COMPETING SOVEREIGNS: Circuit Courts’ Varied Approaches to Federal Statutes in Indian Country

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The Federal Lawyer’s April 2015 Indian Law issue detailed “jurisdictional hooks” that allow private parties to sue Indian tribes in employment-law cases. The topic is an important one. Some federal laws expressly apply to tribes and allow suit, but Congress expressly exempted tribes from other laws. Where the text of a federal statute appears to apply nationwide (a “statute of general applicability”) but neither includes nor excludes tribes, practitioners face a particularly difficult task. Federal circuit courts apply divergent, often-conflicting analyses to determine whether these silent statutes apply to tribes.

Practitioners looking to sue tribes must learn the schisms in this landscape. The April 2015 article correctly described the analysis in the U.S. Court of Appeals for the Ninth Circuit and those circuits that have embraced the Ninth Circuit test. But other circuit courts apply different tests and place greater emphasis on the protection of tribal sovereignty. And six circuits have either not yet addressed the question or have not yet settled on their approach. Understanding the historical background of this split informs what suits practitioners may decide to bring, how tribes respond to these suits, and how the U.S. Supreme Court may ultimately bring clarity to the question.

### Foundational Inconsistencies in Federal Indian Law

Federal Indian law often struggles to balance the rights of competing tribal, state, and federal sovereigns. Indian tribes enjoyed and exercised inherent sovereign rights, including the right to govern their territories, long before the framers of the U.S. Constitution put pen to paper. Early after the Revolutionary War, the United States began entering into peace treaties with these tribes. As the British Crown had before it, the fledgling nation engaged in an “extravagant … pretension of converting the discovery of an inhabited country into conquest.” But it did so without the expense or bloodshed of continentwide war. By negotiating treaties with Indian tribes on a nation-to-nation basis, the United States acquired large swaths of territory without the expense of outright conquest.

In exchange, the United States promised in these treaties to provide the tribes with certain goods and services, to reserve to them certain land parcels, and foremost, to respect the Indian tribes’ sovereign independence. The Constitution establishes that these treaties are the supreme law of the land. They are also the foundation of the Supreme Court’s “trust-responsibility” doctrine. The federal trust responsibility obligates the United States to protect and defend tribal treaty rights, lands, assets, and resources and to carry out the mandates of federal Indian law. The Court recognizes that tribes have kept their word and placed their faith in the United States to fulfill its bargain. In exchange, the United States has charged itself with “moral obligations [toward tribes] of the highest responsibility and trust.” The United States has committed its “national honor” to fulfilling its treaty responsibilities.

Much of federal Indian law is built around this trust-responsibility doctrine.

Yet the Constitution also “grants Congress broad general powers to legislate in respect to Indian tribes.” The Supreme Court has described this congressional power as “plenary and exclusive.”

Using this power, Congress can both restrict tribal sovereignty and relax those restrictions. With the stroke of a pen, Congress can affect “major changes in the metes and bounds of tribal sovereignty.”

Taking the two doctrines together, in treaties, the federal government gave its word to tribes and should keep its word as a matter of national honor, but Congress may nevertheless break federal promises if it deems it expedient to do so. The tension between these rules is the root of the question this article addresses: How do courts treat generally applicable statutes when those statutes do not mention tribes?

### The Supreme Court’s Clear-and-Plain Rule

Congress is in the business of enacting nationwide legislation. But what happens when generally applicable federal legislation, if applied to Indian tribes, would divest the tribe of an inherent sovereign or treaty-protected right? “Indian tribes retain attributes of sovereignty over both their members and their territory to the extent that sovereignty has not been withdrawn by federal statute or treaty.” So where Congress has not abrogated them, tribes’ preconstitutional rights and sovereign powers remain in place, unaffected by federal law.

Take the National Labor Relations Act as an example. The Act never mentions Indian tribes in its text or legislative history. But
The National Labor Relations Act is the “supreme law of the land.” But so are Indian treaties. And the trust responsibility applies to federal agencies as well as it does federal courts. The question for courts, then, is whether a federal statute that makes no mention of tribes can force such deep incursions into tribal sovereignty.

The National Labor Relations Board (NLRB) has been particularly aggressive in asserting its jurisdiction in Indian country.

