No. 19-3373

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

EUGENE SCALIA, SECRETARY OF LABOR,
U.S. DEPARTMENT OF LABOR

Petitioner,

v.

RED LAKE NATION FISHERIES, INC.,

Respondent.

On Petition for Review of Final Order of the Occupational Safety and Health Review Commission, OSHRC No. 18-0934

AMICUS BRIEF OF NCAI FUND IN SUPPORT OF RESPONDENT

Daniel David Lewerenz
NATIVE AMERICAN RIGHTS FUND
1514 P Street NW, Suite D
Washington, DC 20005
Tel: (202) 785-4166
Fax: (202) 822-0068

Counsel of Record for Amicus

Derrick Beetso
NCAI FUND
1516 P Street NW
Washington, DC 20005
Tel: (202) 466-7767
Fax: (202) 466-7797

Counsel for Amicus

CORPORATE DISCLOSURE STATEMENT

Pursuant to Local Rule 26.1A and Fed. R. App. P. 29(a)(4)(G), *Amicus Curiae* makes the following disclosure:

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

3) If there is a publicly held corporation which is not party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests: Counsel for *Amicus Curiae* is aware of no such corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES and CONGRESSIONAL MATERIALS

EXECUTIVE BRANCH MATERIALS

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae NCAI Fund is the nonprofit public-education arm of the National Congress of American Indians, the Nation's oldest and largest organization of American Indian and Alaska Native Tribal governments and their citizens. NCAI Fund's mission is to educate the public, and Tribal, Federal, and State governments, about Tribal self-government, treaty rights, and policy issues affecting Indian Tribes and Tribal enterprises, including the interpretation of statutes and their application to Indian Tribes and Tribal enterprises. *Amicus* has a substantial interest in preserving the unique government-to-government relationship between the United States and Indian Tribes, including the "duty of protection" the United States owes to Tribes, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 556 (1832) (Marshall, C.J.), and in ensuring that courts construe statutes consistent with Congress's well-established respect for Tribal self-determination. *See, e.g.*, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987) (recognizing "the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development") (quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983)).

[1] Undersigned counsel hereby certifies that: All parties have consented to *amicus curiae*'s submission of this brief; no counsel for a party authored this brief in whole or in part; and no person or entity, specifically no party's counsel, other than *amicus curiae*, its members, and its counsel, contributed money intended to fund the preparation or submission of this brief.

INTRODUCTION

This case invites this Court to construe statutory silence. The Occupational Safety and Health Act of 1970 ("OSHA" or the "Act")[2] is silent as to whether Indian Tribes and Tribal enterprises[3] are within its ambit. OSHA's legislative history, too, is silent on this issue.[4] The Secretary of Labor ("Secretary") construes Congress's silence as an implicit grant of authority to regulate sovereign Tribes. 29 C.F.R. 1975(4)(b)(3) ("provided they otherwise come within the definition of 'employer' as interpreted in this part … Indian tribes, whether on or off reservations … will be treated as employers subject to the requirements of the Act").[5] Now the Secretary, in an enforcement action against Red Lake Nation Fisheries, Inc. ("Fisheries")—a corporation wholly owned by the Red Lake Band of Chippewa Indians ("Red

---

[2] 84 Stat. 1590 (1970) (codified at 29 U.S.C. § 651, *et seq.*).

[3] A "tribal enterprise" is "an economic venture that is owned, sponsored, or run by a Native national government." DAVID KAMPER, THE WORK OF SOVEREIGNTY: TRIBAL LABOR RELATIONS AND SELF-DETERMINATION ON THE NAVAJO NATION 5 (2010).

[4] *See* STAFF OF S. SUBCOMM. ON LABOR, COMM. ON LABOR AND PUBLIC WELFARE, 92D CONG., 1ST SESS., LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970 (S. 2193, P.L. 91-596) (Comm. Print 1971). In almost 1,300 pages of compiled legislative history, the word "Indian" appears only once: on page 183, in the text of an existing statute for the protection of officers and employees of the United States, which includes "any officer or employee of the Indian field service of the United States." *Id.* at 182-83.

[5] This is merely an "interpretive rule[] and general statement[] of policy," 37 Fed. Reg. 929, 929 (Jan. 21, 1972), and is not entitled to *Chevron* deference. *Christensen v. Harris County*, 599 U.S. 576, 587 (2000) (citing *Reno v. Koray*, 515 U.S. 50, 61 (1995)).

Lake"), that operates only on the Red Lake Reservation ("Reservation"), and employs only Red Lake members—asks this Court to do the same. *See generally* Secretary's Br.

This Court, however, taking its direction from the Supreme Court, understands that Tribes' sovereign authority to "regulat[e] their internal and social relations," *EEOC v. Fond du Lac Heavy Equip. and Const. Co.*, 986 F.2d 246, 248 (8th Cir. 1993) (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978)), provides a critical "backdrop" against which to analyze claims that a general statute applies to Indian Tribes and Tribal enterprises. *United States v. Winnebago Tribe of Neb.*, 542 F.2d 1002, 1004-05 (8th Cir. 1976) (citing *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 172-73 (1973)). Against that backdrop—and notwithstanding the Supreme Court's statement in *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960), that general statutes apply to Indians and their property interests—this Court will construe a general statute to impinge on Tribal sovereign prerogatives only upon a "clear and plain" showing of Congress's intent to do so. *Fond du Lac*, 986 F.2d at 248 (quoting *United States v. Dion*, 476 U.S. 734, 738 (1986). Because OSHA contains no such clear and plain showing, this Court should affirm the ALJ's holding that OSHA does not apply to the Fisheries.

