No. 18-873

In The
Supreme Court of the United States

CASINO PAUMA, an enterprise of the Pauma Band of Luiseno Mission Indians of the Pauma and Yuima Reservation, a federally-recognized Indian Tribe,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF

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ARGUMENT IN REPLY

I. Counsel for the NLRB Previously Wanted to Rectify the Circuit Splits, and Mentioned this Case as a Vehicle To Do So

A chorus of formulaic "noes" permeates the Solicitor General's opposition brief (e.g., no conflict, no harm, nothing to see here), but the main basis for objecting to the resolution of the all-important statutory interpretation issue in the Petition is that "[t]his Court has previously denied petitions for writ of certiorari presenting the same question . . . and the same result is warranted here." Opp. 12 (citing *Soaring Eagle Casino & Resort v. NLRB*, 136 S. Ct. 2509 (2016) ("*Soaring Eagle*"); *Little River Band of Ottawa Indians Tribal Gov't v. NLRB*, 136 S. Ct. 2508 (2016) ("*Little River*")). It is true that this Court did have an opportunity to address a *similar* issue (*see* § 2, *infra*) in 2016 after the Sixth Circuit applied the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. § 151 *et seq*., to Indian tribes even though a super-majority of judges on the two deciding panels believed that doing so violated Supreme Court precedent. *See Soaring Eagle*, 791 F.3d 648 (6th Cir. 2015); *Little River*, 788 F.3d 537 (6th Cir. 2015). But, what is even more interesting than the disposition of these prior cases is the contents of the briefs the federal government filed in response to these decisions – including one before this Court – in an effort to bring some clarity to a subject that has not only created rifts between circuits but within them as well.

As one would expect, the immediate response by the appellant tribes in *Little River* and *Soaring Eagle*

to being on the receiving end of federal circuit court opinions condoning agency jurisdiction of dubious legality was to seek *en banc* review of the two decisions. In a surprising twist, however, the National Labor Relations Board ("NLRB" or "Board") actually *agreed* with the affected tribes that the Sixth Circuit should rehear both of the panel decisions *en banc*. *See Little River*, No. 14-2239, Dkt. No. 27 (6th Cir. Aug. 28, 2015). The NLRB did more than just "ask" the Sixth Circuit for this outcome, though; it actually "urge[d]" the appellate court to grant such rehearing so the entire court could "reaffirm both decisions and . . . resolve the split between the two panels on the important issue of the applicability of general federal laws like the National Labor Relations Act to certain commercial enterprises on Indian lands." *Id.* at p. 4. The decision by the Sixth Circuit to rebuff a universal invitation to reconcile its decisions simply elevated the matter to this Court and provided the Solicitor General with an opportunity to offer its own view on the need for definitive clarification. In the end, the Solicitor General took a more measured approach than the NLRB did before the Sixth Circuit, pointing out that another case raising the issue of the Act's applicability to Indian tribes was pending before the Ninth Circuit, and the Supreme Court should at least stay its hand until the opinion in that case issued since it had the potential to influence the discussion:

> In addition to the absence of a direct conflict in the court of appeals, . . . another case presenting the question of the Board's jurisdiction over a tribal casino is now pending in the

> Ninth Circuit. *See Casino Pauma v. NLRB*, No. 16-70397 (docketed Feb. 10, 2016). . . . That court will be able to take account of the reasoning in the Sixth Circuit's decision in this case and *Soaring Eagle Casino*, as well as the D.C. Circuit's decision in *San Manuel*.

As the block quote above indicates, the case referenced by the Solicitor General in its prior opposition briefs in *Soaring Eagle* and *Little River* is this very one. The underlying decision by the Ninth Circuit certainly did nothing to bring any semblance of order to the issue; it relegates the discussion of the seventy-five pages of Sixth Circuit opinions in *Soaring Eagle* and *Little River* to a single two-sentence footnote and takes a novel approach to addressing the issue – one that is based on reflexively deferring to the NLRB's interpretation of the Act under an automatic application of *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). Thus, the federal government has gone from wanting reconciliation – and reconciliation in connection with this case in particular – in 2016 to now not wanting the Supreme Court to touch the issue *at all*. The fissures that have emerged over the last thirteen years between the Tenth Circuit, D.C. Circuit, Sixth Circuit, and Ninth Circuit in terms of either approaching or addressing the issue at hand have not magically healed during the last three. So what then has changed that would cause the Solicitor General to change its stance in turn?

