

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

**CHICKASAW NATION operating
WINSTAR WORLD CASINO**

and

**Cases 17-CA-25031
17-CA-25121**

**INTERNATIONAL BROTHERHOOD
OF TEAMSTERS LOCAL 886,
affiliated with THE INTERNATIONAL
BROTHERHOOD OF TEAMSTERS**

**THE CHICKASAW NATION'S BRIEF TO THE
NATIONAL LABOR RELATIONS BOARD**

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STATEMENT OF ISSUES

The questions presented are whether the Board has jurisdiction over the Chickasaw Nation; and if so, whether the Nation violated Section 8(a)(1) of the National Labor Relations Act by informing employees that they did not have the protections of the Act because of tribal sovereignty. Joint Statement of Issues and Stipulated Facts at 1 (July 19, 2012), Ex. 3.

STATEMENT OF THE CASE

This case is before the Board pursuant to the Corrected Order Approving Stipulation, Granting Motion, and Transferring Proceedings to the Board, Case No. 17-CA-025031, 17-CA-025121. That Order granted the parties' joint motion to transfer this case to the Board pursuant to 29 C.F.R. § 102.35(a)(9) (2012). The parties further requested that the Board give expedited consideration to this matter, such that the Board have simultaneously under consideration this matter, *Little River Band of Ottawa Indians Tribal Government*, Case No. 07-CA-051156, and *Soaring Eagle Casino and Resort*, Case No. 07-CA-053586. The prior proceedings are recited in the Counsel for the Acting General Counsel's Brief ("AGC Br.") at pp. 1-3, and are not restated here.

STATEMENT OF FACTS

The Chickasaw Nation ("Nation") is a federally-recognized Indian Tribe, Stip. ¶1, holding rights under treaties with the United States that include the 1830 Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 333, Ex. A¹ [hereinafter 1830 Treaty]; the 1837 Treaty of Doaksville, Jan. 17, 1837, 11 Stat. 573 [hereinafter 1837 Treaty]; the 1855 Treaty of Washington, June 22, 1855, 11 Stat. 611, Ex. B [hereinafter 1855 Treaty]; and the 1866 Treaty of Washington, Apr. 28, 1866, 14 Stat. 769, Ex. C [hereinafter 1866 Treaty].

¹ The lettered exhibits are attached to Exhibit 4, the Stipulated List of Exhibits (July 19, 2012).

The Nation governs under the Chickasaw Nation Constitution, which establishes Executive, Legislative and Judicial branches based on separation of powers principles. Stip. ¶1. See Ex. E, CHICKASAW NATION CONSTITUTION, art. 5, § 1. The Executive Branch is organized into departments and is overseen by the Office of the Governor. Joint Statement of Stipulated Facts, Ex. 3, (“Stip.”) ¶2. The Territory that the Nation governs is described in the Chickasaw Constitution and encompasses all or parts of 13 counties in Southcentral Oklahoma. Ex. E, CHICKASAW NATION CONSTITUTION, pmb1.

The Nation provides governmental services that include protecting public safety, providing health care, educational support and enhancing understanding of Chickasaw history and culture. Stip. ¶¶5-6.

The Chickasaw Lighthorse Police Department patrols and investigates crimes across the entire Chickasaw Nation, handling approximately 16,000 calls a year. Stip. ¶5(c). The Lighthorse Police have a SWAT team, Dive team and 4 K-9 units. Its 38 employees consist of 30 officers, 5 dispatch operators, 2 administrative assistants and 1 crime analyst. *Id.*

The Chickasaw Nation Medical Center is a 72-bed hospital located in Ada, Oklahoma. It is very busy: between June 1, 2010 and May 31, 2011 the Hospital recorded 2,664 surgeries, 588 births, 8,422 inpatient days and 2,392 admissions. Stip. ¶5(a). The Nation also operates four outpatient clinics; three wellness centers; and two nutritional centers. *Id.* In addition, the Nation has a Dental Clinic program, Diabetic Care Center, Eyeglass Program, and Optometry Program. *Id.* The Nation’s healthcare system reported 445,478 patient visits between June 1, 2010 and May 31, 2011 and has approximately 1,100 employees. *Id.*

The Division of Education is comprised of five departments which are staffed by 210 employees. Stip. ¶5(b). The Child Care Department operates a development center for children

up to 5 years of age, and a child care program, both of which are open to the public. Ex. M at 2. The Early Childhood Department operates the Nation's Head Start program. *Id.* at 3. Other Departments serve Chickasaw students in public schools, *id.* at 4-6, provide scholarships for students to attend colleges, technology centers, and trade schools, *id.* at 6, and serve secondary students needs in the area of vocational rehabilitation. *Id.* at 7.

The Division of Youth and Family Services operates seven departments which are staffed by 150 employees. Stip. ¶5(d). The Family Resource Center teaches Nation citizens best practices for families. Stip. ¶5(d)(i). The Office of Strong Family Development provides therapeutic services for Chickasaw citizens. Stip. ¶5(d)(ii). Other programs serve special needs of high priority that include operation of a group home for Chickasaw children, Stip. ¶5(d)(iii), and a domestic violence shelter. Stip. ¶5(d)(vi).

The Division of History and Culture (CNHC) enhances understanding of the Nation's history and culture through language instruction, historical research and archival and archaeological collections. Stip. ¶6. The CNHC is organized into 8 departments employing approximately 150 employees. *Id.* The CNHC includes the Chickasaw Cultural Center, which is the Nation's central repository for its archival and archaeological collections, and houses a museum and cultural resource center. *Id.*

All of these services and programs are funded by revenues raised by the Nation's government through gaming activities conducted by the Division of Commerce, a part of the Chickasaw Nation's Executive Branch. Stip. ¶¶2-3. The Division centrally manages these activities from the Nation's offices on trust lands in Ada. Stip. ¶4. Each of the Nation's gaming locations is situated on trust property within the Nation's Treaty boundaries, and each operates pursuant to a location-specific license issued and overseen by the Chickasaw Nation Office of the

Gaming Commissioner, Stip. ¶4, in compliance with the Chickasaw Nation Public Gaming Act of 1994, CNC § 3-3306.9a (2011), Ex. G, and IGRA, 25 U.S.C. § 2710(b)(1)(B), (d)(1)(A)(ii) (2006). The WinStar World Casino is a licensed gaming location situated on trust land in Thackerville, Oklahoma that generated more than \$500,000 in gross revenues in 2010. Stip. ¶¶4, 7. A majority of the Nation's workforce at WinStar is non-Indian. Stip. ¶¶8-9. The Nation advertises gaming at WinStar within and without the Nation's jurisdictional area, and a majority of its patrons are non-Indian. Stip. ¶10. In 2010, the Nation made purchases exceeding \$50,000 from points outside the State of Oklahoma. Stip. ¶7.

SUMMARY OF ARGUMENT

This case presents a jurisdictional question of great importance: whether the Chickasaw Nation's regulation and operation of a gaming facility in the exercise of its sovereign authority to raise revenue for essential governmental services is subject to the Board's jurisdiction under the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-169 (2006). That facility is located on land held in trust for the Nation by the United States; it is operated by the Nation through the Division of Commerce; and it is regulated by the Nation in accordance with federal and tribal law. The Nation asserts that it is exempt from the NLRA because (1) the NLRA's governmental exemption, which generally exempts all governments from its coverage, applies to the Nation; and (2) under *United States v. Dion*, 476 U.S. 734, 738 (1986), and *Dobbs v. Anthem Blue Cross & Blue Shield*, 600 F.3d 1275, 1283 (10th Cir. 2010), the NLRA does not apply to the Nation because application of the Act would interfere with the Nation's sovereign authority in the absence of a "clear and plain" expression of congressional intent that it apply to tribal governments. Indeed, neither the text nor the legislative history of the Act mention Indian tribes, and "[s]ilence is not sufficient to establish congressional intent to strip Indian tribes of their retained inherent authority to govern their own territory." *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1196 (10th Cir. 2002) (en banc) (citations omitted).

ARGUMENT

I. THE NATION CONDUCTS GAMING IN THE EXERCISE OF ITS SOVEREIGN AUTHORITY.

The Nation conducts gaming to raise the revenue needed to provide essential governmental services. The Nation does so in the exercise of its Treaty rights of self-government and inherent sovereign authority to engage in and regulate economic activity.

A. The Nation Conducts Gaming in the Exercise of Its Sovereign Authority, and in Accordance with the Nation's Treaties, IGRA, the Oklahoma-Nation Compact and the Nation's Gaming Laws.

The Nation's gaming activities are an exercise of the right of self-government, which is protected and advanced in the Nation's Treaties with the United States, as well as the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721, the Oklahoma-Chickasaw Nation Gaming Compact, and the Nation's gaming laws. The Nation conducts gaming to raise revenue for essential governmental services.

1. The 1830 Treaty.

The Nation's Treaties with the United States have exceptional force. In the 1830 Treaty of Dancing Rabbit Creek, the United States granted lands to the Nation "to inure to them *while they shall exist as a nation* and live on it," and promised the Nation "the jurisdiction and government of all the persons and property that may be within their limits . . ." Arts. 2, 4 (emphasis added).² As the Supreme Court has recognized, the primary purpose of Article 4 is to secure to the Nation "the jurisdiction and government of all the persons and property that may be within their limits. . . ." *Chickasaw Nation*, 515 U.S. at 466 (Article 4 "provides for the Nation's

² In article 1 of the 1837 Treaty, the United States guaranteed to the Chickasaw Nation homeland rights under the 1830 Treaty "on the same terms that the Choctaws now hold it, except the right of disposing of it, (which is held in common with the Choctaws and Chickasaws). . . ." See *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 465 n.15 (1995).

sovereignty within Indian country”); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 197 (1978) (Article 4 guaranteed to the [Nation] “the jurisdiction and government of all the persons and property that may be within their limits”). The Supreme Court has described the extraordinary breadth of the sovereignty which the 1830 Treaty secured to the Nation as follows:

As a guarantee that they would not again be forced to move, the United States promised to convey the land to the Choctaw Nation in fee simple ‘to inure to them while they shall exist as a nation and live on it.’ In addition, the United States pledged itself to secure to the Choctaws the ‘jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation * * * and that no part of the land granted them shall ever be embraced in any Territory or State.’ Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 333-334.

Choctaw Nation v. Oklahoma, 397 U.S. 620, 625 (1970). These rights protect the Nation from diminishment by *federal* law, as *Choctaw Nation* vividly demonstrates. At issue there was whether the equal footing doctrine conveyed to Oklahoma title to a riverbed upon its admission to the Union under the Act of June 16, 1906, §§ 3-4, Pub. L. No. 234, 34 Stat. 267, 271. The Court relied on the extraordinary language of the 1830 Treaty to reject Oklahoma’s claim and to confirm title in the Chickasaw and Choctaw Nations. 397 U.S. at 635. The Court concluded that the equal footing doctrine (a settled rule of federal common law which guarantees to newly admitted States title to lands beneath navigable waters, *see Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845)) could not diminish the Nations’ rights because of the “promise[] of virtually complete sovereignty over their new lands” made to the Nations under the 1830 Treaty. *Id.* at 635 (citing *Atl. & Pac. R. Co. v. Mingus*, 165 U.S. 413, 435-36 (1897)).

In *Mingus*, the Court upheld a federal statute forfeiting land that had previously been conveyed to a railroad company under an federal earlier act on the condition that it timely complete a specified route. The company asserted that the forfeiture was invalid because the delay had resulted from the Government’s failure to extinguish Indian title to certain lands along

that route pursuant to the earlier act. Addressing the sovereign status of those lands, which included Indian Territory lands held by the Chickasaw and Choctaw Nations under the 1830 Treaty, *id.* at 434-36, the Court stated that the Indian Territory “stands in an entirely different relation to the United States from other territories, and that for most purposes it is to be considered as an independent country.” *Id.* The Court then rejected the claim that the Government was required to extinguish Indian title to those lands, which had been “guarantied to the Indians by solemn treaties, and . . . possessed by them for upwards of 40 years, with the powers of an almost independent government.” *Id.* at 437.