This Court also should reject the "governmental-vs.-commercial" dichotomy that the Secretary urges, Secretary's Br. 28-39, as have both this Court, *Fond du Lac*, 986 F.2d at 249 & n.3, and the Supreme Court. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 797-803 (2014). Such a distinction runs counter to Congressional policy, which has long encouraged the development of Tribal enterprises.

ARGUMENT

I. In OSHA, Congress did not express the "clear and plain" intent necessary to abridge a Tribe's right to self-government.

A. Tribal sovereignty is the "backdrop" against which OSHA's scope must be considered.

"Indian tribes are 'distinct, independent political communities, retaining their original natural rights' in matters of self-government." *Santa Clara Pueblo*, 436 U.S. at 55 (quoting *Worcester*, 31 U.S. at 559); *Fond du Lac*, 986 F.2d at 248 ("Indian tribes possess the 'inherent powers of a limited sovereignty which has never been extinguished.'") (quoting *United States v. Wheeler*, 435 U.S. 313, 322 (1978)). "The sovereignty retained by tribes includes 'the power of regulating their internal and social relations.'" *Mescalero Apache*, 462 U.S. at 332 (quoting *United States v. Kagama*, 118 U.S. 375, 381-82 (1886)); *see also Williams v. Lee*, 358 U.S. 217, 221-22 (1959) ("the internal affairs of the Indians remain[] exclusively within the jurisdiction of … tribal government"). "As a necessary implication of this broad

federal commitment," the Supreme Court has held that Tribal sovereign powers include authority "to undertake and regulate economic activity within the reservation." *Mescalero Apache*, 462 U.S. at 335. Accordingly, "traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important 'backdrop' … against which vague or ambiguous federal enactments must always be measured." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980) (quoting *McClanahan*, 411 U.S. at 172); *Winnebago*, 542 F.2d at 1004-05.

This backdrop of Tribal sovereignty informs statutory construction in two important ways. First, although Congress has plenary authority to regulate Indian commerce, "unless and 'until Congress acts, the tribes retain' their historic sovereign authority." *Bay Mills*, 572 U.S. at 788 (quoting *Wheeler*, 435 U.S. at 323); *see also Wheeler*, 435 U.S. at 323 ("Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute"). Thus, a statute should be construed to interfere with Tribal sovereignty *only* upon a showing of "clear and plain" Congressional intent to do so. *See Dion*, 476 U.S. at 738 (requiring "clear and plain" statement for abrogation of treaty rights); *Winnebago*, 542 F.2d 1005 (requiring a "clear expression of congressional purpose" to abrogate treaty rights). Ordinarily such intent must be plain on the face of a statute, *see Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979) ("Absent

explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights ….”), but it may be found in a statute’s legislative history. *Dion*, 476 U.S. at 739-40; *Fond du Lac*, 986 F.2d at 248 (“A clear and plain intent may be demonstrated by an ‘express declaration’ in the statute, by the ‘legislative history,’ and by ‘surrounding circumstances.’”).[6] This requirement for a clear showing of Congressional intent “reflects an enduring principle of Indian law: … courts will not lightly assume that Congress in fact intends to undermine Indian self-government.” *Bay Mills*, 572 U.S. at 790.

Second, because courts require a clear showing of Congressional intent, any ambiguity in the statute’s text or legislative history must be construed in the Tribe’s favor. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 152 (1982) (“‘[a]mbiguities in federal law have been construed generously in order to comport with … traditional notions of sovereignty and with the federal policy of encouraging tribal independence’”) (quoting *White Mountain Apache*, 448 U.S. at 143-44 (alterations in *Jicarilla Apache*)); *Fond du Lac*, 986 F.2d at 250 (“ambiguities of congressional intent must be resolved in favor of the tribal sovereignty.”); *Winnebago*, 542 F.2d at

[6] Although this Court has recognized legislative history as a source in which to find Congress’s intent, courts have moved away from this approach, particularly where—as here—the legislative history is silent as to the relevant question. *See, e.g.*, *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1143 (2018) (“If the text is clear, it needs no repetition in the legislative history; and if the text is ambiguous, silence in the legislative history cannot lend any clarity.”).

1006 ("doubtful expression[s] of congressional intent must be resolved in favor of the Tribe.").

This backdrop illuminates why, contrary to the Secretary's assertions, *Tuscarora* is of little help in resolving this case.

B. This Court has always recognized the limited nature of *Tuscarora*.

Red Lake ably explained the Supreme Court's decision in *Tuscarora*, Red Lake Br. 35-40, which *amicus* need not repeat here. Suffice to say the Federal Power Act,[7] unlike OSHA, was not silent as to its applicability to Indian Tribes—it expressly included Indian reservations in its definition of "reservations," and provided that such lands could be used for power purposes only if doing so would "not interfere or be inconsistent with the purpose for which the reservation was created or acquired." *Tuscarora*, 362 U.S. at 110-11 (citing 16 U.S.C. § 796(2) (quoting 16 U.S.C. § 797(e)). The Court held that the lands at issue in that case were not reservation lands. *Id.* at 115. Only then, in asking whether some other principle not provided in the statute might protect the Tuscarora's lands, did the Court state that "a general statute in terms applying to all persons includes Indians and their property interests." *Id.* at 116.