II. The Solicitor General Previously Acknowledged a Circuit Split Exists on Interpreting the NLRA vis-à-vis Indian Tribes

The issue in *Little River* and *Soaring Eagle* about which the Solicitor General claimed there was an "absence of direct conflict in the court of appeals" is actually conceptually distinct from the admittedly divisive one raised in this Petition. The opposition brief filed by the Solicitor General in connection with these prior petitions made sure to emphasize that the argument therein addressed the explicit question raised by the petitioning tribes – one that was framed in terms of amorphous principles of federal Indian law rather than settled ones of statutory interpretation. To explain, the Sixth Circuit panel in *Little River* that issued the controlling opinion reached its holding by simply branding the statute generally applicable and then analyzing whether the NLRB could assert jurisdiction over the tribe according to a common law test arising out of *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960), which simply says that "a general statute in terms applying to all persons includes Indians and their property interests." *Little River*, 788 F.3d at 542-48. Thus, the resultant question presented in the *Little River* petition also sounded in notions of federal Indian law that seemed to be completely unmoored from the actual language of the statute, asking rather generally "[w]hether the National Labor Relations Board exceeds its authority by ordering an Indian tribe not to enforce a tribal labor law that governs the organizing and collective

bargaining activities of tribal government employees working on tribal trust lands." *This* was the question presented, the answer to which produced no disagreement amongst the federal circuit courts according to the Solicitor General. The argument in the opposition brief could have ended there, but the Solicitor General went one step further, though, and rather candidly admitted that the federal circuit courts *were* indeed split on the separate question that was not raised in the underlying petitions of whether the NLRA applies to Indian tribes according to the text of the statute.

> Petitioner contends that the decision below 'conflicts with decisions of other courts of appeals.' . . . But, as petitioner concedes, the only current conflict is a disagreement about 'the proper approach to interpreting the NLRA's application to Indian tribes' (Pet. 16) – not any disagreement about the correct answer to the question presented.

This disagreement about interpreting the NLRA with respect to Indian tribes existed in 2016, well before the Ninth Circuit would deepen the circuit split in the opinion below by allowing the Board to carry the water on the interpretation issue for the federal courts. Thus, the position taken now by the Solicitor General in its opposition brief that "the court of appeals decision does not conflict with any decision of another court of appeals" is of no probative value since it is simply impossible to square with its contrary admission three years ago.

Make no mistake, the question presented in this case is firmly grounded in statutory interpretation. What is remarkable is if one puts aside the rather straightforward textual analysis in *NLRB v. Pueblo of San Juan*, 276 F.3d 1186 (10th Cir. 2002) (*en banc*), all of the other federal circuit court opinions on the issue that seem completely scattered from a superficial perspective have one thing in common – they use an artifice to apply the NLRA to Indian tribes so as to avoid having to directly consider the language of the statute. There is the Ninth Circuit and its decision to immediately label the statute "ambiguous," which enabled the court to uphold the NLRB's assertion of jurisdiction under *Chevron* without having to take a close look at the actual text or legislative history of the statute. And, again, there is the Sixth Circuit and its claim that the statute is "generally applicable," which in turn brought into the discussion the aforementioned common law test arising out of *Tuscarora* that applies a federal statute to an Indian tribe (not just an "Indian") in practically any situation involving outsiders. *See Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985) (applying a general statute to a non-treaty tribe unless doing so would "touch[] exclusive rights of self-governance in purely intramural matters"). Without even broaching the fact that a fundamental distinction exists between an "Indian" and an "Indian tribe" (just like a resident of a state and the state itself), the prevailing understanding of *Tuscarora* in the related cases is still flawed because it is seen as an interpretive shortcut that requires no interpretation. And yet, this Court issued an opinion addressing *Tuscarora* in 1984

in which it explained the decision to apply the particular statute in that case was based on the actual language of the statute "that neither overlooks nor excludes Indians" and the legislative history that reveals Congress not only discussed Indians but "squarely considered and rejected" the idea of exempting them from the statute. *See Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 786-87 (1984). Thus, the proper approach to resolving the pending question about the NLRA should be no different than that in any other case: interpret the statute in light of its text and surrounding context to determine whether it applies in a particular situation.

The answer to this question is one that should come from the federal judiciary and *not* the NLRB. Recently, two members of this Court added to the mounting criticism of *Chevron* by questioning whether the doctrine "retains *any* force" since it allows "the federal government's executive branch . . . [to] dictate an inferior interpretation of the law that may be more the product of politics than a scrupulous reading of the statute." *BNSF v. Loos*, 586 U.S. ___, 139 S. Ct. 893, 908-09 (2019) (Gorsuch, J., dissenting). The interpretative flip flop in this case that was thirty years in the making shows that the NLRB is particularly prone to the politics problem, especially when it comes to resolving issues of its own jurisdiction. Consider for a moment the latest controversy in which the NLRB is embroiled: the issue of charter schools. The NLRB first addressed this subject just a few years ago in 2016, holding that it would determine on a case-by-case basis

whether a charter school qualifies as a "political subdivision" and is thus exempt from jurisdiction under Section 152(2). *See, e.g., Hyde Leadership Charter Sch.*, 364 NLRB No. 88 (2016). Three years and one administration change later and suddenly the NLRB is already revisiting this decision in order to determine whether it should decline jurisdiction over the seven-thousand-plus charter schools as a class under Section 164(c) for quizzically having an insubstantial effect on interstate commerce. *See* Order Granting Review in Part and Invitation to File Briefs, *Kipp Academy Charter School*, No. 02-RD-191760 (Feb. 4, 2019), *available at* https://www.nlrb.gov/case/02-RD-191760 (last visited Apr. 20, 2019). Perhaps the NLRB deserves a free pass in this instance since charter schools are a relatively new creation that did not come about until the early 1990s. But, Indian tribes are not; they predate both the NLRB and the Act, and the only plausible explanation for exerting jurisdiction over them after seventy years when neither the statutory language nor interpretive norms have changed is nothing other than the political forces derided in *BNSF*.