2. The 1855 and 1866 Treaties.

The 1855 and 1866 Treaties broadly reaffirm the Nation’s right of self-government. The 1855 Treaty provides that “[s]o far as may be compatible with the Constitution of the United States and the laws made in pursuance thereof, regulating trade and intercourse with the Indian tribes, *the Choctaws and Chickasaws shall be secured in the unrestricted right of self-government, and full jurisdiction, over persons and property, within their respective limits. . . .*” Art. 7 (emphasis added). The 1866 Treaty reaffirms this fundamental principle: “The Choctaws and Chickasaws agree to such legislation as Congress and the President of the United States may deem necessary for the better administration of justice and the protection of the rights of person and property within the Indian Territory: *Provided, however, Such legislation shall not in anywise interfere with or annul their present tribal organization, or their respective legislatures or judiciaries, or the rights, laws, privileges, or customs of the Choctaw and Chickasaw Nations respectively.*” Art. 7 (emphasis added). In addition, the 1866 Treaty reaffirms the obligations of the United States and the rights of the Nations under prior treaties. *Id.* arts. 10, 45.

Under these treaties, the Nation also holds the power of exclusion, which includes the right to determine who may enter Tribal Territory, and to impose conditions on the presence of those permitted to enter. *Morris v. Hitchcock*, 194 U.S. 384 (1904). As the Court explained:

While it is unquestioned that, by the Constitution of the United States, Congress is vested with paramount power to regulate commerce with the Indian tribes, yet it is also undoubted that in treaties entered into with the Chickasaw Nation, the right of that tribe to control the presence within the territory assigned to it of persons who might otherwise be regarded as intruders has been sanctioned, . . . And it is not disputed that, under the authority of these treaties, the Chickasaw Nation has exercised the power to attach conditions to the presence within its borders of persons who might otherwise not be entitled to remain within the tribal territory.

Id. at 388-89 (citing 1855 Treaty, arts. 7, 14; 1866 Treaty, art. 8). The Supreme Court has repeatedly affirmed this holding. *Strate v. A-1 Contractors*, 520 U.S. 438, 457 (1997); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 142 (1982); *Montana v. United States*, 450 U.S. 544, 565-66 (1981).

In the exercise of these Treaty rights and inherent sovereign authority, the Nation raises revenue to provide essential governmental services through the conduct of gaming by the Nation's Division of Commerce. The decision to structure its government in this manner is an exercise of the Nation's right of self-government. *See, e.g., Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62-63 (1978).

3. IGRA, the Oklahoma-Chickasaw Gaming Compact, and the Nation's gaming laws.

The Nation manages and regulates its gaming facilities in accordance with a comprehensive body of federal and tribal law. These laws include IGRA, 25 U.S.C. §§ 2701-2721, Stip. ¶3; the Chickasaw Nation Public Gaming Act of 1994, CNC §§ 3-3401 to 3-3610, Ex. G, which has been approved in accordance with IGRA, 25 U.S.C. § 2710(b)(1)(B), (d)(1)(A); 59 Fed. Reg. 18,167 (Apr. 15, 1994); and the Nation's Tribal Gaming Compact with Oklahoma, executed on November 23, 2004 and approved by the Secretary of the Interior on

January 12, 2005. 70 Fed. Reg. 6725 (Feb. 8, 2005), Ex. F. Under IGRA, this intergovernmental Compact has the force of federal law. 25 U.S.C. § 2710(d)(2)(C), (d)(3)(B).

In sum, the Nation's gaming activities are an expression of the right of self-governance secured to the Nation by its Treaties with the United States, IGRA, the Nation's Public Gaming Act, and the Nation's federally approved Compact with Oklahoma.

- B. The Supreme Court, the Tenth Circuit, and Congress have All Recognized that Indian Gaming is an Exercise of the Right of Self-Government and a Governmental Function.

As the Supreme Court, the Tenth Circuit, and Congress have all determined, Indian tribes conduct gaming as an exercise of their right of self-government, in order to raise revenues to operate tribal government and provide essential governmental services. These holdings are a complete answer to the Acting General Counsel's ("Counsel") argument that rights of tribal self-government are limited to intramural matters, and do not include Indian gaming. See AGC Br. at 6-8

Tribal rights of self-government include the right to engage in and regulate economic activity. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983).³ That power is held "[i]n addition to [the tribes'] broad authority over intramural matters such as membership." *San Juan*, 276 F.3d at 1192-93 (citations omitted) (emphasis added). As the Supreme Court

³ As the Court explained in *New Mexico*, 462 U.S. at 335-36 (footnotes and citations omitted):

[B]oth the tribes and the Federal Government are firmly committed to the goal of promoting tribal self-government, a goal embodied in numerous federal statutes. We have stressed that Congress' objective of furthering tribal self-government encompasses far more than encouraging tribal management of disputes between members, but includes Congress' overriding goal of encouraging "tribal self-sufficiency and economic development." In part as a necessary implication of this broad federal commitment, we have held that tribes have the power to manage the use of its territory and resources by both members and nonmembers, to undertake and regulate economic activity within the reservation, and to defray the cost of governmental services by levying taxes.

made clear in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216-222 (1987), Indian gaming furthers “the congressional goal of Indian *self-government*, including its ‘overriding goal’ of encouraging tribal self-sufficiency and economic development,” *id.* at 216 (quoting *New Mexico*, 462 U.S. at 333-34) (emphasis added), by providing “revenues for the operation of the tribal governments and the provision of tribal services.” *Id.* at 219. This is essential to tribal self-government because “[s]elf-determination and economic development are not within reach if the Tribes cannot *raise revenues* and provide employment for their members.” *Id.* at 219 (emphasis added).

The Tenth Circuit, too, has recognized that Indian gaming is a revenue raising activity conducted in the exercise of the right of self-government. In *Indian Country, U.S.A., Inc. v. Oklahoma ex rel. Oklahoma Tax Commission*, 829 F.2d 967 (10th Cir. 1987), the Circuit held that the Creek Nation’s operation of a bingo hall was protected by its treaty-based right of self-government, *id.* at 974-76, and that its conduct of gaming was a traditional governmental function because it raises revenue for the Tribe. *Id.* at 982. “‘The Tribes in this case are engaged in the traditional governmental function of raising revenue. They are thereby exercising their inherent sovereign governmental authority.’” *Id.* (quoting *Cabazon Band of Mission Indians v. County of Riverside*, 783 F.2d 900, 906 (9th Cir. 1986), *aff’d sub nom. California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987)).⁴

⁴ In urging otherwise, Counsel relies principally on *NLRB v. San Manuel Indian Bingo & Casino*, 341 N.L.R.B. 1055 (2004), which in turn relies on *Donovan v. Coeur d’Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985). But *Coeur d’Alene* was decided before *Cabazon* and *Indian Country U.S.A.*, which are controlling here, *see infra* at 20, and thus cannot be relied on to dispute their holdings that Indian gaming is an exercise of the right of self-government, which IGRA confirms. *See infra* at 12-13. And while *San Manuel* and *Coeur d’Alene* also rely on *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), their reading of the *Tuscarora* decision is contrary to law. *See infra* at 24-29. Finally, Counsel also relies on two

Cabazon and *Indian Country, U.S.A.* also foreclose Counsel's argument that the use of gaming revenues for essential governmental functions does not show that Indian gaming is an exercise of tribal self-governance. *See* AGC Br. at 7-8. Counsel's related argument that Indian gaming is not an exercise of self-governance if it competes with privately operated gaming and attracts non-Indian patrons fares no better. AGC Br. at 8. In *Cabazon*, the tribe competed with private (and state-run) gaming to attract non-Indian patrons, 480 U.S. at 210-11, 216, and the Court held that this *enhanced*, rather than diminished, tribal sovereignty. By "buil[ding] modern facilities which provide recreation opportunities and ancillary services to their patrons," and offering "comfortable, clean, and attractive facilities and well-run games in order to increase attendance at the games," the tribes "are generating value on the reservations through activities in which they have a substantial interest." *Id.* at 219-20. In turn, that value "generates funds for essential tribal services and provides employment for tribal members." *Id.* at 220. Nor does the employment of non-Indians at a tribal gaming facility undercut tribal self-government, *see* AGC Br. at 7 & n.4. A tribe *retains* its sovereign authority when it enters into commercial dealings with non-Indians. *Merrion*, 455 U.S. at 145-46.⁵ Moreover, employing non-Indians actually

cases from other Circuits, *see* AGC Br. at 7, but they too misread *Tuscarora*, and neither concerned Indian gaming.

⁵ In *Merrion*, 455 U.S. at 146-47, the Court underscored that a tribe is *not* divested of its sovereign authority when engaging in commercial activity:

[Confusing] the Tribe's role as a commercial partner with its role as a sovereign ... relegates the powers of sovereignty to the bargaining process undertaken in each of the sovereign's commercial agreements.

... Only the Federal Government may limit a tribe's exercise of its sovereign authority. Indian sovereignty is not conditioned on the assent of a nonmember; to the contrary, the nonmember's presence and conduct on Indian lands are conditioned by the limitations the tribe may choose to impose.

expands an Indian tribe's inherent sovereign authority. As the Court held in *Montana*, 450 U.S. at 565-66 (1981):

Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.⁶

In enacting IGRA, Congress reaffirmed that Indian gaming is a governmental activity used to raise revenue for governmental purposes. "One of the ways that Congress has promoted tribal sovereignty through economic development is . . . the authorization of Indian gaming." *Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1183 (10th Cir. 2010) (discussing IGRA). Congress determined that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." 25 U.S.C. § 2701(5). Congress enacted IGRA to "provide a statutory basis for the operation of gaming *by Indian tribes* as a means of

⁶ Counsel's argument is also foreclosed by *Indian Country, U.S.A.*, where the Tenth Circuit *rejected* the argument that Creek Nation Bingo was not a tribal enterprise because ICUSA was a non-Indian company operating games under a management agreement with the Tribe.

[T]he evidence in the record amply supports the district court conclusion that Creek Nation Bingo is 'tribal enterprise.' The Creek Nation retains full ownership rights over the land and facility and ultimate control over the bingo activities. Furthermore, whatever the specific arrangements for daily management control, return of capital, and distribution of profits, it is clear that the Creek Nation developed the bingo enterprise for the benefit of the tribe. It is also clear that benefits are in fact flowing to the tribe, in the form of both profits and employment.

829 F.2d at 983. The same conclusion applies here, though with greater force. The Nation's gaming activities are operated directly by the tribal government, not a private company, Stip. ¶2; on tribal lands within treaty boundaries, Stip. ¶4; and with *all* revenues used to fund essential governmental purposes. Stip. ¶5.

promoting *tribal economic development, self-sufficiency, and strong tribal governments*,” *id.* § 2702(1) (emphasis added), and specifically recognized that Indian tribes engage in gaming “as a means of generating tribal governmental revenue,” *id.* § 2701(1). Indeed, IGRA permits tribal gaming revenues to be used *only* to fund tribal government operations and programs, provide for the general welfare of the tribe, promote tribal economic development, and for charitable and local purposes. *Id.* § 2710(b)(2)(B).⁷

Indian Country, U.S.A., Cabazon, IGRA and Breakthrough establish beyond reasonable debate that Indian tribes engage in gaming as a *governmental* activity, and they completely foreclose Counsel’s contrary assertions.

C. Counsel’s Reliance On Various Treaty Provisions To Support The Application Of The NLRA To The Nation Does Not Withstand Scrutiny.