The Secretary argues for an expansive view of *Tuscarora*, Secretary's Br. 19-26, first articulated in the 1972 policy statement. *See* 29 C.F.R. 1975.4(b)(3) (citing

[7] 41 Stat. 1063 (codified at 16 U.S.C. § 791a, *et seq.*).

Tuscarora, 362 U.S. at 115-18).[8] The Circuit Courts are split on this question.[9] This notwithstanding that the *Tuscarora* statement is "in the nature of dictum and entitled to little precedential weight." *Nat'l Labor Relations Bd. v. Little River Band of Ottawa Indians Tribal Gov't*, 788 F.3d 537, 557 (6th Cir. 2015) (McKeague, J., dissenting).[10] "Worse," as the Secretary employs it, "it is dictum taken out of context," *Perez v. Mortgage Bankers Association*, 575 U.S. 92, 105 (2015), that "offers little authoritative guidance on the present jurisdictional question." *Little River*, 788 F.3d at 558 (McKeague, J., dissenting).

[8] The policy statement also cites *Navajo Tribe v. NLRB*, 288 F.2d 162, 164-65 (D.C. Cir. 1961). However, the holding in that case—that the National Labor Relations Board could regulate a private non-Indian employer on an Indian reservation—offers no support to the Secretary's assertion that OSHA authorizes him to regulate Indian tribes and tribal enterprises on Indian reservations.

[9] For Circuit Courts holding that OSHA applies to Tribal enterprises, *see Menominee Tribal Enters. v. Solis*, 601 F.3d 669, 670, 674 (7th Cir. 2010) (Tribal sawmill); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 177, 182 (2d Cir. 1996); *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985); *but see Donovan v. Navajo Forest Prod. Indus.*, 692 F.2d 709, 711-12 (10th Cir. 1982) (adopting limited view of *Tuscarora*, holding OSHA inapplicable to Tribal sawmill).

[10] Even those courts that have "followed" *Tuscarora* describe the statement about general statutes as dictum. *Mashantucket*, 95 F.3d at 177 (describing *Coeur d'Alene* test as "a presumption[] from dictum in [*Tuscarora*]"); *Coeur d'Alene*, 751 F.2d at 1115 ("The farm may be correct when it argues that this language from *Tuscarora* is dictum, but it is dictum that has guided many of our decisions." (collecting cases)).

This Court has always recognized the limited nature of the Supreme Court's statement in *Tuscarora*.[11] In *United States v. White*, 508 F.2d 453 (8th Cir. 1974), a Red Lake member was charged with violating the Bald and Golden Eagle Protection Act ("BGEPA").[12] *Id.* at 454. This Court acknowledged *Tuscarora*'s "general rule that congressional enactments, in terms applying to all persons, includes Indians and their property interests." *Id.* at 455. But it did so with qualifications. It observed that the *Tuscarora* Court "was careful to note that the language of the congressional enactments specifically dealt with Indian property and that the 'lands in question [were] not subject to any treaty between the United States and the Tuscaroras.'" *Id.* at 455 n.2. And it observed that "areas traditionally left to tribal self-government … have enjoyed an exception from the general rule." *Id.* at 455.[13] Thus, if the BGEPA was to diminish Red Lake's treaty hunting rights, "it was incumbent upon Congress

[11] This Court has followed *Tuscarora* in cases concerning areas of Federal law that are entitled to a greater presumption of applicability. *See United States v. Wadena*, 152 F.3d 831, 841-42 (8th Cir. 1998) (criminal law); *Stone v. United States*, 506 F.2d 561, 563 (8th Cir. 1974) (same); *Holt v. Comm'r of Internal Revenue*, 364 F.2d 38, 40 (8th Cir. 1966) (federal tax law). None of these cases contained the detailed discussion of *Tuscarora*'s limitations provided in the cases discussed below.

[12] 54 Stat. 250 (1940) (codified as amended at 16 U.S.C. § 668, *et seq.*).

[13] In explaining which "areas [are] traditionally left to tribal self-government," this Court pointed *both* to areas "most often the subject of treaties," *id.*, *and* to the *McClanahan* Court's description of Tribes as "'a separate people, with the power of regulating their internal and social relations.'" *Id.* at 455 n.1 (quoting *McClanahan*, 411 U.S. at 173).

to *expressly* abrogate or modify the spirit of the relationship between the United States and the Red Lake Chippewa Indians on their reservation." *Id.* at 457-58 (emphasis added).[14]

Two years later, this Court held that the Flood Control Act of 1944 ("FCA")[15] did not authorize taking the Winnebago Tribe's lands, *Tuscarora* notwithstanding. *Winnebago*, 542 F.2d at 1004. The Court began with the "backdrop" of Tribal sovereignty, *id.* at 1004-05, and observed that "the general rule of *Tuscarora* does not apply when the interest sought to be affected is reserved to the Indians by treaty." *Id.* at 1005 (citing *White*, 508 F.2d at 455). Where treaty rights were at stake, the Court said, they "will not be deemed to have been abrogated or modified absent a clear expression of congressional purpose, for 'the intention to abrogate or modify a treaty is not to be lightly imputed to Congress.'" *Id.* (quoting *Menominee*, 391 U.S. at 413).[16]

---

[14] Finding no such express language, this Court refused to construe "congressional silence … 'as a backhanded way of abrogating the hunting … rights of these Indians,'" *id.* at 458 (quoting *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412 (1968) (second alteration in *White*)), and affirmed the district court's dismissal of the charge. *Id.* at 459.