The Supreme Court protects tribes’ inherent right to govern and regulate economic activity within their territories. And many tribes retain the right to exclude unwanted persons from their territories, a right that includes the lesser power to condition entry into the reservation on, for example, compliance with tribal law. But if the National Labor Relations Act applies to tribes in their Indian country, then the Act would abrogate both the right to self-govern and the right to exclude. Tribes’ right to govern themselves would be abrogated because they could not legislate their own labor relations code or hear labor disputes in their own courts. Their right to exclude would be impaired because they could not regulate employees and labor organizers entering their reservations. Moreover, because tribes generally lack any effective tax base, they depend on commercial enterprises to generate the bulk of their governmental revenue. If labor strikes shut down those commercial operations, private actors could stop the flow of governmental revenue, crippling the tribal governments—and the police departments, fire departments, clinics, schools, heating assistance, and every other program those governments administer.

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To balance Congress’s plenary power over Indian affairs against the United States’ trust responsibility to tribes, the Supreme Court long ago drew this line: “Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so.” Put differently, a long line of Supreme Court cases “have required that Congress’ intention to abrogate Indian treaty rights be clear and plain.” The same test applies to the inherent sovereign rights of tribes, even when those rights are not protected by treaty.

The Supreme Court has applied this clear-and-plain test in a variety of circumstances. It has, for example, used the test to determine whether Congress changed the boundaries of Indian reservations, to evaluate whether Congress abrogated treaty fishing rights, and most recently to decide whether Congress had waived tribal sovereign immunity from suit.

Most relevant here, the Court has several times applied the clear-and-plain rule to determine whether a “generally applicable” statute in fact applied to abrogate tribal and treaty rights. In United States v. Dion, the Court considered whether the Bald Eagle Protection Act could abrogate a tribal member’s treaty-protected right to hunt eagles on an Indian reservation. The Court recognized Congress’s power to abrogate tribal rights but repeated its rule that “[w]e have required that Congress’ intention to abrogate Indian treaty rights be clear and plain.” Courts can find “clear and plain” congressional intention on the face of the statute or in its legislative history, but “what 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 that conflict by abrogating the treaty.” Applying the test, the Bald Eagle Protection Act abrogated treaty rights because legislative history evinced Congress’s intent to abrogate the hunting rights. The Bald Eagle Protection Act abrogates treaty rights because Congress said it does.

Similarly, consider the “generally applicable” statute that affords federal courts jurisdiction over diversity cases, but says nothing about tribes. In Iowa Mutual v. LaPlante, a litigant argued that the diversity-jurisdiction statute overrode a federal policy of encouraging tribal-court jurisdiction, divesting tribal courts of jurisdiction over diverse parties. The Supreme Court disagreed. It held that “[i]n the absence of any indication that Congress intended the diversity statute to limit the jurisdiction of the tribal courts, we decline petitioner’s invitation to hold that tribal sovereignty can be impaired in this fashion.”

Thus, a silent statute (such as the employment statutes that the April Federal Lawyer article considered, including the Age Discrimination in Employment Act (ADEA), Fair Labor Standards Act, Family Medical Leave Act, Worker Adjustment and Retraining Notification Act, Occupational Safety and Health Act, and Title III of the Americans with Disabilities Act), no matter how generally applicable, cannot abrogate tribal rights. A silent statute necessarily lacks any evidence that Congress actually considered the conflict, let alone that it decided to resolve the conflict in derogation of tribal sovereignty. As the Supreme Court explained, where a federal statute does not say it applies to tribes, then regardless of how otherwise “generally applicable” the statute is, “the proper inference from silence” is that sovereign power “remains intact.”

The Tuscarora Dictum

A single sentence in one Supreme Court decision can be read to depart from the Court’s otherwise unbroken application of the clear-and-plain rule. In Federal Power Commission v. Tuscarora Indian Nation, the Court addressed whether the Federal Power Act authorized condemnation of off-reservation fee land owned by a tribe. To reach its holding, the Court applied its typical clear-and-plain rule and found evidence that Congress intended that the Federal Power Act apply to tribes because it “specifically defines and treats with lands occupied by Indians.” It allowed the Federal Power Act to
abrogate tribal rights because Congress said so.