The Nation’s Treaty rights include the right “to exist as a nation,” 1830 Treaty, art. 2, “the jurisdiction and government of all the persons and property that may be within their limits,” *id.* art. 4, and the power of exclusion. *Morris*, 194 U.S. at 389 (citing 1855 Treaty, arts. 7, 14; 1866 Treaty, art. 8). *See supra* at 5-8.⁸ Nevertheless, Counsel argues that the Nation’s Treaties do not protect it from *any* federal laws. AGC Br. at 10-11. Were that so, the promises made to the Nation in its Treaties would be a virtual nullity, since the primary purpose of the Treaties was to secure to the Nation a territory that it alone would govern. Counsel’s contrary arguments are foreclosed by the very provisions Counsel relies upon.

⁷ Counsel argues that the application of the NLRA would not conflict with IGRA. AGC Br. at 13-14. But the determinations made by Congress that are set forth above are controlling, and reaffirm that Indian tribes conduct gaming in the exercise of the right of self-government. The Board has no power to rule otherwise. And as we show in Part IV, applying the NLRA to the Nation would interfere with the Nation’s right of self-government.

⁸ These rights are also held by the Nation as an element of its inherent sovereign authority. *See supra* at 9-13.

We begin with the proposition that “[a] treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations.” *Washington v. Wash. State Comm. Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 675 (1979). And under settled law, treaties *protect* Indian tribes from the application of federal statutes that would diminish their treaty rights. *See, e.g., id.* at 689-90 (holding that the Convention for the Protection, Preservation and Extension of the Sockeye Salmon Fisheries in the Fraser River System, May 26, 1930, U.S.-Can., 8 U.S.T. 1058, dividing certain salmon catch between the United States and Canada, did not abrogate Indian treaty rights, emphasizing that “[a]bsent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights”); *Dion*, 476 U.S. at 738 (“Congress’ intention to abrogate Indian treaty rights [must] be clear and plain”); *EEOC v. Cherokee Nation*, 871 F.2d 937, 938 (10th Cir. 1989) (we have been “extremely reluctant to find congressional abrogation of treaty rights” absent explicit statutory language). With this settled law in mind, we address each of Counsel’s arguments that the Nation’s Treaties somehow authorize the application of the NLRA to the Nation.

Counsel first argues that the Nation’s Treaty rights protect it only from interference by state law, relying exclusively on *Chickasaw Nation*, 515 U.S. 450 (1995). *See* AGC Br. at 10. *Chickasaw Nation* did not address the 1830 Treaty’s protections from federal law because the interference with the Nation’s rights in that case only involved state law.⁹ Furthermore, the Nation’s Treaties also *displace* generally applicable federal law that conflicts with the Nation’s

⁹ Counsel imaginatively points to the majority’s use of the word “such,” to suggest otherwise, *see* AGC Br. at 10 (quoting *Chickasaw Nation*, 515 U.S. at 469), but that word did not simultaneously create and resolve a new issue; “such” simply refers to the state laws at issue in the case. Nor does Justice Breyer’s separate opinion do so. His reference to the Treaty promise to protect the Nation from all laws “except those the Nation made itself or that Congress made” is simply a shorthand reference to the “explicit exceptions to this promise” set forth in the 1830 Treaty, neither of which he found would have applicable. *Chickasaw Nation*, 515 U.S. at 469 (Breyer, J., concurring in part, dissenting in part).

Treaty rights. *See supra* at 6-7, discussing *Choctaw Nation*, 397 U.S. at 635 (federal equal footing doctrine and Oklahoma Statehood Act do not convey title to beds of navigable waters which are protected by the 1830 Treaty); *Mingus*, 165 U.S. at 434-35 (title to Indian Territory lands held by Treaty not subject to extinguishment under federal act).

Counsel next advances the broad assertion that the 1830, 1855 and 1866 Treaties “provide for the supremacy of federal law and anticipate federal regulation.” AGC Br. at 10-11. But this argument fails to recognize that these Treaties, too, are the “supreme Law of the Land,” U.S. CONST., art. VI, cl. 2. And by their terms, the Nation is subject only to federal laws enacted pursuant to Congress’ authority over Indian affairs.

Article 4 of the 1830 Treaty (quoted selectively quoted by Counsel, *cf.* AGC Br. at 11-12 and Ex. A at 3), guarantees to the Nation “the jurisdiction and government of all the persons and property that may be within their limits. . . .” This is its primary purpose. In furtherance of that guarantee, the United States promises to protect the Nation’s sovereignty “from and against all laws,” with the exception of: (a) laws enacted by the Nation that are consistent with “the Constitution, Treaties, and Law of the United States,” and (b) laws enacted by Congress in the exercise of its power “over Indian affairs.” Although Counsel’s argument is based entirely on the first exception, that exception does not purport to extend any federal law *to the Nation*, either now or in the future. It simply provides that the United States will not protect the Nation from laws which *the Nation* enacts that are consistent with the Constitution, treaties (including the Nation’s Treaties with the United States) and laws of the United States. So the first exception (and the only cited provision from Article 4) gets Counsel nowhere.

Article 4’s second exception is more relevant, as it, alone, describes the *federal* laws which *will* apply to the Nation. And those are only laws “enacted by Congress, to the extent

Congress under the Constitution are required to exercise a legislation over Indian affairs.” *Id.* No other federal laws are made to apply, and certainly the NLRA is not a law relating to Congress’ authority “over Indian affairs.” This reading of Article 4 is readily confirmed by the Supreme Court’s interpretation of even broader language in *Ex parte Crow Dog*, 109 U.S. 556, 559 (1883). Crow Dog challenged his homicide conviction on the ground that the federal government had no jurisdiction to try him. The government relied on the 1877 Agreement between the United States and the Sioux, Act of Feb. 28, 1877, chap. 72, 19 Stat. 254, art. 8, to support federal jurisdiction. The language relied on read: “And congress shall, by appropriate legislation, secure to [the Sioux] an orderly government; *they shall be subject to the laws of the United States*, and each individual shall be protected in his rights of property, person, and life.” 109 U.S. at 568 (emphasis added). The Court rejected the government’s argument because it was inconsistent with the 1877 Agreement as a whole. That agreement retained for the Sioux “the highest and best of all [arts of civilized life], – that of self government” *Id.* at 568. And although the Sioux were, as part of this agreement, to remain subject to the laws of the United States, they did not do so as individual citizens of the United States. *Id.* at 568-69. Rather, they did so “as a dependent community” in a guardian-ward relationship with the United States. *Id.* at 569. Accordingly, the treaty language at issue was simply “an acknowledgement of [the Sioux’s] allegiance, as Indians, to the laws of the United States, made or to be made in the exercise of the legislative authority over them as such.” *Id.* That holding mirrors the text of the second exception in Article 4 of the 1830 Treaty, and applies here as well.¹⁰

¹⁰ If Article 4 had the meaning that Counsel ascribes to it, the sovereign autonomy that “[t]he Government and people of the United States” promised by its terms would have been meaningless, as the Nation would thenceforth have been subject to all federal laws. That Article 4 cannot be so interpreted is shown by *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). There, the Court held that a provision in the Treaty of Hopewell which provided that the United States

Counsel's reliance on Article 7 of the 1855 Treaty similarly fails because that article simply provides that “[s]o far as may be compatible with the Constitution of the United States and the laws made in pursuance thereof, regulating trade and intercourse with the Indian tribes, the Choctaws and Chickasaws shall be secured in the unrestricted right of self-government, and full jurisdiction, over persons and property, within their respective limits. . . .” *Id.*, art. 7 (emphasis added). This language does not make the Constitution of the United States applicable to the Nation, nor does it apply any federal laws except those “regulating trade and intercourse with the Indian tribes.” *Id.* This is shown by the decision in *Talton v. Mayes*, 163 U.S. 376 (1896). The United States and the Cherokee had agreed in the Treaty of Washington that Cherokee jurisdiction over its own members would be exercised in a manner “not inconsistent with the Constitution and such acts of congress as have been or may be passed regulating trade and intercourse with the Indians.” *Id.* at 380 (quoting 1835 Treaty of Washington, Mar. 14, 1835, 7 Stat. 481). A member of the Cherokee Nation had been convicted of murder in tribal court. *Id.* at 376-77. The grand jury that had indicted him only had five members, however, and the defendant asserted in federal court that this violated his due process rights under the United States Constitution. *Id.* Although the statutes of the United States did provide for a larger grand jury, the Court said those laws would have “no application [in Cherokee courts], for such statutes relate only, *if not otherwise specially provided*, to grand juries impaneled for the courts of an under the laws of the United States.” *Id.* at 382 (emphasis added). The Court then considered

shall “have the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs, as they think proper,” applied only to the Cherokee Nation’s trade. *Id.* at 553-54. The Court found it “inconceivable” that the Indians would have understood that provision “to have divested themselves of the right of self-government on subjects not connected to trade.” *Id.* Had the parties to the Treaty intended a total surrender of tribal self-government, the Court reasoned that “it would have been openly avowed.” *Id.* at 554. So too here. But if the question were in doubt, it would be resolved by the rule, expressly recited in Article 18 of the 1830 Treaty, that treaties must be construed in favor of the Indians.

the Fifth Amendment argument, and held that the Fifth Amendment does not apply to the Cherokee Nation because its sovereignty preexisted the federal government and was not an incident of the Constitutional system. *Id.* at 382-83. As an Indian Nation, the Cherokees were a “distinct, independent political communit[y], retaining their original natural rights.” *Id.* (quoting *Worcester*, 31 U.S. at 559). These holdings have equal application here. And plainly the NLRA does not “specifically provide[],” *id.* at 382, for its application to the Nation, nor was it enacted to “regulate trade and intercourse with the Indians.” 1855 Treaty, art. 7. The NLRA is therefore not made applicable to the Nation by the 1855 Treaty.

Article 7 of the 1866 Treaty, though also relied on by Counsel, actually recites the same principle in even more limited terms:

The Choctaws and Chickasaws agree to such legislation as Congress and the President of the United States may deem necessary for the better administration of justice and the protection of the rights of person and property *within the Indian Territory: Provided, however, Such legislation shall not in anywise interfere with or annul their present tribal organization, or their respective legislatures or judiciaries, or the rights, laws, privileges, or customs of the Choctaw and Chickasaw Nations respectively.*”

(emphasis added). Here, the federal legislation agreed to is *only* that deemed necessary by Congress and the President for the better administration of justice and the protection of the rights of person and property “within the Indian Territory.” Plainly, Congress never said that the NLRA is “necessary for . . . the protection of the rights of any person . . . within the Indian Territory,” nor did Congress use any equivalent language to indicate the statute’s application to the Chickasaw Nation or to tribes generally.¹¹

¹¹ Even if Congress had (and it didn’t), Article 7 declares that such laws would not be applied if they would “interfere” with the Nation’s government activities and sovereign rights (including rights held under the 1830 Treaty, *see Chickasaw Nation v. Oklahoma ex rel. Okla. Tax Comm’n*, 31 F.3d 964, 978 (10th Cir. 1994) (holding that Articles 10 and 45 of 1866 Treaty “reaffirmed” the obligations of Article 4 of 1830 Treaty), *rev’d on other grounds*, 515 U.S. 450, 462-71

Finally, Counsel's reliance on Article 8(4) of the 1866 Treaty, AGC Br. at 11, leads nowhere. Article 8 addresses only "a council, consisting of delegates, elected by each nation or tribe lawfully resident within the Indian Territory." *Id.* The council was authorized to meet annually and to exercise certain powers through a general assembly consisting of representatives of its member tribes, art. 8(3), with its powers spelled out in art. 8(4). The provision of art. 8(4) relied on by Counsel only says that the laws enacted by the general assembly shall not be "inconsistent with the Constitution of the United States or the laws of the Congress, or existing treaty stipulations with the United States." Such a provision would have to be interpreted in the same manner as the similar language at issue in *Crow Dog*. *Supra* at 16. And its terms would not permit the council to affect the Nation's Treaty rights in any event.