[15] 58 Stat. 887 (1944).

[16] With no evidence of Congressional intent to take Winnebago lands in the FCA's text, and ambiguity in the legislative history, "[t]his doubtful expression of congressional intent must be resolved in favor of the tribe." *Id.* at 1005-06.

Finally, and most relevant to this case, *Fond du Lac* presented the question of whether a Tribal enterprise of the Fond du Lac Band of Lake Superior Chippewa ("Fond du Lac") was subject to the Age Discrimination in Employment Act ("ADEA").[17] 986 F.2d at 248. Again, this Court recognized the "general rule in *Tuscarora*," but said that rule "does not apply when the interest sought to be affected is a specific right reserved to the Indians." *Id.* at 248 (citing *Winnebago*, 542 F.2d at 1005). "Specific Indian rights will not be deemed to have been abrogated or limited absent a 'clear and plain' congressional intent." *Id.* (citing *Dion*, 476 U.S. at 738). Notably, the Court did not limit this exception to *Tuscarora*'s "general rule" to consideration of treaty rights, but more broadly weighed the ADEA against Fond du Lac's "[i]nherent … quasi-sovereignty" and "right to self-governance"—i.e., "the tribe's power to 'make their own substantive law in internal matters and to enforce that law in their own forums.'" *Id.* at 249 (quoting *Santa Clara Pueblo*, 436 U.S. at 55-56).[18] Thus, "some affirmative evidence of congressional intent, either in the

[17] 81 Stat. 605 (1967) (codified at 29 U.S.C. § 621 *et seq.*).

[18] Red Lake correctly notes that a Tribe's right to self-governance includes the right to exclude. Red Lake Br. 40-44. The Secretary argues that Red Lake "has not pointed to any specific treaty language" that would sustain such a right. Secretary's Br. 41. However, both the Supreme Court and this Court have recognized a Tribe's right to exclude even in the absence of a treaty. *See, e.g.*, *Jicarilla Apache*, 455 U.S. at 133, 141 (on reservation created by Executive Order, "a hallmark of Indian sovereignty is the power to exclude non-Indians from Indian lands"); *Attorney's Process and Investigation Servs., Inc. v. Sac & Fox Tribe of Miss. in Iowa*, 609 F.3d 927, 940 (8th Cir. 2010) (recognizing on Sac and Fox lands "[a] 'tribe's 'traditional and undisupted power to exclude persons' from tribal

language of the [ADEA] or its legislative history, is required to find the requisite 'clear and plain' intent to apply the statute to Indian tribes." *Id.* at 250 (citing *Dion*, 476 U.S. at 739-40).[19]

This narrow view of *Tuscarora* is entirely consistent with Supreme Court precedent. Since deciding *Tuscarora*, the Supreme Court has never once cited its "general rule";[20] instead, the Court has repeatedly stated that Tribal sovereign prerogatives may be infringed only upon a demonstration of clear Congressional intent.[21] "Indeed, the Supreme Court recently affirmed the 'enduring principle of

---

land'") (quoting *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 335 (2008) (quoting in turn *Duro v. Reina*, 495 U.S. 676, 696 (1990))); *Sac and Fox Tribe of Miss. in Iowa v. Licklider*, 576 F.2d 145, 147-48 & nn.3-4 (8th Cir. 1978) (Sac and Fox purchased lands which were taken into trust by Iowa and later tendered to the United States).

[19] For a discussion of the specific analysis in *Fond du Lac*, *see infra* Part I.C.

[20] *See Little River*, 788 F.3d at 556 (McKeague, J., dissenting) (*Coeur d'Alene* and its progeny utilize a framework "that has never been approved by the Supreme Court").

[21] These cases span a wide variety of contexts, including treaty rights, *e.g. Herrera v. Wyoming*, 139 S. Ct. 1686, 1696 (2019) ("If Congress seeks to abrogate treaty rights, 'it must clearly express its intent to do so.'") (quoting *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999)); *see also Dion*, 476 U.S. at 738-40; *Fishing Vessel Ass'n*, 443 U.S. at 690; *Menominee*, 391 U.S. at 413; reservation disestablishment and diminishment, *e.g. Nebraska v. Parker*, 136 S. Ct. 1072, 1078-79 (2016) ("Only Congress can divest a reservation of its land and diminish its boundaries, and its intent to do so must be clear.") (internal quotation and citation omitted); *see also Solem v. Bartlett*, 465 U.S. 463, 470 (1984); and tribal sovereign immunity, *e.g.*, *Bay Mills*, 572 U.S. at 790 ("the baseline position, we have often held, is tribal immunity; '[t]o abrogate [such] immunity, Congress must 'unequivocally' express that purpose.'") (quoting *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411,

Indian law' that tribal sovereignty is retained unless and until Congress clearly indicates intent to limit it." *Little River*, 788 F.3d at 557 (McKeague, J., dissenting) (quoting *Bay Mills*, 572 U.S. at 790).