But the Court also noted (in a statement that courts generally agree is dictum) that “it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests.” Recent attempts to assert federal authority over tribes in Indian Country are all rooted in this single sentence. The “many decisions” the Court relied on were three. Each of those three cases—like the statement itself—involved the rights of individual Indians, not the sovereign rights of tribes.

The distinction is important because “[t]he relevant comity is a duty of forbearance not to individual Indians but to Indian governments.” Just as saying that U.S. laws are generally applicable to Californians does not address whether the same laws apply to the state of California itself, the Supreme Court’s statement that laws are generally applicable to individual Indians does not address whether the same laws apply to Indian tribes.

The Supreme Court has looked at whether “generally applicable” statutes and federal policy divest tribal rights three times since Tuscarora. It held that the Bald Eagle Protection Act abrogates tribal rights because legislative history expresses that intent. Congress said the statute should abrogate tribal rights, so it did. The Court also refused to apply the diversity statute or national energy policies to divest tribes of sovereign rights because the it found “no clear indications that Congress has implicitly deprived the Tribe of its power.” Congress didn’t address whether the statute abrogated tribal rights, so the Court couldn’t apply the statute to abrogate the rights.

In each post-Tuscarora “generally applicable” case, the Court applied the clear-and-plain rule to determine whether the silent statute or policy could abrogate sovereign rights—just as it did in Tuscarora. None of the post-Tuscarora cases mentioned the Tuscarora dictum. Indeed, in the more than 50 years since the Court announced Tuscarora, no Supreme Court justice has ever relied on this dictum—whether writing for a majority, concurrence, or dissent.

Instead, each time it describes its Tuscarora holding, the Court relies on the case’s clear-and-plain analysis, not the single-sentence digression. It explains that Tuscarora teaches that the Federal Power Act abrogates tribal rights because “Congress squarely considered and rejected” a role for tribal regulation, and that Tuscarora “reaffirmed” the Court’s reliance on the clear-and-plain rule. Thus, Supreme Court jurisprudence remains unchanged: Silent statutes cannot undermine tribal rights. If Congress seeks to abrogate tribal rights, it must speak clearly and plainly.

**D.C. Circuit Test**

"traditional" customs and practices

"blurred distinction" between tribal governance and commerce

How much does the statute impinge upon tribal sovereignty?

**Ninth Circuit Invention of the Tuscarora/Coeur d’Alene Rule**

The law in the circuits is less certain. In 1985, 25 years after Tuscarora, Ninth Circuit jurisprudence turned a corner with Donovan v. Coeur d’Alene Tribal Farm. A compliance officer with the Occupational Safety and Health Administration (OSHA) issued a $185 fine against a tribe under the Occupational Safety and Health Act. When the Occupational Safety and Health Review Commission reversed the fine, refusing to apply the Act to the tribe, the Secretary of Labor appealed to the Ninth Circuit.

The secretary argued that Tuscarora’s stray statement about “Indians and their property interests” governed the case. The Ninth Circuit agreed that the tribe “may be correct when it argues that this language from Tuscarora is dictum, but it is dictum that has guided many of our decisions.” That was true. The Ninth Circuit had often, appropriately, applied statutes of general applicability to individual Indians (who do not exercise sovereign rights and to whom the United States does not owe a trust responsibility). But then the Ninth Circuit made a jump. It said that “many of our decisions have upheld the application of general federal laws to Indian tribes.” The Coeur d’Alene Court string cited a slew of cases concerning individual Indians. For example, the court relied on U.S. v. Farris, which applied the Organized Crime Control Act to Indians, not tribes. In that case, Judge Herbert Choy, writing for himself, noted that “federal laws generally applicable throughout the United States apply equally to Indians and their property interests.”

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The importance of the test is not its outcome but its effectuation of the federal trust responsibility and respect for the Constitution's textual commitment of Indian affairs to Congress, not agencies or courts. The Ninth Circuit shudders that a rule other than Coeur d'Alene means that "the enforcement of nearly all generally applicable federal laws would be nullified[.]" But the U.S. Supreme Court responds that that complaint is one for Congress, not the courts: "The special brand of sovereignty the tribes retain—both its nature and its extent—rests in the hands of Congress." If federal policy demands that that tribal sovereignty should be limited, that "is fundamentally Congress's job, not ours."  