II. THE NLRA DOES NOT APPLY TO THE CHICKASAW NATION'S EXERCISE OF SOVEREIGN AUTHORITY BECAUSE THE ACT LACKS ANY EXPRESS CONGRESSIONAL AUTHORIZATION.

In Part I we showed that the Chickasaw Nation's gaming activities are an exercise of its Treaty-protected right of self-government, and that the application of the NLRA to the Nation is not authorized under any treaty provision. In this Part we discuss and apply the controlling principle that, under such circumstances, a federal statute like the NLRA is not to be applied to the Nation.

A. Federal Regulatory Statutes Do Not Apply to Indian Tribes Exercising Their Sovereign Authority Absent Express Congressional Authorization.

Application of the NLRA to the Nation's governmental activities, including gaming activities, is contrary to law because the Act does not contain an express congressional

(1995) (both majority and dissent relying upon 1830 Treaty, art. 4)). Since the NLRA would "interfere" with the Nation's own laws controlling tribal government employment, gaming, and the whole structure of tribal government (including the governmental revenues upon which that government depends), the express terms of the 1866 Treaty bar application of the NLRA to the Nation.

authorization to apply it to Indian Tribes. This result is compelled by controlling law of the Tenth Circuit, and confirmed by decisions of the Supreme Court. The Act therefore does not apply to the Nation.

1. Tenth Circuit law is controlling and protects tribal sovereign authority from statutory abrogation absent express congressional authorization.

The law of the Tenth Circuit is controlling here. The parties have stipulated that judicial review of any Board decision will be in the Tenth Circuit, *Chickasaw Nation v. NLRA*, No. CIV-11-506-W (W.D. Okla. May 10, 2012), and that stipulation has been approved by the Federal District Court for the Western District of Oklahoma. *Chickasaw Nation v. NLRA*, No. CIV-11-506-W (W.D. Okla. June 20, 2012). Accordingly, the Board must follow Tenth Circuit law. See *Ithaca College v. NLRB*, 623 F.2d 224, 228-29 (2d Cir. 1980) (holding that administrative bodies whose “hearings, findings, conclusions and orders are subject to direct judicial review” stand in a similar position to United States District Courts in relation to the Circuit Courts, and that the judgments of the Circuit Courts are binding on administrative agencies dealing with matters pertaining to those judgments).

The Tenth Circuit rule is that “federal regulatory schemes do not apply to tribal governments exercising their sovereign authority absent express congressional authorization.” *Dobbs*, 600 F.3d at 1283 (citing *San Juan*, 276 F.3d at 1200; *Cherokee Nation*, 871 F.2d at 939; *Donovan v. Navajo Forest Prods. Indus.*, 692 F.2d 709, 714 (10th Cir. 1982)). This rule applies whether (as is the case here) the exercise of tribal sovereign power is based on a treaty that “expressly protect[s] Indian tribes’ sovereignty,” *id.* (quoting *Navajo Forest*, 692 F.2d at 711-12), or on inherent sovereign authority (as is also the case here). *Id.* Therefore, the NLRA does not apply to the Nation. *Id.* at 1284 (citing *San Juan*, 276 F.2d at 1200) (“we held that Congressional silence exempted Indian tribes from the National Labor Relations Act.”).

Dobbs places great weight on *San Juan*, where the Tenth Circuit held that the NLRA did not preempt tribal sovereign authority to enact a right-to-work ordinance. In *San Juan* the Circuit rejected the Board’s argument that, given § 14(b) of the Act, only states or territories could prohibit union security agreements otherwise authorized by § 8(a)(3). The Court of Appeals held that the Pueblo’s right-to-work ordinance was an exercise of its “retained sovereign authority,” 276 F.3d at 1195, and that the NLRA would be construed to work a divestiture of that sovereignty only if “Congress ha[d] made its intent clear that we do so,” *id.* Finding that the NLRA is silent as to Indian tribes, the Circuit held that “[s]ilence is not sufficient to . . . strip Indian tribes of their retained sovereignty to govern their own territory.” *Id.* at 1196. Accordingly, “[t]he correct presumption is that silence does not work a divestiture of tribal power.” *Id.*

The Supreme Court has also squarely held that statutory silence does not establish congressional intent to abrogate tribal rights of self-government. In *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), the Court rejected the argument that the diversity statute, 28 U.S.C. § 1332 (1982), limited tribal court jurisdiction because “[t]he diversity statute makes no reference to Indians and nothing in the legislative history suggests any intent to render inoperative the established federal policy promoting tribal self-government,” 480 U.S. at 17. The Court explained that, “[b]ecause the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact.” *Id.* at 18 (quoting *Merrion*, 455 U.S. at 149 n.14).¹²

¹² That holding reflects the longstanding rule that when tribal sovereignty is at stake, “we tread lightly in the absence of clear indications of legislative intent.” *Santa Clara Pueblo*, 436 U.S. at 60.

In protecting retained sovereign authority from implied statutory divestiture, the Circuit in *Dobbs* also relied on *Cherokee Nation* and *Navajo Forest*. Those cases had long established that the treaty right of self-government bars the application of a federal regulatory statute absent clear congressional intent to abrogate the treaty right. In *Cherokee Nation* the Tenth Circuit rejected EEOC's effort to apply the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634 (1982) to the Cherokee Nation. The Circuit found that the Cherokee Nation's Treaty preserved its right of self-government, which included the right "to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country." 871 F.2d at 938 & n.2 (quoting Treaty of New Echota, art. 5, Dec. 29, 1835, 7 Stat. 478). As nothing in the ADEA purported to abrogate that right, the Circuit concluded that the ADEA did not apply to the Cherokee Nation. *Id.*¹³ In *Navajo Forest*, the Circuit held that the Navajo Nation's treaty right to self-government shielded it from the application of the Occupational Safety and Health Act (OSHA), 29 U.S.C. §§ 651-678 (1976). The Secretary of Labor asserted the right to enforce OSHA based on *Tuscarora*, but the Tenth Circuit found *Tuscarora* inapplicable if "application of the general statute would be in derogation of the Indians' treaty rights." 692 F.2d at 711.¹⁴

¹³ The Circuit explained: "We believe that unequivocal Supreme Court precedent dictates that in cases where ambiguity exists (such as that posed by the ADEA's silence with respect to Indians), and there is no *clear* indication of congressional intent to abrogate Indian sovereignty rights (as manifested, *e.g.*, by the legislative history, or the existence of a comprehensive statutory plan), the court is to apply the special canons of construction to the benefit of Indian interests." *Id.* at 939 (citing *Merrion*, 455 U.S. at 148-49 n.11).

¹⁴ The Navajo Nation's right to exclude supported that holding, as did the Nation's inherent right to exclude non-Indians from the reservation. 692 F.2d at 712-13. The Circuit relied on *Merrion*, where the Supreme Court found the power to exclude non-Indians from a reservation to be a "hallmark" of Indian sovereignty, derived from a tribe's inherent powers as a sovereign over its land and landowner. *Merrion*, 455 U.S. at 141, 146 n.12. As the Circuit noted in *Navajo Forest*, *Merrion*'s ruling on this point "limits or, by implication, overrules *Tuscarora* . . ." 692 F.2d at

These cases confirm that the Nation's right of self-government is sufficiently specific to bar the application of a statute that is silent with respect to Indian tribes, and they foreclose Counsel's reliance on other circuit case law to urge a different result. *See* AGC Br. at 8-9.¹⁵ Furthermore, where, as here, Indian treaty rights are at issue, the test for abrogation is particularly demanding, and is not satisfied by statutory silence. As the Court noted in *Dion*, "Congress' intention to abrogate Indian treaty rights [must] be clear and plain." 476 U.S. at 738. "[W]hat is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other and chose to resolve the conflict by abrogating the treaty." *Id.* at 739-40. *See also Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202-03 (1999) (applying same test to reject claim that the

713. After *Merrion*, the Tenth Circuit will not read a general statute to divest a tribe of the right to exclude unless Congress has made that intent clear. *Id.* at 713-14.

¹⁵ This is also confirmed by the extraordinary breadth of the Nation's Treaty rights of self-government, and by its power to exclude. *See supra* at 5-8. The cases relied on by Counsel do not show otherwise. *See* AGC Br. at 8-10. The treaty at issue in *Smart v. State Farm Insurance Co.*, 868 F.2d 929 (7th Cir. 1989) simply "set aside certain lands for the use and occupancy of the Tribe." *Id.* at 934. And in *United States v. Sohappy*, 770 F.2d 816 (9th Cir. 1985), the Court simply held that the Lacey Act, 16 U.S.C. § 3372 (1982), provides for the prosecution of individual Indians for trafficking in fish taken in violation of tribal law. *Id.* at 818-22. The Lacey Act specifically provides that it does not supersede or modify any treaty right, 16 U.S.C. § 3378(c)(2), and while the court held that the tribe did not have exclusive jurisdiction over fishing matters, that holding was based on the treaty right at issue, under which the Indians' right to take fish "was not exclusive, but was to be shared "in common with citizens of the Territory." *Sohappy*, 770 F.2d at 819. Nor is *United States v. Farris*, 624 F.2d 890 (9th Cir. 1980) to the contrary. First, the treaty right there at issue simply provided for a reservation "marked out for their exclusive use." *Id.* at 894 (quoting Treaty of Medicine Creek, Dec. 26, 1854, 10 Stat. 1132.). Second, *Farris* fundamentally misconstrues the nature and scope of Indian treaty rights. As the Supreme Court held long ago "the treaty was not a grant of rights to the Indians, but a grant of right from them, – a reservation of those not granted. *United States v. Winans*, 198 U.S. 371, 381 (1905). Thus, the Treaty right to hunt and fish is protected from abrogation by a federal statute even if that right is not specifically addressed in the Treaty. *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 406 & n.2, 412-13 (1968). Third, *Farris* was superceded by the enactment of IGRA, as the Ninth Circuit recognized in *United States v. E.C. Investments, Inc.*, 77 F.3d 327, 330 (9th Cir. 1996). And finally, the law of the Tenth Circuit, not *Farris*, is controlling here. *See supra* at 20.

Minnesota enabling act abrogated Chippewa treaty rights); *Menominee Tribe*, 391 U.S. at 413 (quoting *Pigeon River Improv., Slide & Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138, 160 (1934)) (intent to abrogate will not be “lightly imputed to Congress”).

2. The *Tuscarora* decision does not establish any different rule because Congress there expressly addressed Indian tribes, as the rule commands.

The Supreme Court’s decision in *Tuscarora* is not to the contrary because Congress there had made the statute at issue *expressly* applicable to Indian tribes:

[The Federal Power Act] neither overlooks nor excludes Indians or lands owned or occupied by them. Instead, as has been shown, *the Act specifically defines and treats with lands occupied by Indians – “tribal lands embraced within Indian reservations.”* See §§ 3(2) and 10(e). The Act gives every indication that, within its comprehensive plan, Congress intended to include lands owned or occupied by any person or persons, including Indians.

362 U.S. at 118 (emphasis added).¹⁶ Furthermore, the lands at issue were not protected by treaty or statute. *Id.* at 118-22. Under these unique circumstances, not presented here, the Court held that the Federal Power Act (FPA) authorized the condemnation of tribal land owned in fee simple status. *Tuscarora* provides no basis for applying the NLRA to the Chickasaw Nation in the circumstances presented here.