The Secretary's approach prevailed in the Second, Seventh, and Ninth Circuits (but not the Tenth Circuit), *see supra* n.9, but is inconsistent with Supreme Court precedent and this Court's decision in *Fond du Lac*. Because this case is so squarely on all fours with *Fond du Lac*, this Court should reject the Secretary's approach.

C. The ALJ correctly held that *Fond du Lac* controls and OSHA cannot apply to the Fisheries.

The Secretary argues at length that *Fond du Lac* should not control in this case. Secretary's Br. 26-39. But his arguments ignore the remarkable factual similarities in the cases, the plain text of *Fond du Lac*, and the precedents upon which it relied.

The core of *Fond du Lac* is set forth in the following two paragraphs, from which the Secretary cherry picks to avoid those passages (here in *italics*) that undermine his case:

> *The facts in this case reveal that this dispute involves a strictly internal matter. The dispute is between an Indian applicant and an*

---

418 (2001) (quoting, in turn, *Santa Clara Pueblo*, 436 U.S. at 58)); tribal civil jurisdiction, *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987); and tribal taxing authority, *Jicarilla Apache*, 455 U.S. at 149 n.14. None of these cases cites to *Tuscarora*.

> *Indian tribal employer. The Indian applicant is a member of the tribe, and the business is located on the reservation. Subjecting such an employment relationship between the tribal member and his tribe to federal control and supervision dilutes the sovereignty of the tribe.* The consideration of a tribe member's age by a tribal employer should be allowed to be restricted (or not restricted) by the tribe in accordance with its culture and traditions. Likewise, disputes regarding this issue should be allowed to be resolved internally within the tribe. Federal regulation of the tribal employer's consideration of age in determining whether to hire the member of the tribe to work at the business located on the reservation interferes with an intramural matter that has traditionally been left to the tribe's self-government.
>
> *Because the tribe's specific right of self-government would be affected, the general rule of applicability does not apply. Therefore, we find that the ADEA, as a statute of general applicability, does not apply to the Band absent a clear and plain congressional intent.*

Fond du Lac, 986 F.2d at 249 (citations and footnote omitted) (emphasis on text omitted from Secretary's Br.).

The Secretary, quoting selectively from passage above, also cherry picks *Fond du Lac*'s statement that "the ADEA does not apply to *the narrow facts of this case*,"[22] Secretary's Br. 35 (quoting *Fond du Lac*, 986 F.2d at 251 (emphasis in Br.)), and argues that *Fond du Lac* applies only to cases in which the statute would interfere with "tribal custom or practice." *Id.* at 36. But this Court never said that Fond du Lac *had* a custom or practice concerning age at hiring.

So what *did* the *Fond du Lac* Court say?

[22] For the full quotation, *see infra* p. 15-16.

- Tribes have the inherent sovereign authority to regulate internal matters, which include commercial matters. 986 F.2d at 248, 249 n.3.
- An employment dispute between a Tribe and one of its members is an internal matter. *Id.* at 249.
- Such internal matters are "traditionally … left to the tribe's self-government," *id.*, and are not subject the "general rule in *Tuscarora*," because "[s]pecific Indian rights" like the right of Tribal self-government "will not be deemed to have been abrogated or limited absent a 'clear and plain' congressional intent.'" *Id.* at 248.
- "[S]ome affirmative evidence of congressional intent, either in the language of the statute or its legislative history, is required to find the requisite 'clear and plain' intent to apply the statute to Indian tribes." *Id.* at 250.
- The ADEA's text "does not expressly refer to Indians," and its legislative history "contains no reference regarding its applicability to Indian tribes." *Id.* at 250.

The *Fond du Lac* Court's conclusion: In the absence of any affirmative evidence of Congress's intent that the ADEA should apply to Indian tribes, "we find that the ADEA does not apply to the narrow facts of this case *which involve a member of the tribe, the tribe as an employer, and on the reservation employment, and we affirm*

the district court's dismissal of this case." *Id*. at 251 (emphasis on text omitted from Secretary's Br.).

Now apply that analysis to this case: This case concerns an employment matter between the Tribe, as an on-Reservation employer, and its members. Red Lake has inherent sovereign authority to regulate internal matters, including commercial matters. Thus, this matter should be left to Red Lake's self-government absent a "clear and plain" showing, by affirmative evidence, of Congressional intent otherwise. There is no such evidence in OSHA's text or its legislative history. Following *Fond du Lac*, then, OSHA does not apply to the Fisheries.

That is precisely the analysis the ALJ performed, reaching the same conclusion. Secretary's Br. Addendum 13-20. Because the ALJ's decision properly followed *Fond du Lac*, this Court should affirm.

II. This Court and the Supreme Court have rejected the Secretary's proposed "governmental-vs.-commercial" dichotomy, which if embraced would contravene Congressional policy.