D.C. Circuit Goes Rogue: the San Manuel Rule

The D.C. Circuit takes a third approach. For decades, the NLRB had refrained from exercising jurisdiction over tribes. It properly acknowledged its responsibility to assert jurisdiction over nontribal employers and individual Indians in Indian Country. But it also recognized that under established principles of federal Indian law, tribal governmental employers were "implicitly exempt as employers within the meaning of the Act." About 10 years ago, the NLRB...
decided to “adopt a new approach” fueled by the Tuscarora dictum and Coeur d’Alene exceptions. It sought to enforce an order against the San Manuel Band of Serrano Mission Indians for what it believed were the tribe’s unfair labor practices at the tribally owned casino that the tribe operated within its tribal territory. The question for the D.C. Circuit was whether to apply the silent National Labor Relations Act to the tribe in derogation of the tribe’s sovereign rights.

The tribe argued the clear-and-plain rule while the NLRB argued for its application of the Coeur d’Alene test. The D.C. Circuit believed that it saw “conflicting Supreme Court canons of interpretation” but determined that it need not choose between the clear-and-plain rule and the Tuscarora dictum with Coeur d’Alene exceptions. Instead, it articulated a sliding scale of tribal sovereignty with “traditional customs and practices” occurring within the reservation on one end and “commercial enterprises that tend to blur any distinction between tribal government and a private corporation” at the other. To determine whether a silent statute applies to a tribe, it places the challenged activity on this continuum and tries to quantify how much the statute would “impinge[e] upon protected tribal sovereignty.”

On the facts before it, it acknowledged that the tribe’s operation of its casino was governmental and that application of the National Labor Relations Act to the tribe “will impinge, to some extent” on tribal sovereignty, but it nevertheless applied the Act to the tribe. It reasoned that any impairment of tribal sovereignty was “negligible” and its effect on governmental revenue would be “unpredictable, but probably modest.”

No other circuit-court case has ever applied this rule. Rightly so. It essentially asks a court to determine whether a tribe’s activity is “Indian enough” and whether an incursion into tribal sovereignty or treaty rights is “big enough” to warrant protection. No Supreme Court precedent supports this result.

Sixth Circuit Drama: To Coeur d’Alene or Not To Coeur d’Alene

Against this backdrop, this year two parallel cases made their way to the U.S. Court of Appeals for the Sixth Circuit presenting substantially the same question: whether the National Labor Relations Act applies to the respective tribes. In both NLRB v. Little River Band of Ottawa Indians and Soaring Eagle Casino & Resort v. NLRB, the National Labor Relations Board used its modified Coeur d’Alene test to apply the Act to the tribes. In both, the tribes argued for application of the clear-and-plain rule.

The cases wound their way to the Sixth Circuit on parallel paths, and in June, while the Soaring Eagle panel still held its case under advisement, the Little River panel held that the Act applied to the Band. The lead opinion recognized that “federal Indian law and policy are areas over which the Board has no particular expertise.” The court nevertheless decided on a split 2-1 vote to follow the Board’s lead and “adopt the Coeur d’Alene framework to resolve that case.”

To reach this result, the Court focused on circuit-court treatment of statutes of general applicability and emphasized a body of Indian law addressed to whether tribes have jurisdiction over non-members, not whether federal actors have jurisdiction over tribes.

Judge McKeague, though, offered a full-throated dissent from the decision. He began that “[t]he sheer length of the majority’s opinion ... betrays its error.” He traced the fanciful path of the dictum-turned-doctrine and called Coeur d’Alene a house of cards. It should—and does—collapse when we notice what is inexplicably overlooked in the fifty-five years of adding card upon card to ‘a thing said in passing.’ Not only has the Supreme Court conspicuously refrained from approving it, but the ‘doctrine’ is exactly 180-degrees backward.