The Tenth Circuit reached the very same conclusion in *San Juan*. First, the Circuit recognized at the outset that Congress had never acted to protect the *Tuscarora*’s fee lands, either by treaty or statute. 276 F.3d at 1198. The Circuit then reasoned that the sentence in *Tuscarora* – stating that “it is now well settled that a general statute applying to all persons includes Indians and their property interests,” 362 U.S. at 116 – addressed only the applicability of such laws to

¹⁶ The Court reached this result by determining: *first*, that Congress had *expressly* defined the term “reservation” in the FPA to include Indian reservations, *id.* at 110-15; *second*, that Congress in the Act had *expressly* provided for the manner in which “Indian reservation” lands were to be treated, *id.* at 115; and *third*, that the *Tuscarora* fee lands at issue were not qualifying “reservation” lands under the definition. *Id.*

individual Indians, not to Tribes, as the cases the Supreme Court cited in support of that sentence confirmed. *San Juan*, 276 F.3d at 1198.¹⁷ The Circuit concluded that *Tuscarora* “dealt solely with issues of ownership, not with questions pertaining to the tribe’s sovereign authority to govern the land,” *id.* at 1198, and thus “do[es] not constitute a holding as to tribal sovereign authority to govern.” *Id.* at 1199.

Counsel asserts that the Tenth Circuit has found *Tuscarora* applicable where a Tribe acts “in a proprietary capacity such as that of employer or landowner,” and that accordingly it applies here. AGC Br. at 15-16 (quoting *San Juan*, 276 F.3d at 1199). That is simply not correct.

First, the decision in *San Juan* rejects the premise of Counsel’s argument – that the NLRA is a general federal law. AGC Br. at 4. The Tenth Circuit there held that the Act contains numerous exceptions that “indicate[] that Congress did not intend ‘inclusion within its general ambit as the norm.’” 276 F.3d at 1199 (citation omitted). That holding applies with even greater force in the face of the Act’s broad exception for sovereign entities set forth in § 2(2). *See infra* at 33-40.

Second, the Nation operates WinStar in its *governmental* capacity, not as a commercial employer. *See supra* at 5-13. The relationship between the Nation and its employees at WinStar is not governed by a handbook written by a human resources department; it is governed by federal law and tribal law enacted by the Chickasaw Legislature.

Third, the Tenth Circuit has expressly held that *Tuscarora* does not apply to treaty-protected tribes like the Chickasaw Nation, even when they *are* acting as employers. *Cherokee*

¹⁷ Counsel relies on two cases of this kind, *United States v. Dakota*, 796 F.2d 186 (6th Cir. 1986) and *Farris*. AGC Br. at 4, 9, 12, neither of which even mention *Tuscarora*. These cases instead concerned the application of a federal statute, the Organized Crime Control Act (OCCA), 18 U.S.C. § 1955, to individual Indians, and thus are inapposite here. Further, *Farris* has been superceded, as Counsel acknowledges. AGC Br. at 12.

Nation, 871 F.2d at 938 n.3 (“The so-called *Tuscarora* rule is not applicable to treaty cases”); *Navajo Forest*, 692 F.2d at 711 (“The *Tuscarora* rule does not apply to Indians if the application of the general statute would be in derogation of the Indians’ treaty rights.”); *Dobbs*, 600 F.3d at 1294 (Briscoe, J., concurring in part and dissenting in part) (*Tuscarora* does not apply “to Indian tribes as employers” where “cases involved Indian treaties”).

In sum, “the proposition that ‘[f]ederal statutes of general application apply to Native Americans and their property interests’” applies only to “cases in which an Indian tribe exercises its property rights,” and not to “cases in which a tribe ‘exercise[s] its authority as a sovereign.’” *Dobbs*, 600 F.3d at 1284 & n.8 (quoting *San Juan*, 276 F.3d at 1199) (citation omitted) (alteration in original). Here, we are dealing with tribal labor relations; indisputably a tribal government’s exercise of authority over labor relations involves “exercis[ing] its authority as a sovereign,” “rather than in a proprietary capacity.” *San Juan*, 276 F.3d at 1199. Since the Nation’s authority over labor relations is premised upon its treaty rights and inherent sovereign authority, *Tuscarora* does not apply.

B. The Board’s San Manuel Decision Must be Overturned Because it is Contrary to Law and Unworkable.

In *San Manuel*, the Board held that “statutes of ‘general application’ apply to the conduct and operations, not only of individual Indians, but also of Indian tribes.” 341 N.L.R.B. at 1059 (citing *Tuscarora*, 362 U.S. at 116). Looking primarily to precedents from other Circuits, *see id.* at 1059, the Board held that the NLRA applies to the conduct and operations of Indian tribes unless it is shown that “(1) the law ‘touches exclusive rights of self-governance in purely intramural matters’; (2) the 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.” *Id.* (quoting *Coeur d’Alene*, 751 F.2d at 1115).¹⁸ The *San Manuel* test cannot be relied on here because it is contrary to the controlling Tenth Circuit law.¹⁹ Furthermore, the commercial-governmental distinction upon which the *San Manuel* test relies, *id.* at 1062-63, is unsound and unworkable, as the Supreme Court’s decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) shows, and should be abandoned for that reason too.

1. The *San Manuel* test is contrary to law.

First, the Board in *San Manuel* misread *Tuscarora*. The Board said that the Supreme Court applied the FPA in *Tuscarora* “because the FPA provided no express exemption for Indians,” *San Manuel* at 1059. The Board also said *Tuscarora* holds “that statutes of general applicability apply to Indian tribes in the absence of a Congressional statement otherwise.” *Id.* at 1060. Both of these statements are wrong. First, the FPA *did* contain an exemption that applied to Indian tribes in certain circumstances, but the Court found it inapplicable. *Tuscarora*, 362 U.S. at 115. Second (and as the Tenth Circuit held in *San Juan*, 276 F.3d at 1198), the *Tuscarora* dictum at issue actually addressed only the applicability of general laws to *individual Indians*; it did not address the application of such laws to a tribe holding treaty rights or exercising sovereign authority. Accordingly, the Board’s insistence that the *Tuscarora* dictum also applies “to the conduct and operations . . . of Indian tribes,” *San Manuel*, 341 N.L.R.B. at 1059, simply cannot survive. And since the Board’s adoption of Ninth Circuit *Coeur d’Alene*

¹⁸ The *San Manuel* decision is distinguishable from this case because it did not involve treaty rights. 341 N.L.R.B. at 1063; AGC Br. at 5 (acknowledging same). By contrast, this case arises directly under the Nation’s Treaties.

¹⁹ For the same reason, the D.C. Circuit’s ruling affirming the Board’s decision in *San Manuel* has no application here – it conflicts with the law of the Tenth Circuit. *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306 (D.C. Cir. 2007).

test rests entirely on this erroneous interpretation of *Tuscarora, id.*, the Board's test is unmoored and cannot survive either.

Second, in *San Juan* the Tenth Circuit made clear that the absence of a reference to Indian tribes in a statute conclusively demonstrates the statute's *inapplicability* to tribal exercises of sovereign authority, not its presumptive applicability. "Silence is not sufficient to establish congressional intent to strip Indian tribes of their retained inherent authority to govern their own territory," 276 F.3d at 1196, and "the proper inference from silence . . . is that the sovereign power . . . remains intact." *LaPlante*, 480 U.S. at 18 (quoting *Merrion*, 455 U.S. at 149 n.14). Tenth Circuit and Supreme Court precedent thus foreclose the *San Manuel* test's insistence upon "proof" in the statutory language or legislative history that Congress did not intend the law to apply to Indian tribes." *San Manuel*, 341 N.L.R.B. at 1059 (quoting *Coeur d'Alene*, 751 F.2d at 1115). The Board's application of a reverse presumption misstates the law and cannot survive.

Third, *San Manuel*'s assertion that the only rights of self-government that are protected from interference by a general federal law are those involving "purely intramural matter[s]," *id.*, is equally wrong. Tribal rights of self-government include the right to engage in economic activity, including gaming, *supra* at 5-13, and the right of self-government is itself sufficient to bar the application of a federal regulatory statute that interferes with its exercise. *Cherokee Nation* and *Navajo Forest* eliminate any debate on that score. *See supra* at 22-23 & nn. 13-15.

Fourth, the distinction between commercial and governmental activities upon which the Board's *San Manuel* test centrally relies, 341 N.L.R.B. at 1059-60, is contrary to law. Congress

and the Courts have already determined that Indian gaming is a governmental activity, *see supra* at 9-13, and the Board has no authority to depart from that determination.²⁰

Fifth, in *Dobbs* the Tenth Circuit refused to presume that Congress intended to infringe upon tribal sovereignty by “treating tribal governments as a kind of inferior sovereign,” unless the Court could find “an express statement or strong evidence of congressional intent” to that effect. 600 F.3d at 1284. In contrast, the Board considers the sovereign status of Indian tribes as merely one of several ‘factors’ to be weighed as the Board seeks to “accommodate the unique status of Indians in our society and legal culture.” *San Manuel*, 341 N.L.R.B. at 1062. Nothing in the NLRA even remotely reflects an intent by Congress to delegate authority to the Board to weigh “the unique status of Indians in our society and legal culture,” and the Tenth Circuit’s controlling view in *Dobbs* and *San Juan* foreclose the Board from determining for itself the scope of tribal sovereignty.

2. The *San Manuel* test should be abandoned because the commercial-governmental distinction on which it relies is unworkable.

The commercial-governmental distinction upon which the *San Manuel* test relies is completely unworkable, as the Supreme Court has held in an analogous context, and should be abandoned for this reason as well. In *Garcia*, 469 U.S. at 546, the Supreme Court found “unsound in principle and unworkable in practice” all prior judicial efforts to draw such

²⁰ The Supreme Court has made perfectly clear that if a distinction is to be made between the so-called commercial and governmental activities of Indian Tribes that would impact their rights, it is for Congress, alone, to make the change. *Kiowa Tribe v. Mfg. Tech. Inc.*, 523 U.S. 751, 759 (1998) (*rejecting* a commercial activity exception to tribal sovereign immunity). Similarly in *Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991), the Court *rejected* the argument that “tribal business activities . . . are now so detached from traditional tribal interests that the tribal-sovereignty doctrine no longer makes sense,” and the assertion that tribal sovereign immunity should be limited to the tribal courts and internal affairs of tribal government. *Id.* at 509-10. The same principle applies here: only Congress can determine whether to apply the NLRA to the so-called commercial activities of Indian tribes. Indisputably, Congress has not done so here.

distinctions in the context of delimiting Congress' commerce powers over state governments. Those efforts had led to a string of confusing and contradictory rulings by federal courts on what constitutes a "traditional" function of government. *Id.* at 538. Some federal courts had determined that the regulation of traffic on public roads was not a traditional government function, see *Friends of the Earth v. Carey*, 552 F.2d 25, 38 (2d Cir. 1977), while others had found that operating a highway authority was such a function, see *Molinsa-Estrada v. P.R. Highway Auth.*, 680 F.2d 841, 845-46 (1st Cir. 1982). Similarly, some courts had determined that the regulation of air transportation was not a traditional function, see *Hughes Air Corp. v. Pub. Utils. Comm'n of Cal.*, 644 F.2d 1334, 1340-41 (9th Cir. 1981), while others had ruled that operating a municipal airport was. See *Amersbach v. City of Cleveland*, 598 F.2d 1033, 1037-38 (6th Cir. 1979). The same inconsistency was found in the regulation of ambulance services, *Gold Cross Ambulance v. City of Kansas City*, 538 F. Supp. 956, 967-69 (W.D. Mo. 1982) *aff'd on other grounds*, 705 F.2d 1005 (8th Cir. 1983), versus the operation of a mental health facility, *Williams v. Eastside Mental Health Ctr., Inc.*, 669 F.2d 671, 680-81 (11th Cir. 1982). As the *Garcia* Court noted, "[w]e find it difficult, if not impossible, to identify an organizing principle that places each of the cases in the first group on one side of a line and each of the cases in the second group on the other side." 469 U.S. at 539.