The "governmental-vs.-commercial" dichotomy that the Secretary urges has been repeatedly rejected by the Supreme Court, *see Bay Mills*, 572 U.S. at 797-803, and was rejected by this Court in *Fond du Lac*. 986 F.2d at 249 & n.3. These clear statements of law are reason enough to reject this framework, which also is contrary to Congressional policy.

A. *Fond du Lac* implicitly rejected the "governmental vs. commercial" dichotomy, consistent with Supreme Court precedent.

The Secretary acknowledges that the Fisheries is incorporated under Tribal law, wholly owned and operated by Red Lake for the benefit of Red Lake and its members, and employs only Red Lake members. Secretary's Br. 9. Nevertheless, the Secretary argues that this Court should distinguish between Tribes' "governmental" and "commercial" activities, with the latter subject to OSHA. *Id.* at 28-34.[23] The Secretary does this without a single citation to *Fond du Lac*. *Id.* Presumably that is because there is no support in *Fond du Lac* for such a distinction.

For example, the Fond du Lac Heavy Equipment and Construction Co. "was located on the [Fond du Lac] reservation and occasionally did work off the reservation land." 948 F.2d at 248. That did not stop the Court from analyzing the case through the lens of Fond du Lac's sovereignty and right of self-government. *Id.* at 249 ("[T]he Band has the implicit right to self-governance."). The Secretary offers no explanation why, if the starting point in *Fond du Lac* was Tribal sovereignty and self-government, it should be any different for the Fisheries.

[23] The Secretary's characterization of the governmental-vs.-commercial dichotomy as the "consensus view," Secretary's Br. 34, overstates the case. The Tenth Circuit joins this Court in granting Tribal enterprises the same deference afforded to Tribes themselves. *See*, *e.g.*, *Navajo Forest Prod.*, 692 F.2d 709. The First, Third, Fourth and Fifth Circuits appear not to have addressed the question.

In fact, the *Fond du Lac* Court implicitly rejected the very distinction that the Secretary urges. In a passage quoted by the Secretary, the Court held that applying the ADEA to the Tribal enterprise would "interfere with an intramural matter that has traditionally been left to the tribe's self-government." *Id.* at 249 (quoted in Secretary's Br. 35). A footnote to that sentence contains the following quotation:

> Even in matters involving *commercial* and domestic relations, we have recognized that "subject[ing] a dispute arising on the reservation among reservation Indians" to a forum other than their own may undermine the authority of the tribal court and "infringe on the right of the Indians to govern themselves."

Id. at 249 n.3 (quoting *Santa Clara Pueblo*, 436 U.S. at 59) (internal citations omitted) (emphasis added in *Fond du Lac*) (alteration in *Santa Clara Pueblo*). Thus the *Fond du Lac* Court believed a Tribe's right to self-government encompassed the right to resolve commercial matters.

Which should come as no surprise, because the Supreme Court in a series of Tribal sovereign immunity cases has refused to treat Tribal enterprises differently from Tribes themselves. In *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, the Court was not persuaded by Oklahoma's argument that the Band's convenience store should not share the Band's sovereign immunity. 498 U.S. 505, 510 (1991). In *Kiowa Tribe of Okla. v. Mfg. Technologies, Inc.*, the Court refused to "confine immunity from suit … to governmental activities," noting that "our precedents have not drawn [this] distinction." 523 U.S. 751, 755 (1998).

Most recently, in *Bay Mills*, the Court extensively reviewed the precedent and again held that Tribal sovereign immunity encompasses Tribes' commercial activities. 572 U.S. at 797-803.[24] Tribal enterprises "cannot be understood as mere profit-making ventures that are wholly separate from governmental functions." *Bay Mills*, 572 U.S. at 810 (Sotomayor, J., concurring).

In light of this Court's and Supreme Court precedent, the Secretary's attempt to paint the Fisheries as "commercial" is bankrupt.

B. Such a dichotomy would be contrary to Congressional policy, which has long encouraged Tribal enterprises as critical components of Tribal economic development and Tribal self-government.

For almost a century, Congress has enacted legislation to promote tribal economic development. From the Indian Reorganization Act of 1934 ("IRA")[25] to

[24] The Supreme Court likewise rejects the governmental-vs.-commercial distinction with regard to State sovereign interests as "unsound in principle and unworkable in practice." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546-47 (1985). *See also*, *Coll. Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 684 (1999) (State sovereign immunity is no less "robust" where State activity is "undertaken for profit, … is traditionally performed by private citizens and corporations, and … otherwise resembles the behavior of 'market participants'"); *Reeves, Inc. v. Stake*, 447 U.S. 429, 442 n.16 (1980) ("[A] State's project is as much a legitimate governmental activity whether it is traditional, or akin to private enterprise, or conducted for profit.").

