commission is the only governmental body of the Band with licensing experience and capability. (Joint Exhibit 4, FEP Code § 16.08).

43. The Gaming Commission is a regulatory body, established by the Tribal Council under authority of the Band's Constitution, and governed by the Band's Gaming Commission Ordinance, Chapter 400, Title 4 of the Tribal Code of the Band, and the Commissions Ordinance, Chapter 150, Title 01 of said Code. (Joint Exhibit 26, Gaming Commission Ordinance).

* * * *

53. Pursuant to October 15, 2008 amendments to Article XVI of the FEP Code, the Tribal Council provided that the Model Band-Union Election Procedures Agreement, may serve as the basis for other Agreements entered into by the Band and labor organizations to establish procedures for determining appropriate bargaining units for collective bargaining within the governmental operations of the Band and elections by such units of public employees for exclusive bargaining representatives. (Joint Exhibit 4, FEP Code XVI §§ 16.09, 16.10; Joint Exhibit 10, Model Band-Union Election Procedures Agreement).

* * * *

57. Section 16.02 of the FEP Code provides as follows:

The Tribal Council declares that it is the policy of the Tribe to promote harmonious and cooperative relationships between tribal government and its employees by permitting employees within the Governmental Operations of the Band to organize and bargain collectively; to protect orderly Governmental Operations of the Band to provide for the health, safety, and welfare of the Band and its members; to prohibit and prevent all strikes by employees within the Governmental Operations of the Band; to protect the rights of employees within the jurisdiction of the Band to join or refuse to join, and to participate in or refuse to participate in, labor organizations; to protect the rights of tribal members to employment preferences; and to ensure the integrity of any labor organization doing business within the jurisdiction of the Band by requiring any such labor organization to obtain a license. (Joint Exhibit 4; FEP Code § 16.02).

58. In furtherance of the policy set forth in Section 16.02 of the FEP Code, in enacting additions to Article XVI in October 2008, the Tribal Council drew from the public sector labor laws of states to: (a) define the rights and duties of employers, employees, and labor organizations within the Band's public sector with respect to collective bargaining, including the duty to bargain in good faith, which excepts from such duty any requirement to bargain over any matter that would conflict with the laws of the Band (all as reflected in FEP Code §§ 16.12, 16.14, 16.21, and 16.24(d)); (b) provide procedure for resolving alleged violations of those rights and duties, including unfair labor practice procedures (as reflected in FEP Code §§ 16.15 and 16.16); (c) design processes for management of public employers and exclusive bargaining

representatives to resolve bargaining impasses through mediation, fact finding and arbitration, and setting the standards for consideration by arbitrators (all as reflected in FEP Code §§ 16.17); (d) establish that management and exclusive bargaining representatives may bargain over “fair share” contributions by public employees within a bargaining unit who do not join the union, and setting procedures for employees to vote to rescind any such “fair share” provision (all as currently reflected in FEP Code § 16.13); (e) limit the duration of public sector collective bargaining agreements to three years or less (as currently reflected in FEP Code § 16.18); and (f) provide a process for a bargaining unit of public employees to vote to decertify an exclusive bargaining representative with oversight by the Band’s Neutral Election Official (as reflected in FEP Code § 16.19).

59. In furtherance of the public policy set forth in FEP Code § 16.02, in enacting additions to Article XVI in October, 2008, the Tribal Council provided that the terms and conditions under which the Band’s public employers may test employees for alcohol or drug use shall not be subject to collective bargaining with any labor organization (as reflected in FEP Code § 16.20). It also waived the sovereign immunity for the Band’s public employers from suit for the purpose of the enforcement of any collective bargaining agreement in the Tribal Court and for limited review of certain arbitrator decisions related to unfair labor practices (as reflected in FEP Code § 16.26) and provided for the use of the “Model Band-Union Election Procedures Agreement” as referenced above.

* * * *

68. Elections for union representation, the initiation and resolution of election disputes, collective bargaining, the initiation and resolution of alleged unfair labor practices, and the initiation and resolution of bargaining impasse procedures have all proceeded apace for nearly three years pursuant to Article XVI of the FEP Code and the terms of the above-referenced Band-Union Election Procedures Agreements.

69. Since his appointment in 2008, Neutral Election Official Peterson has (a) overseen (and issued sworn declarations in reference to) the count of signatures of employees to verify the requisite support for union elections with respect to four separate bargaining units of employees at LRCR, (b) subsequently overseen four elections for union of representation in four bargaining units at the LRCR, and (c) issued Official Tallies of Votes with respect to those elections. (Joint Exhibit 14).

70. Over the course of the last three years, at least four unfair labor practice claims have been resolved under Article XVI of the FEP Code or the provisions of an executed Band-Union or Election Procedures Agreement, including one by written decision of an arbitrator.

71. During the last four years, there have been collective bargaining agreement negotiations with respect to four separate bargaining units of employees at the LRCR, involving over 40 full days of negotiation sessions. The four bargaining units constitute over 250 employees, and each of the four bargaining units is made up of enrolled tribal members as well as nonmembers.

72. Enrolled tribal members have served on the LRCR management's negotiating team with respect to collective bargaining for all four bargaining units.

73. Enrolled tribal members also serve on management's negotiating team with respect to meetings held to administer the collective bargaining agreement entered into with the USW with respect to the LRCR security officers bargaining unit as described in paragraphs 74-77 below, and a tribal member served on the employees' initial negotiating team, represented by the USW, with respect to that agreement.

74. After over a year of collective bargaining with respect to the security employees' bargaining unit, the LRCR management and the USW reached an impasse over certain terms and conditions of employment. As a result, they invoked the three step impasse resolution process provided for in Article XVI of the FEP Code. (Joint Exhibit 4, FEP Code § 16.17).

75. A hearing was held on or about June 24, 2010, by a fact finder, chosen by the parties—Attorney Anne T. Patton, Esq.—and, in accordance with FEP Code Section 16.17(c)(2), she issued a 32 page “Findings of Fact and Recommendations,” dated August 8, 2010. As a result of said Findings of Fact and Recommendations, the LRCR management and the USW narrowed the issues left for negotiation and then preceded to interest arbitration.

76. In accordance with FEP Code Section 16.17(d), an interest arbitration hearing was held on or about October 11, 2010, by the arbitrator chosen by the parties, Attorney Richard N. Block, Esq, and, thereafter he issued a 39 page “Opinion and Award” in the matter.

167a

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Respectfully submitted this 3rd day of August, 2011

/s/ A. Bradley Howell

A. Bradley Howell

Counsel for Acting General Counsel

National Labor Relations Board,

Region 7

Grand Rapids Resident Office

Gerald R. Ford Federal Building,

Room 299

110 Michigan Street, N.W.

Grand Rapids, MI 49503-2363

/s/ Kaighn Smith Jr.

Kaighn Smith Jr.

Counsel for Respondent

Little River Band of

Ottawa Indians

Tribal Government

Drummond Woodsum

84 Marginal Way, STE 600

Portland, ME 04101-2480

/s/ Ted M. Iorio, Esq.

Ted M. Iorio, Esq.

Counsel for the Charging Union

Local 406, International

Brotherhood of Teamsters

Kalniz Iorio & Feldstein

4981 Cascade Road, SE

Grand Rapids, MI