The Court, having decided that the traditional/non-traditional distinction rested on an unworkable standard, then dismissed the alternatives. *Id.* at 543. With particular relevance here, the Court found that it would be inappropriate to rely on historical precedent to determine traditional functions, because such an approach "prevents a court from accommodating changes in the historical functions of States, changes that have resulted in a number of once-private functions like education being assumed by the States and their subdivisions." *Id.* at 543-44. A

standard that only protected “uniquely” governmental functions was also likely to be unmanageable and had been rejected elsewhere. *Id.* at 545 (citing *Indian Towing Co. v. United States*, 350 U.S. 61, 64-68 (1955) (rejecting this standard in the field of governmental tort liability)). A standard that protected “necessary” governmental functions—that is to say, services that would be provided inadequately or not at all without the government – was also probably useless, because “[t]he set of services that fits into this category . . . may well be negligible” and courts are not well equipped to determine what they are, anyway. *Id.* And, finally, a standard that distinguished between traditional state functions and other functions on the basis of whether the federal government had historically been involved with that function would be faulty because federal involvement in many areas is of relatively recent vintage, yet the recency of that involvement does not diminish asserted federal or state interests in those functions. *Id.* at 544 n.10.

In sum, the Supreme Court has eschewed federal court involvement in so-called commercial-governmental distinctions as unworkable in a variety of contexts, including when it comes to tribal sovereignty and sovereign immunity, and its conclusions apply equally here.

III. THE BOARD DOES NOT HAVE JURISDICTION OVER THE NATION BECAUSE THE NLRA DOES NOT APPLY TO INDIAN TRIBES.

The NLRA is silent as to Indian tribes, and since silence cannot establish intent to apply the Act to Indian tribes, it does not so apply. This result is confirmed by the Act’s general principle that it does not apply to sovereigns, as the Board and the courts have held. Accordingly, Indian tribes are exempt from the Act as sovereigns under that same principle.

A. A Clear Expression of Congressional Intent is Required to Apply the Act to Indian Tribes.

The *Dobbs* rule controls this case. But the same standard would apply even if it did not. When the Board’s exercise of jurisdiction raises “public questions particularly high in the scale

of our national interest” application of the Act requires a showing of “the affirmative intention of the Congress clearly expressed.” *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 500-501 (1979) (quoting *McCulloch v. Sociedad Nacional de Marineros de Hond.*, 372 U.S. 10, 17, 22 (1963) (quoting *Benz v. Compania Naviera Hidalgo*, 335 U.S. 138, 147 (1957))). The holding of *Catholic Bishop* applies here, and it is not affected one iota by *San Manuel*.

This case plainly raises “public questions particularly high on the scale of our national interest.” The United States has an obligation to protect the rights of Indian tribes under the federal trust responsibility. *San Juan*, 276 F.3d at 1195; *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (Indian tribes are subject to the protection of the United States as “domestic dependent nations” whose “relation to the United States resembles that of a ward to his guardian”); *Worcester*, 31 U.S. (6 Pet.) at 557 (construing treaties with the Cherokee Nation as “explicitly recognizing the national character of the Cherokee and their right to self-government . . . [and] assuming the duty of protection; and of course pledging the faith of the United States for that protection”). At stake is the meaning of the 1830 Treaty, in which the United States gave its solemn word in exchange for which it obtained the Nation’s ancestral lands. *See Choctaw Nation*, 397 U.S. at 622-26 (1970). And here, just as much as in *Catholic Bishop* where First Amendment concerns were present, 440 U.S. at 501-04, there is plainly a significant risk that application of the NLRA to the Nation would violate the Nation’s Treaty rights, *see supra* at 5-19, *infra* at 41-50. In these circumstances, “the affirmative intention of Congress clearly expressed,” *id.* at 501, is required to apply the Act under *both Catholic Bishop* and *Dobbs*. And nothing in the NLRA meets this stringent standard with respect to Indian tribes for the reasons that follow.

B. Congress Did Not Clearly Intend the NLRA to Apply to Indian Tribes.

The NLRA contains no clear expression of congressional intent to apply the Act to Indian tribes; indeed, there is no indication that Congress even considered doing so. What is known is that Congress clearly intended to exempt *all* sovereign entities from the Act, and such an exemption includes Indian tribes as well.

1. The language and structure of the NLRA shows that sovereign entities, including Indian tribes, are not “employers” under the Act.

The term “employer” has been applied by the Board and the courts to include *all* sovereigns in the Act’s exemption. Indeed, from the Act’s inception the Board’s regulations have exempted from the definition of “employer” the District of Columbia and all territories and possessions of the United States, though none of these sovereign entities are expressly listed in § 2(2). *See e.g.*, 1 Fed. Reg. 208 (Apr. 18, 1936) (“The Term ‘State’ as used herein shall include all States, territories, and possessions of the United States and the District of Columbia.”). *See* 29 C.F.R. § 102.7 (2012). Similarly, the courts have held that the Act does not apply to the Port Authority of New York and New Jersey, *see Brown v. McKeon*, 661 A.2d 312, 315-16 (N.J. Super. Ct. App. Div. 1995), or to the Commonwealth of Puerto Rico’s Maritime Shipping Authority, *Chaparro-Febus v. Int’l Longshoremen Ass’n, Local 1575*, 983 F.2d 325, 329-30 (1st Cir. 1993), or to the Virgin Islands Port Authority, *V.I. Port Auth. v. SIU de P.R.*, 354 F. Supp. 312, 312 (D.V.I. 1973), though *none* of these entities are expressly listed in § 2(2). In sum, § 2(2) has consistently been interpreted to mean that sovereign entities are not employers.

Indian tribes are, of course, sovereign entities, and “like states, are entitled to comity.” *San Juan*, 276 F.3d at 1195 (quoting *Reich v. Great Lakes Indian Fish & Wildlife Comm’n*, 4 F.3d 490, 496 (7th Cir. 1993)). Indeed, for the first 40 years of the Act’s implementation the Board recognized that Indian tribes are excluded from the Act under the same general principle

applicable to all other government employers. *See Fort Apache Timber Co.*, 226 N.L.R.B. 503, 506 (1976) *overruled by San Manuel*, 341 N.L.R.B. 1055 (“*it is clear beyond peradventure that a tribal council such as the one involved herein – the governing body on the reservation – is a government, both in the usual meaning of the word, and as applied by Congress, the Executive, and the Courts,*” adding “*the Tribal Council, and its self-directed enterprise on the reservation that is here asserted to be an employer, are implicitly exempt as employers within the meaning of the Act.*”) (footnotes omitted) (emphasis added). The Board in *Fort Apache* explained that, just as the Court in *NLRB v. Natural Gas Utility District*, 402 U.S. 600, 604 (1971), had held that a utility district formed by private individuals who were responsible to public officials was a political subdivision exempt under § 2(2), “[s]o here we conclude that the Fort Apache Timber Company is an entity administered by individuals directly responsible to the Tribal Council of the White Mountain Apache Tribe, hence exempt as a governmental entity recognized by the United States, *to whose employees the Act was never intended to apply.*” *Id.* at 506 n.22 (emphasis added).

This conclusion is confirmed by the broader context of the statute as a whole. The Act was intended to address “industrial strife or unrest,” which Congress found necessary because some employers had refused to engage in collective bargaining. § 1. That concern did not include sovereign entities, however, as they are exempted from the Act in § 2(2). And there are no references to Indian tribes anywhere in the Act to suggest that they were to be treated differently than other sovereigns. Indeed, the Act’s definition of “commerce,” § 2(6), refers to commerce with States, the District of Columbia, Territories and foreign countries, but conspicuously omits any reference to commerce with Indian tribes.

2. The legislative history of the NLRA confirms that sovereign entities were not intended to be “employers” under the Act.

The legislative history confirms that the NLRA was not intended to apply to Indian tribes. It does not mention Indian tribes. *San Juan*, 276 F.3d at 1196 (noting same); *San Manuel*, 341 N.L.R.B. at 1058 (same). This is not surprising, since “congressional attention was focused on employment in private industry and on industrial recovery.” *Catholic Bishop*, 440 U.S. at 504 (citations omitted). As President Roosevelt stated upon signing the NLRA into law, it defined “the right of self-organization of employees *in industry*” President’s Statement upon signing S. 1958, 79 CONG. REC. 10,719 (1935) (statement of President Roosevelt), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947 at 3269 (1948) [hereinafter NLRB HIST.] (emphasis added). And as shown below, Indian tribes and industry held much different places in American life at that time.

The principle purpose of the NLRA was to “eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions. . . .” § 1. More specifically, Congress was concerned that the balance of power between employers and employees tipped too far in favor of employers, causing detrimental effect on commerce, *see* 78 CONG. REC. 3443-44 (1934) (statement of Sen. Wagner upon introducing S. 2926), *reprinted in* 1 NLRB HIST. at 15-16. But nothing in the legislative history indicates that Indian tribes were causing any such obstructions, or that the balance of power that was of concern to Congress tipped too far in favor of Indian tribes. Instead, Congress was concerned with “an ever-increasing stoppage of the free flow of commerce between the several States and between this and other countries as a result of disturbances in some of our larger *industrial enterprises*.” S. REP. NO. 73-1184, at 11 (1934), *reprinted in* 1 NLRB HIST. at 1099, 1111 (emphasis added). Finally, the bill’s two animating objectives were “industrial peace” and “economic adjustment.”

S. REP. NO. 74-573, at 1, 3 (1935), *reprinted in* 2 NLRB HIST. at 2300, 2302. But again, there are no indications in the legislative history that industrial peace was needed on Indian reservations (where there was hardly any employment to begin with), and the Act made no economic adjustments with respect to Indian tribes.

The NLRA's legislative history also shows that the sovereign exemption was a part of the NLRA from the beginning, received little attention, and was not controversial. Under the original bill, the term employer was defined to exclude "the United States, or any State, municipal corporation, or other governmental instrumentality. . . ." S. 2926, 73rd Cong. § 3(2) (original Senate print, March 1, 1934), *reprinted in* 1 NLRB HIST. at 1-2. A later version of the bill revised the sovereign exemption to state that the term employer "shall not include the United States, or any State or political subdivision thereof. . . ." S. 1958, 74th Cong. § 2(2) (final print, July 5, 1935), *reprinted in* 2 NLRB HIST. at 3270, 3271. That exemption was not controversial. Indeed, the Senate Report accompanying the original bill notes that the definition of "employer" is important but does not mention the sovereign exclusion. S. REP. NO. 73-1184, at 3, *reprinted in* 1 NLRB HIST. at 1099, 1102. *See also* S. REP. NO. 74-573, at 6, *reprinted in* 2 NLRB HIST. at 2300, 2305 (also omitting any discussion of the sovereign exemption). The few witnesses who did testify on the issue only drive home Congress's intent to exempt all governments in all their capacities. Of these, J.W. Cowper of John W. Cowper Co., Inc. is the most interesting, for Mr. Cowper complained that the exception for governmental bodies "may be reasonable enough if it applies purely to governmental agencies but where these governmental divisions are engaged in pursuits, competing with private enterprise, then there should be no exception and such agencies should be under the same restrictions as a corporation or private employer." *National Labor Relations Act: Hearings on S. 2926 Before the S. Comm. on Ed. and Labor, 73rd Cong.* 295

(1934) (statement of John W. Cowper, President, John W. Cowper Co., Inc.), *reprinted in* 1 NLRB HIST. at 27, 325. Objecting more broadly, the executive director of the International Juridical Association testified that his group could find “no reason why the United States should be exempted from the employers covered by the act and, therefore, urge the amendment of section 3(2) by deleting the United States from the exemption.” *Id.* at 1017 (brief of Isadore Polier, Executive Director, International Juridical Association), *reprinted in* 1 NLRB HIST. at 1055. But Congress neither deleted the exclusion nor limited it in the manner Mr. Cowper urged. *See also Hearings on Labor Disputes Act: Hearings on H.R. 6288 Before the H. Comm. On Labor*, 74th Cong. 179 (1935) (statement of Francis Biddle, Chairman, National Labor Relations Board), *reprinted in* 2 NLRB HIST. at 2473, 2653 (supposing that the reason governmental entities were excluded was so as not to “overload the bill”).