[25] 48 Stat. 984 (1934); *see Morton v. Mancari*, 417 U.S. 535, 542 (1974) (IRA's "overriding purpose … was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically."); see also KAMPER at 52 (with sections covering Tribal governance and Tribal enterprise, IRA "sought to intricately combine and sustain the traditional, governmental, and economic lives of tribal communities").

the Indian Gaming Regulatory Act ("IGRA"),[26] Congress has encouraged Tribal economic development through the development of Tribal enterprise,[27] which it views as "governmental" rather than "commercial." *See, e.g.*, S. Rep. 100-446, 100th Cong., 2d Sess. (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3082 ("The Committee views tribal gaming as governmental gaming, the purpose of which is to raise revenues for member services."). Consequently, "tribal governments directly control or participate in commercial activities more frequently than other types of governments[.]" *Breakthrough Mgmt. Grp. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173, 1183 (10th Cir. 2010).

The need for Tribal enterprise is critical. "Tribal governments generally cannot raise revenue the way most governments do, through taxes." KAMPER at 213 n.5; *Bay Mills*, 572 U.S. at 813-14 (Sotomayor, J., concurring) (many Tribes lack a viable tax base). Consequently, "tribal business operations are critical to the goals of tribal self-sufficiency … due in large part to the insuperable … barriers Tribes

[26] 102 Stat. 2467 (1988) (codified at 25 U.S.C. § 2701, *et seq.*); *Bay Mills*, 572 U.S. at 810 (Sotomayor, J., concurring) ("Congress's purpose in enacting IGRA was 'to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments.'" (quoting 25 U.S.C. § 2702(1))).

[27] *See, e.g.*, *Cabazon*, 480 U.S. at 216; *Mescalero Apache*, 426 U.S. at 334-35, 335 n.17 (1983) (collecting statutes in furtherance of those goals); *White Mountain Apache*, 448 U.S. at 143 ("a number of congressional enactments demonstrat[e] a firm federal policy of promoting tribal self-sufficiency and economic development").

face in raising revenue through traditional means." *Id.* at 810. Moreover, many Tribes face unemployment rates as high as 80 percent. ROBERT J. MILLER, RESERVATION CAPITALISM: ECONOMIC DEVELOPMENT IN INDIAN COUNTRY 1 (2012). "A society cannot function with 20 to 80 percent unemployment. It is a recipe for disaster for community building and for preserving a nation and a culture." *Id.* at 2. And "[s]elf-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members." *Cabazon*, 480 U.S. at 219.

Tribal enterprises engage in a wide variety of activities. Best known are gaming, *e.g. Bay Mills*, 572 U.S. at 786; *Cabazon*, 480 U.S. at 205; and enterprises like the Fisheries that manage Tribal natural resources. But Tribes also operate retail, *e.g.*, *Citizen Band Potawatomi*, 498 U.S. at 507; outdoor recreation facilities, *e.g. Mescalero Apache*, 462 U.S. at 327; *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 146 (1973); timber and lumber, *e.g. White Mountain Apache*, 448 U.S. at 136, 137-38; *Menominee Tribal Enterprises*, 601 F.3d at 670; *Navajo Forest Prod.*, 692 F.2d at 710; and construction, *e.g. Fond du Lac*, 986 F.2d at 248; *Mashantucket*, 95 F.3d at 175; among others.

Tribal enterprises serve two economic functions. First, they "provide employment opportunities for members of the Tribe," which without Tribal enterprises often are lacking. *Mescalero Apache*, 462 U.S. at 327; *see also* KAMPER

at 8 ("[A] major goal of tribal economic development is to reduce reservation unemployment."). The Fisheries often directly employed more than 200 Red Lake members, and hundreds more directly benefited from the operation, ANTON TREUER, WARRIOR NATION: A HISTORY OF THE RED LAKE OJIBWE 222, 224 (2015), because "the labor of fishing was shared by so many relatives. The income paid to two hundred members likely benefited a 'thousand members of the band,' according to one important tribal official." BRENDA CHILD, MY GRANDFATHER'S KNOCKING STICKS: OJIBWE FAMILY LIFE AND LABOR ON THE RESERVATION 90 (2014). Tribal enterprises have reduced unemployment on innumerable reservations. MILLER at 72. Perhaps as important, they have allowed reservation Indians the means to remain in their communities, and even provided opportunities for off-reservation Indians to return. *Id.* at 72, 87; Nicholas G. Rosenthal, *The Dawn of a New Day? Notes on Indian Gaming in Southern California*, *in* NATIVE PATHWAYS: AMERICAN INDIAN CULTURE AND ECONOMIC DEVELOPMENT IN THE TWENTIETH CENTURY 91, 103 (Brian Hosmer and Colleen O'Neill eds. 2004) [hereinafter NATIVE PATHWAYS].

Second, Tribal enterprises are a critical source of Tribal government revenues, *Bay Mills*, 572 U.S. at 810 (Sotomayor, J., concurring), which are essential to fund day-to-day government operations and services. *See Mescalero Apache*, 462 U.S. at 327 (Tribal enterprise "generates income which is used to maintain the tribal government and provide services to Tribe members"); *White Mountain Apache*, 448