Moreover, Judge McKeague noted his belief that the Little River decision created a circuit split, perhaps signaling the need for en banc or certiorari review.
Barely three weeks later, the Soaring Eagle panel delivered their opinion. They similarly held that the NLRA applies to the tribe, but only did so because they were bound by Little River's adoption of Coeur d'Alene.\(^9\) The 34-page Soaring Eagle decision outlined why, if writing on a clean slate, we would conclude that, keeping in mind “a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area,” Santa Clara Pueblo, 436 U.S. at 60, the Tribe has an inherent sovereign right to control the terms of employment with nonmember employees at the Casino, a purely tribal enterprise located on trust land. The NLRA, a statute of general applicability containing no expression of congressional intent regarding tribes, should not apply to the Casino and should not render its no-solicitation policy void.\(^9\)

The opinion recognized that “[t]he Coeur d’Alene framework unduly shifts the analysis away from a broad respect for tribal sovereignty,”\(^100\) and doubted that “Tuscarora can bear the weight placed on it by the Coeur d’Alene framework or the strain of the Court’s more recent contrary pronouncements on Indian law.”\(^101\) But bound by Little River’s adoption of Coeur d’Alene, the court ruled against the tribe “[n]otwithstanding our preferred analytical framework,”\(^102\)

In the end, four of the six judges who considered the question would not apply the NLRA to tribes, but the law of the circuit is to do just that. The question is ripe for en banc resolution.

Resolution of the Circuit Split

With three tests across eight circuits, the question of whether Coeur d’Alene should supplant over a century of Indian law is ripe for high-court resolution. As the Sixth Circuit cases continue, the Supreme Court may well face a certiorari petition that notes the three different tests that circuit courts apply to the question of whether silent statutes of general application apply to Indian tribes. That certiorari petition would ask the Court to resolve the question once and for all.

Conclusion

Conflicting principles of Indian law created a split in courts’ treatment of whether a generally applicable statute that does not mention tribes nevertheless can apply to tribes. In the Second, Sixth (for now), Ninth, and Eleventh circuits, the tribe must essentially prove the federal statute doesn’t apply. In the Eighth and Tenth circuits, the plaintiff must prove that it does. The law is up in the air in the remaining circuits. Unless and until the Supreme Court settles the circuit split, knowing what (if any) test a plaintiff’s chosen venue applies may influence plaintiffs’ filing decisions and tribes’ defense strategies. Practitioners looking to sue a tribe must be mindful of this divergent law.\(^\odot\)

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Endnotes


\(^3\) See, e.g., Johnson v. McIntosh, 21 U.S. 543, 591 (1823).

\(^3\) See, e.g., Reich v. Mashantucket Sand & Gravel, 95 F.3d 174, 177 (2d Cir. 1996) (recognizing that the Ninth Circuit’s analysis “borrowed a presumption[] from dictum in [Tuscarora]”).

\(^2\) Tuscarora, 362 U.S. at 116.

\(^2\) Oklahoma Tax Comm’n v. United States, 319 U.S. 598 (1943) (holding that a state may impose inheritance tax on estate of tribal member); Superintendent of Five Civilized Tribes v. Comm’r, 295 U.S. 418 (1935) (holding that federal tax laws apply to earnings
of funds invested on behalf of individual tribe members); Chateau v. Burnet, 283 U.S. 691, 693 (1931) (applying the Internal Revenue Code to individual Indians because “[t]he language of [the Code] subjects the income of ‘every individual’ to tax” (emphasis added) (footnote omitted)).

39Reich v. Great Lakes Indian Fish & Wildlife Comm’n, 4 F.3d 490, 494-95 (7th Cir. 1993).

40Dion, 476 U.S. at 740-45.


42Merrion, 455 U.S. at 151-52 (1982).

43Id. at 152.


46Oneida Cnty., 470 U.S. at 248 n.21.

47Donovan v. Coeur d’Alene Tribal Farm, 751 F.2d 1113, 1114-15 (9th Cir. 1985).

48Id. at 1115.

49Id.

50The single case it cited regarding an Indian tribe, Confederated Tribes of Warm Springs Reservation of Oregon v. Kurtz, 691 F.2d 878 (9th Cir. 1982), concerned the peculiar situation of conflicting canons of interpretation. Because the tribe did not argue the clear-and-plain rule that protects tribes from congressional silence, the court followed the contrary tax canon that requires exemptions to be definitely expressed. Id. at 880-81. The result is less a matter of Indian law than tax law.