3. The Indian Reorganization Act and the Taft-Hartley Act confirm that the NLRA was not intended to apply to Indian tribes.

The NLRA’s meaning is also informed by consideration of the seminal Indian Reorganization Act of 1934 (IRA), 25 U.S.C. §§ 461-477, in which Congress dealt directly with Indian tribes *as sovereign entities* one year before the NLRA was enacted. Congress’s modern policy of promoting Indian tribes as governmental institutions has its roots in the IRA, which reversed the disastrous paternalistic policies of the previous decades. As shown by the IRA’s legislative history, by the 1930s the governmental institutions of many tribes had “very largely disintegrated or been openly suppressed” by excessive Interior Department control. 78 CONG. REC. 11,729 (1934) (statement of Rep. Howard). As the bill’s sponsor, Senator Wheeler, stated in the Senate debate on the Act “the Indian agent located upon an Indian reservation was [at the time] a czar.” *Id.* at 11,125 (1934). Tribal and individual Indian landholdings had been drastically reduced. *Id.* at 11,726 (statement of Rep. Howard).

The IRA was enacted in 1934 to reverse this course. President Roosevelt hailed it as “embod[ying] the basic and broad principles of the administration for a new standard of dealing between the Federal Government and its Indian wards.” Letter from President Roosevelt to Senator Wheeler (Apr. 28, 1934), *reprinted in* S. REP. NO. 73-1080, at 3 (1934). This was necessary because, as President Roosevelt stated, “the continuance of autocratic rule, by a Federal Department, over the lives of more than 200,000 citizens of this Nation is incompatible with American ideals of liberty.” *Id.* at 4. As the Supreme Court later found, “[t]he overriding purpose of . . . [the IRA] was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically.” *Morton v. Mancari*, 417 U.S. 535, 542 (1974). To enhance their governmental institutions, § 16 of the Act authorized Indian tribes to adopt constitutions exercising “all powers vested in any Indian tribe or tribal council by existing law,” as well as additional specified powers. 25 U.S.C. § 476(e). To facilitate economic development by tribal governments, § 17 of the Act authorized the Secretary of the Interior to issue charters of incorporation authorizing Indian tribal governments to organize and operate business corporations under such charters. 25 U.S.C. § 477. Two years later, Congress extended the same policy and same basic terms to Indian tribes in Oklahoma, by enacting the Oklahoma Indian Welfare Act of 1936 (OIWA), 25 U.S.C. §§ 501-509. *See Morris v. Watt*, 640 F.2d 404, 409-10 (D.C. Cir. 1981) (finding the IRA and OIWA were enacted to enhance tribal self-governance); *Harjo v. Andrus*, 581 F.2d 949, 951 (D.C. Cir. 1978) (adopting district court findings of same).

It would be irrational to ascribe to Congress an intent to subject tribal governments to the NLRA *sub silentio* at the same time that Congress was putting in place historic measures to reaffirm and strengthen those very governments. Subordinating tribal self-government to the

requirements of the NLRA and the enforcement authority of the Board, treating tribal employees as private sector employees, and permitting work stoppages that could bring tribal governments to their knees, would have been sharply at odds with Congress's contemporaneous efforts to establish a new regime for the Government's dealings with Indian tribes by enacting the IRA (the year before the NLRA) and the OIWA (the year after the NLRA).²¹

The Labor Management Relations Act of 1947, Pub. L. No. 80-101, 61 Stat. 136 (codified in sections of 29 U.S.C.) (the Taft-Hartley Act) confirms that Congress never intended to bring Indian tribes under the NLRA. We consider it here since "the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citing *United States v. Estate of Romani*, 523 U.S. 517, 530-531 (1998)). The Taft-Hartley Act authorized labor organizations to bring suit in federal court to enforce collective bargaining agreements. See 61 Stat. 136, § 301(a). But the Act does not purport to waive tribal sovereign immunity from suit – a precondition to § 301(a)'s application to Indian tribes – even though the tribes' sovereign immunity from suit as governments had been clearly established by 1947. *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 512 (1940) (declaring, specifically with reference to the Chickasaw and Choctaw Nations, that "[t]hese Indian nations are exempt from suit without Congressional authorization.") Had Congress – which is presumed to know

²¹ Quite possibly Indian tribes were not specified in the "employer" exclusion because, at the time of the NLRA's enactment, Indian tribes were characterized as "an instrumentality and agency of the Federal Government," 1 Op. Solic. Dep't Int. Ind. Aff. 484, 491 (D.O.I. Dec. 13, 1934) (interpreting the 1934 Indian Reorganization Act) ("The Indian tribes have long been recognized as vested with governmental powers, subject to limitations imposed by Federal statutes. The powers of an Indian tribe cannot be restricted or controlled by the governments of the several States. The tribe is, therefore, so far as its original absolute sovereignty has been limited, an instrumentality and agency of the Federal Government."). See also *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134, 184 n.8 (1980) (reviewing cases). As such, they would fall within the exclusion already provided for the federal government.

the law, *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) – intended the Act to apply to Indian tribes, it would have waived their sovereign immunity from suit to permit private enforcement of collective bargaining agreement against the tribes. That it did not do so confirms that tribal governments were not covered by the Act.²²

In sum, the NLRA was not intended to apply to Indian tribes, and it therefore does not apply to Indian tribes.²³ But even assuming, *arguendo*, that the question was in doubt, it would be resolved by application of “the special canons of construction to the benefit of Indian interests,” *San Juan*, 276 F.3d at 1194 (quoting *Cherokee Nation*, 871 F.2d at 939) (emphasis omitted), which are rooted in the unique federal trust responsibility that exists between Indian tribes and the United States. *Id.* (citing *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985)). Those rules require that “[d]oubtful or ambiguous expressions ... are to be construed as leaving tribal sovereignty undisturbed.” *Id.* And as is particularly relevant here, the canon that “statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit,” *id.* at 1191 (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985)), “means that ‘doubtful expressions of legislative intent must be resolved in favor of the Indians.’” *Id.* (quoting *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 506 (1986)). Indeed, the 1830 Treaty expressly requires that “in the construction of this Treaty

²² In *San Manuel*, the Board relied on statutes that expressly exclude Indian tribes to conclude that “Congress purposely chose not to exclude Indian tribes from the Act’s jurisdiction.” 341 N.L.R.B. at 1059. But, since Congress never considered applying the Act to Indian tribes, it had no occasion to refer to tribes in § 2(2).

²³ Even if Indian tribes were “employers” within the literal meaning of the NLRA, it would not apply to the Nation if its application would violate the treaty power to exclude, and “dilute the principles of tribal sovereignty and self-government recognized in the treaty.” *Navajo Forest*, 692 F.2d at 712. And as we show next, applying the NLRA to the Nation would have such an affect.

wherever well founded doubt shall arise, it shall be construed most favourably towards the Choctaws.” *Id.* art. 18.

IV. APPLYING THE NLRA WOULD AS A PRACTICAL MATTER IMPAIR THE NATION’S TREATY RIGHTS OF SELF-GOVERNMENT AND POWER OF EXCLUSION.

In this section we demonstrate the practical ways in which application of the NLRA to the Nation would violate the Nation’s Treaty rights and inherent sovereign authority. These rights were not abrogated by the NLRA, as there is nothing in the Act that shows the “clear and plain” intent of Congress to do so, which the law requires. *Dion*, 476 U.S. at 738; *Dobbs*, 600 F.3d at 1283 (requiring express congressional authorization to interfere with tribal treaty rights or inherent sovereign authority). Accordingly, the Nation’s rights bar application of the NLRA.

A. Application of the NLRA Would Abrogate the Nation’s Rights of Self-Government.

Applying the NLRA to the Nation would subordinate its sovereignty to the requirements of the NLRA, including the collective bargaining process, and employees’ right to strike, all of which would be enforceable exclusively by the Board. This would divest the Nation of the right of self-government.

1. Applying the NLRA to the Nation would fracture the Nation’s government in violation of its Treaty rights.

The Nation’s Constitution sets up a classic separation of powers between the executive branch, the legislative branch and the judicial branch. Stip. ¶1; Ex. E, CONSTITUTION OF THE CHICKASAW NATION, art. V, sec. 1 (setting out the division of the government); art. VI, (Legislative Department); art. X, (Executive Department); art. XII, (Judicial Department). The Nation conducts gaming under the authority of its executive branch, through the Division of Commerce, Stip. ¶2, 4, pursuant to location-specific licenses issued and overseen by the Chickasaw Nation Office of the Gaming Commissioner. The revenues generated by the Nation’s

gaming are used *exclusively* to fund tribal government operations or tribal programs, including healthcare, education, law enforcement, youth and family services, and history and cultural preservation. Stip. ¶5.

If the Board had jurisdiction to apply the NLRA to the Nation under the *San Manuel* test, it would split the Nation's government in two, one part comprised of whatever the Board in its sole discretion determined constitute "commercial enterprises," and the other comprised of "traditional tribal government functions." 341 N.L.R.B. at 1062-63. All "commercial enterprises" would be subject to the NLRA, and their activities would be subject to the Board's exercise of its administrative and enforcement authority. The "traditional tribal government functions" part of the Nation might or might not be subject to the NLRA. This would depend on how much "leeway" the Board decided to afford the Nation in its sole discretion. *Id.* at 1063.

Under such a regime it would be impossible for the Nation—or even the Board—to know into which category an activity fell until the Board actually adjudicated the issue, and only the Board would have jurisdiction to do so in the process of deciding unfair labor practice complaints. Would the Division of Commerce be commercial in its entirety, or just in its conduct of gaming? Would the Nation's Cultural Center, day care center, and Eyeglass Program be "commercial" or "governmental"? Virtually the entire tribal government would face this uncertainty, and the extent to which the Act would fracture the government could not be known until the Board decided each individual case in which that issue was raised. Any change in the structure of the tribal government would raise the same questions, resolvable only by the Board under the *San Manuel* test. The Nation would be unable to avoid the chilling effect that would result, or the time and cost of repeated visits to the Board, since the Board's adjudicatory process can be initiated at any time by the filing of an unfair labor practice complaint, and the process for

adjudicating such complaints through appeals can take years. Worse yet, the Board would be making these determinations by applying a test that the Supreme Court has found to be unprincipled and unworkable. *Supra* at 29-31.

The Board's authority to determine "bargaining units" under § 9(b) of the Act would have an even greater fracturing effect on the Nation's government. The Board could recognize as many different bargaining units as it wanted to, without regard to the structure of the Nation's government, the organizational choices it has made, and its employee classifications. There might be as many different bargaining units as there are departments of the Nation's government, or more. Indeed, a single gaming location might have several. Or there might be just one unit – the entire "commercial" part of the tribal government itself. Under *San Manuel*, the Nation could avoid these impacts only by *not* engaging in economic activities *at all*, and limiting its activities strictly to those involving "tribal membership, inheritance rules, and domestic relations." *San Manuel*, 341 N.L.R.B. at 1063 (citations omitted).

Subjecting the Nation's government to the Board's plenary power to define what constitutes the Nation's government would destroy the Nation's right of self-government, Ex. A, 1830 Treaty, art. 4, including the right to determine its own form of government, *Santa Clara Pueblo*, 436 U.S. at 62-64, and divest the Nation of the right to engage in economic activity, *San Juan*, 276 F.3d at 1192-93. Indeed, under the *San Manuel* test, the Nation's gaming operations would no longer be an exercise of its right of self-government at all, 341 N.L.R.B. at 1063, nor would any activity denominated by the Board as "commercial." *Id.* at 1062-63.