U.S. at 138 ("The revenue used to fund the Tribe's governmental programs is derived almost exclusively from tribal enterprises."). Such revenues fund Tribal courts; police, fire, and ambulance services; education and job training; health care; child welfare and elder care services; natural resources management; and utilities (electricity, sewage, telecommunications, and water). And when Tribal enterprise revenues are threatened, Tribes' governmental services suffer. Gregory Scruggs et al., *Vulnerable American Indians are 'preparing for the worst'*, WASH. POST, Apr. 5, 2020, at A21, *available with alternative headline at* https://www.washingtonpost.com/climate-environment/2020/04/04/native-american-coronavirus/, ("'If you imagine a state's entire tax base turning off like a switch, that's what's happened to us,' [Cherokee Nation Principal Chief Chuck] Hoskin said. 'Our revenue stream for education, health care, housing—all of that is tied to our businesses.'"). In addition, many Tribes use revenue from a successful enterprise to seed additional Tribal enterprises, thus multiplying the effects on both employment and Tribal revenue. *See, e.g.*, Paul C. Rosier, *Searching for Salvation and Sovereignty: Blackfeet Oil Leasing and the Reconstitution of the Tribe*, *in* NATIVE PATHWAYS 27, 37 (Blackfeet Tribe reinvested oil money into irrigation); David La Vere, *Minding Their Own Business: The Kiowa-Comanche-Apache Business Committee of the Early 1900s*, *in* NATIVE PATHWAYS 52, 57 (Kiowa-

Comanche-Apache used revenue from leasing Tribal lands to fund cattle herds for Tribal members).

Just as important, many Tribal enterprises help maintain and promote a Tribe's culture. The Fisheries is a classic example. Historian Brenda Child, herself a Red Lake member, describes the Fisheries as an "institution[] of cultural heritage and self-government" on the Reservation, where "spiritual leaders, housewives, hereditary chiefs, and officers of the tribal council, had nets hanging in their yard." CHILD at 40, 42. In fact, the desire to protect Red Lake's land, water, and resources—including fish—was a primary impetus for organizing Red Lake's Tribal government and drafting its constitution. *Id.* at 101; TREUER at 122. Likewise at Menominee, where that Tribe's first constitution was a product of their desire to ensure that they alone would reap the benefit of their forest and the Tribal labor that went into managing it. BRIAN C. HOSMER, AMERICAN INDIANS IN THE MARKETPLACE: PERSISTENCE AND INNOVATION AMONG THE MENOMINEES AND METLAKATLANS, 1870-1920 81 (1999). The success of the Menominee sawmill—dismissed by the Seventh Circuit as "just a sawmill, a commercial enterprise," Menominee Tribal Enterprises, 601 F.3d at 671—helped the Menominees stave off the allotment of their reservation, and allowed them a means of resisting the forces of assimilation. Stephen J. Herzberg, *The Menominee Indians: From Treaty to Termination*, 60 WIS. MAG. HIST. 266, 275 (1977); Alexandra Harmon et al.,

Interwoven Economic Histories: American Indians in a Capitalist America, 98 J. AM. HIST. 698, 713 (2011) (describing the Menominee timber enterprise as "the basis for purposeful modernization"). In Tribes as diverse as the Blackfeet of Montana and the Seminole of Florida, per capita distribution of Tribal enterprise revenue filled the place of traditional "giveaways" used to care for needy Tribal members. Rosier at 45 (Blackfeet); Jessica R. Cattelino, *Fungibility: Florida Seminole Casino Dividends and the Fiscal Politics of Indigeneity*, 111 AM. ANTHRO. 190, 195 (2009) (Seminole). To call these enterprises merely "commercial in nature," Secretary's Br. 33-34, misses the point.

Congress encourages Tribal enterprise for all of these reasons—to sustain Tribal governments, to develop Tribal economies, and to preserve Tribal culture. And Congress knows that Tribal enterprise is more than merely "commercial."

CONCLUSION

"If Congress had authorized this [enforcement action by the Secretary, Red Lake] would have no valid grounds to object. But Congress has not done so: … [and w]e will not rewrite Congress's handiwork." *Bay Mills*, 572 U.S. at 804 (refusing to alter contours of Tribal sovereign immunity in IGRA). In enacting OSHA, Congress gave no indication that it intended the Act to apply against Indian Tribes and Tribal enterprises. Because of the special consideration that both Congress and

this Court have given to protecting and preserving Tribal sovereignty, and because interfering with employment matters for Tribal enterprises such as the Fisheries would constitute just such an invasion of the Tribal sovereign sphere, this Court should not infer Congressional intent that OSHA apply in the absence of any affirmative evidence.

For these reasons, *Amicus* urges that this Court **affirm** the decision below.

Respectfully submitted by

/s/ Daniel David Lewerenz
Daniel David Lewerenz
NATIVE AMERICAN RIGHTS FUND
1514 P Street NW, Suite D
Washington, DC 20005
Counsel of Record for Amicus

Derrick Beetso
NCAI FUND
1516 P Street NW
Washington, DC 20005
Counsel for Amicus

CERTIFICATE OF COMPLIANCE

1. This brief complies with the word limit of Fed. R. App. P. 29(a)(5) because this brief contains 6,494 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as determined by the word counting feature of Microsoft Word 2016.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally-spaced typeface, including serifs, using Microsoft Word 2016, in Times New Roman 14-point font.

DATED: May 26, 2020

s/ Daniel D. Lewerenz
Daniel D. Lewerenz

CERTIFICATE OF SERVICE

I hereby certify that, on May 26, 2020, I electronically the foregoing document with the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

DATED: May 26, 2020

s/ Daniel D. Lewerenz
Daniel D. Lewerenz