51U.S. v. Farris, 624 F.2d 890 (9th Cir. 1980).

52Id. at 893 (quotation omitted, emphasis added).

53Coeur d’Alene Tribal Farm, 751 F.2d at 1115.

54Id. at 1115-16 (emphasis added).

55Id. at 1116.

56Id.

57NLRB v. Chapa de Indian Health Program, Inc., 316 F.3d 995 (9th Cir. 2003).

58Reich v. Mashantucket Sand & Gravel, 95 F.3d 174 (2d Cir. 1996); Dept of Labor v. Occupational Safety & Health Review Comm’n, 935 F.3d 182 (9th Cir. 1991).

59Fla. Paraplegic Ass’n v. Miccosukee Tribe of Indians of Florida, 166 F.3d 1126 (11th Cir. 1999).

60Lumber Indus. Pension Fund v. Warm Springs Forest Prods. Indus., 939 F.2d 683 (9th Cir. 1991). The 2006 Pension Protection Act amended ERISA’s exception for governmental plans to “include[] a plan which is established and maintained by an Indian tribal government[,]” but before the amendment, ERISA made no mention of tribes. See Dobbs v. Anthem Blue Cross & Blue Shield, 600 F.3d 1275, 1279 (10th Cir. 2010).

61Dept of Labor v. OSHRC, 935 F.2d 182, 186-87 (9th Cir. 1991).


63Merrion, 455 U.S. at 144-47.


65Id. at #3.


67Snyder v. Navajo Nation, 382 F.3d 892, 895 (9th Cir. 2004).


69Smart v. State Farm Ins., 868 F.2d 929, 936 (7th Cir. 1989) (applying ERISA to a tribe).

70Reich v. Great Lakes Indian Fish & Wildlife Comm’n, 4 F.3d 490, 495 (7th Cir. 1993) (deciding not to apply Fair Labor Standards Act to a tribal entity). But see Menominee Tribal Tribes v. Solic., 601 F.3d 669, 671, 674 (7th Cir. 2010) (applying a Coeur d’Alene-type test to find that OSHA applied to tribal entity).


72See NLRB v. Pueblo of San Juan, 276 F.3d 1186 (10th Cir. 2002). Although some seek to limit the import of San Juan to right-to-work preemption questions, the Tenth Circuit characterized the case as holding that “Congressional silence exempted Indian tribes from the National Labor Relations Act.” Dobbs, 600 F.3d at 1284.


74EOC v. Fond du Lac Heavy Equip. and Constr. Co., 986 F.2d 346 (8th Cir. 1993); EEOC v. Cherokee Nation, 871 F.2d 937 (10th Cir. 1989).

75Phillips Petroleum Co. v. EPA, 803 F.2d 545 (10th Cir. 1986).

76Dobbs, 600 F.3d at 1279, 1283-85.

77Pascaraora, 362 U.S. at 118.


79U.S. Const. art. I, § 8, cl. 3 (Commerce Clause); U.S. Const. art. II, § 2, cl. 2 (Treaty Clause).

80OSHRC, 935 F.2d at 187.

81Bay Mills Indian Community, 134 S.Ct. at 2037.

82Id.

83E.g., Navajo Tribe v. NLRB, 288 F.2d 162, 164 (D.C. Cir. 1961) (upholding the Board’s application of the Act to a private employer despite the employer’s on-reservation location).


86San Manuel Indian Bingo and Casino v. NLRB, 475 F.3d 1306 (D.C. Cir. 2007).

87Id. at 1312-13.

88Id. at 1311.

89Id. at 1314.

90Id.


92Id. at 18.

93Id. at 12-13.

94E.g., id. at 8-11 (describing Montana v. United States, 450 U.S. 544 (1981) and its progeny), 17 (“[T]here is a stark divide between tribal power to govern the identity and conduct of its membership, on the one hand, and to regulate the activities of non-members, on the other.”).

95Id. at 25 (McKeague, J., dissenting).

96Id. at 38 (McKeague, J., dissenting).

97Id.

98Soaring Eagle Casino and Resort v. NLRB, Case No. 14-2405 (July 1, 2015), 17.

99Id. at 27.

100Id. at 32.