2. Applying the NLRA would also divest the Nation of its legislative and judicial authority.

The Nation's legislative authority, *see* Ex. E, CONSTITUTION OF THE CHICKASAW NATION, art. VI, is a central element of its right of self-government. 25 U.S.C. § 2701(5) (recognizing

that tribal regulatory authority over gaming is exclusive); *Cabazon*, 480 U.S. at 221-22 (reaffirming tribal regulatory authority over gaming). So, too, is the Nation's judicial power, *see* Ex. E, CONSTITUTION OF THE CHICKASAW NATION, art. X; *Santa Clara Pueblo*, 436 U.S. at 65 (reaffirming tribal judicial power over Indians and non-Indians); *Williams v. Lee*, 358 U.S. 217, 223 (1959) (same). Yet if the NLRA applied to the Nation, any Legislative or Judicial decision that fell even arguably within the scope of the NLRA would be subject to review and determination by the Board.

The Board could, for example, strike down an Indian preference in employment law by holding that the law interferes with collective bargaining rights held under § 8(a)(1), or is discriminatory under § (8)(a)(3), of the Act.²⁴ Similarly any decision of the Nation's courts that decided an employee dispute would be subject to review by the Board as an unfair labor practice. In short, the Nation's core legislative and judicial powers would be subordinated to the Board's jurisdiction and authority.

3. Subjecting the Nation to the collective bargaining process would require that it bargain for the application of its own laws or face an unfair labor practice charge.

The Nation's right of self-government would be violated if it were required to engage in collective bargaining under §§ 7-9 of the Act, *see* 29 U.S.C. §§ 157-159 (concerning "wages, hours, and other terms and conditions of employment" as defined in § 8(d) of the Act). The phrase "terms and conditions" was left undefined in the Act to order provide the Board wide latitude to determine what decisions require mandatory bargaining "in light of specific industrial practices." *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 675 (1981). Thus, any of the

²⁴ Counsel asserts that the NLRA does not prevent an employer from "hir[ing] as it wishes," AGC Br. at 8 (citing *San Manuel*, 341 N.L.R.B at 1063 n.23), but that general statement does not resolve the specific issue noted above, which would be up to the Board to decide.

Nation's laws affecting employment, including those drawn from IGRA, the Compact, and the Public Gaming Act – including the background and licensing requirements, *see* 25 U.S.C. § 2710(b)(2)(F); CNC §§ 3-3607, 3-3610 – could be the subject of a collective bargaining request. If the Nation refused, the Board would determine whether the request fell within the definition of “terms and conditions” under § 8(d) of the Act. To the extent the Board so held, the Nation's government would be required to bargain over the continued applicability of its own laws to its own activities. Furthermore, in making these determinations, the Board – not the Nation – would determine the “specific industrial practices” of Indian gaming or of any other activity deemed by the Board to be “commercial.” And the Board's authority to do so would be exclusive under § 10(a) of the Act, subject only to review in a Court of Appeals.

At the end of the collective bargaining process, the Nation would be subject to a *de facto* statute – the collective bargaining agreement – which would govern all conditions of employment, superceding any inconsistent laws of the Nation. And the terms of that agreement would be enforceable only by the Board under § 10(a) of the Act.

Such a radical regime would strip the Nation of its right of self-government. President Roosevelt himself understood well the mismatch between private sector collective bargaining and the needs of a government:

All Government employees should realize that the process of collective bargaining, as usually understood, cannot be transplanted into the public service. It has its distinct and insurmountable limitations when applied to public personnel management. The very nature and purposes of Government make it impossible for administrative officials to represent fully or to bind the employer in mutual discussions with Government employee organizations. The employer is the whole people, who speak by means of laws enacted by their representatives in Congress. Accordingly, administrative officials and employees alike are governed and guided, and in many instances restricted, by laws which establish policies, procedures, or rules in personnel matters.

Letter from President Roosevelt to the President of the National Federation of Federal Employees (Aug. 16, 1937) *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=15445>. The President warned that “a strike of public employees manifests nothing less than an intent on their part to prevent or obstruct the operations of Government until their demands are satisfied,” calling such action “unthinkable and intolerable.” *Id.* These conclusions apply equally to the Chickasaw Nation, and nothing in the NLRA suggests Congress intended such consequences to befall tribal government employers.

4. Securing the right to strike to the Nation’s employees would grant them the ultimate power to shut down tribal government.

Applying the NLRA to the Nation would abrogate the Nation’s Treaty-protected right of self-government because it would make the operation of Tribal Government and the delivery of tribal services dependent on the Teamsters’ continuing consent. By granting the Nation’s employees the right to strike, the NLRA would confer on the Teamsters the power to bring the operation of the Nation’s gaming enterprises and the generation of revenues from those enterprises to a halt. And as net revenues generated by the Nation’s IGRA gaming are used exclusively to fund tribal government operations or programs, or to provide for the general welfare of the Nation and its citizens, Stip. ¶5, this would enable the Teamsters to shut down the Tribal Government altogether. A strike by Nation employees would jeopardize the Nation’s ability to operate its health care facilities and police department, Stip. ¶5(a),(c), which are essential to the Nation’s safety and well-being. So, too, the Nation’s programs for children and families would be jeopardized, including its group home, Stip. ¶5(d)(iii), and domestic violence shelter. Stip. ¶5(d)(vi). Vesting the Nation’s employees with the power to strike would force the Nation to choose between the Teamsters’ demands and meeting the responsibilities of governing. A more complete divestiture of the right of self-government is difficult to conceive. And the only way

out of the strike threat would be to obtain the consent of the Teamsters through the collective bargaining process. To borrow from *Merrion*'s context, "[r]equiring the consent of the [Union] deposits in the hands of the [Union] the source of the tribe's power, when the power instead derives from sovereignty itself. Only the Federal Government may limit a tribe's exercise of its sovereign authority." *Merrion*, 455 U.S. at 147 (citing *United States v. Wheeler*, 435 U.S. 313, 322 (1978)). Congress could not possibly have intended such a complete divestiture of the Nation's right of self-governance in a statute which does not even mention Indians. *San Juan*, 276 F.3d at 1196.

B. Applying the NLRA to the Nation Would Divest the Nation of its Power to Exclude and the Related Authority to Condition Entry Upon Nation Land in Compliance with the Nation's Laws.

The 1855 and 1866 Treaties secure to the Nation the power to exclude, which includes the power to place conditions on the presence of those permitted to enter Tribal Territory. *Morris*, 194 U.S. at 388-89 (citing 1855 Treaty, arts. 7, 14; 1866 Treaty, art. 8).

Counsel does not dispute that the Nation's exclusionary powers apply to the Nation's employees and to the Teamsters. But if the NLRA applied to the Nation, the Nation could not condition its employees' entry on Nation land on their compliance with Nation law (including the Nation's regulatory and licensing obligations under IGRA, the Compact, and the Nation's Public Gaming Act). Instead, any law of the Nation affecting employment would be subject to challenge as an unfair labor practice under § 8 of the Act, giving the Board the power to decide the question under § 10(a). Any exercise of the power to exclude by the Nation could be challenged in the same manner, and would be decided by the Board as well. This would abrogate the Nation's power to exclude.

Abrogation would also occur if the Nation were required to grant the Teamsters and their representatives physical and electronic access to its licensed gaming locations for purposes of

communicating with the Nation's employees under § 7 of the Act. Granting the Teamsters access under § 7 of the Act would also deprive the Nation of the right to administer and enforce its background check and licensing processes as a condition of entry, CNC §§ 3-3606, 3-3610 which is required by IGRA, 25 U.S.C. § 2710(b)(2)(F), and the Compact, Ex. F, Part (10)(A)(1) at 27. At the same time, the Nation would remain responsible for compliance with these laws, and for shielding its gaming activities from "organized crime and other corrupting influences." 25 U.S.C. § 2702(2). This would impose a Hobson's choice on the Nation, which would abrogate the Nation's exclusionary powers.

Counsel does contend that the Nation's power of exclusion is inapplicable to the Board's employees, arguing that the "treaties expressly except individuals employed by the Federal Government from the Nation's general right of exclusion." AGC Br. at 11-12 (quoting 1855 Treaty, art. 7). But Article 7 of the 1855 Treaty does not say this – the text to which Counsel refers states only that United States will not be responsible for removing certain persons, including, "[s]uch individuals as are now, or may be in the employment of the Government, and their families." *Id.* Nor does this provision authorize federal employees to enter the Treaty Territory. That subject is addressed in Article 17 of the 1855 Treaty, which describes the federal government's authorized presence in the Treaty Territory, and imposes specific limits on even those employees permitted to enter. Article 17 provides as follows:

The United States shall have the right to establish and maintain such military posts, post-roads, and Indian agencies, as may be deemed necessary within the Choctaw and Chickasaw country, but no greater quantity of land or timber shall be used for said purposes, than shall be actually requisite; and if, in the establishment or maintenance of such posts, post-roads, and agencies, the property of any Choctaw or Chickasaw shall be taken, injured, or destroyed, just and adequate compensation shall be made by the United States. Only such persons, as are, or may be in the employment of the United States, or subject to the jurisdiction and laws of the Choctaws, or Chickasaws, shall be permitted to farm or raise stock within the limits of any said military posts or Indian agencies.

And no offender against the laws of either of said tribes, shall be permitted to take refuge therein.

Id. These exceptions are spelled out in like terms in Articles 11 and 13 of the 1830 Treaty. *Id.* As neither the Board nor its employees are within the limited authorization provided in these articles, the Nation retains the power of exclusion with respect to both. That authority includes the power to deny the Board access to electronic and paper records kept by the Nation on its lands.

Counsel relies on *Farris* and *U.S. Department of Labor v. OSHRC*, 935 F.2d 182 (9th Cir. 1991), asserting that the Nation's right of exclusion is too general to serve as a bar to application of the NLRA. AGC Br. at 12-13. But the treaty at issue in *Farris* simply set aside a reservation for the tribe's "exclusive use," 624 F.2d at 893, as Counsel concedes. AGC Br. at 12. And in *OSHRC*, the Court found that the treaty at issue only specified a general right of exclusion. 935 F.2d at 185. By contrast, the Nation's treaties specifically authorize the Nation to exclude unauthorized persons, precisely as the Supreme Court held in *Morris*, and they note with specificity who is authorized to enter the Nation's Treaty Territory. The Board, the Teamsters, and non-Indian employees are not among those specified.

Moreover, the controlling law here is from the Tenth Circuit, not the Ninth Circuit. The Ninth Circuit itself acknowledged the inconsistency between Tenth Circuit law reflected in *Navajo Forest*, and the Ninth Circuit's decision in *OSHRC*, see 935 F.2d at 185. In *Navajo Forest*, which is controlling here, the Tenth Circuit held that application of OSHA, 29 U.S.C. §§ 651-678 (2006), would abrogate the Navajo Nation's power of exclusion under Article II of the Treaty of June 1, 1868, 15 Stat. 667. Under the Navajo Treaty, the United States had agreed to leave the Navajo alone to conduct their own affairs on their own reservation with a "minimum of interference from non-Indians, and then only by those *expressly* authorized to enter upon the

reservation.” 935 F.2d at 711-12. That holding applies equally to the Nation’s rights of exclusion, and forecloses application of the NLRA.

CONCLUSION

For the foregoing reasons, the Chickasaw Nation respectfully request that the Complaints in this matter be dismissed for lack of jurisdiction.

Respectfully submitted this 13th day of November 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of November 2012 I served or caused to be served upon the following a copy of the foregoing document via electronic mail (e-mail):

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