III. This Petition Adds the New Wrinkle of an "Exclusive" and "Binding" Arbitration Agreement that Arose During the Seventy-Year Period of the NLRA's Inapplicability

The Petition in this case not only raises a different issue from the one that was considered before, but also includes something that was completely absent from

those prior cases – an arbitration agreement for unfair labor practice charges. The Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq*., came about in 1988, twelve and fifty-three years, respectively, after the NLRB issued interpretative decisions and regulations indicating the Act does not apply to Indian tribes. *See, e.g.*, *Fort Apache Timber Co.*, 226 N.L.R.B. 503 (1976). This backdrop could not have been any clearer during the drafting of IGRA, but the manner in which Congress chose to address casino labor issues in the statute was not to simply extend the NLRA to Indian tribes but to leave the subject as one the tribes and states could discuss during the negotiation of regulatory compacts. *See* 25 U.S.C. § 2710(d)(3)(C). More than sixty of these compacts now exist in California, and all of them contain labor laws and an "exclusive" and "binding" arbitration process for unfair labor practice charges – including the one for Pauma. *See* California Gambling Control Commission, *Ratified Tribal-State Gaming Compacts* (*New and Amended*), *available at* http://www.cgcc.ca.gov/?pageID=compacts (last visited Apr. 21, 2019).

Yet, even the most astute observer of this case would probably never realize as much if he or she was not reading the Petition. The discussion of the IGRA compact in the administrative decision is relegated to a single paragraph at the tail end of the jurisdiction section, with the couple sentences of text foregoing any particularized discussion about the arbitration agreement in favor of offering the sweeping statement that the exercise of jurisdiction, no matter when it occurs,

automatically preempts any conflicting processes, no matter what they concern. App. 49-50. The three paragraphs of discussion by the Ninth Circuit similarly avoids mentioning the arbitration agreement (this time by claiming Casino Pauma just "vaguely suggest[ed]" some incompatibility between the two statutes) and then concludes in much the same vein "that Casino Pauma's compact with California does not displace the application of the NLRA to its activities." App. 23-25. The contribution from the Solicitor General is even less substantial, comprising a couple of sentences towards the bottom on page 19 of its opposition brief that merely reiterate that the Ninth Circuit found there is "no IGRA provision stating an intent to displace the NLRA." Opp. 19. All three of these positions are premised on the notion that a conflict must be overt and specifically identified by Congress in the latter statute. None of them seem to appreciate that federal courts are supposed to "harmonize" federal statutes that "allegedly touch on the same topic" (*see Epic Sys. Corp. v. Lewis*, 584 U.S. ___, 138 S. Ct. 1612, 1624 (2018)), even in situations where the conflict stems from just "the *implications* of a statute . . . [being] altered by the implications of a later statute." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000). And now Pauma is left in the paradoxical situation where it has overlapping sets of labor laws, ones that are supposedly consistent from a legal perspective but nevertheless contain dispute resolution processes for unfair labor practices charges that are wholly incompatible with each other. The interplay of the NLRA and IGRA is a topic worthy of more than a

couple sentences of discussion, and hopefully this Court will be both the first and last forum to provide that.

IV. The *Republic Aviation* Rewrite Produces an Illogical Rule that Directly Ties an Employee's Solicitation Rights to a Customer's Privacy Interests

A legal pronouncement that upends the basic rules of workplace solicitation for service establishments across the Nation is not just some "determination that rests on the particular facts of this case." Opp. 23. The opposition brief tries to downplay the magnitude of the NLRB's decision to allow employees to solicit customers *inside* of businesses by suggesting this Court's opinions in *Republic Aviation Corporation v. NLRB*, 324 U.S. 793 (1945), and *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978), circumscribe any solicitations to "non-work areas." Opp. 23. However, both of these opinions only deal with employee-to-employee solicitation. In fact, the majority opinion in *Beth Israel* did not touch the portion of the employer's rule that prohibited "soliciting of the general public (patients, visitors) on Hospital property," but merely allowed employees to solicit their coworkers in a "public" cafeteria the patronage for which was only 1.56% patients because the employer-designated locker rooms were scattered and inaccessible to a large portion of the employee base. *See Beth Israel*, 437 U.S. at 486-89. The concurrence joined in part by former Chief Justice Rehnquist even explained that the *Republic Aviation*

rubric should not be used *at all* in the service industry setting where "employees and members of the public mingle." *Id.* at 511. Yet, used it is and now used against the very people the original rule sought to protect – the customers. With that, the conversation has now shifted from soliciting employees in a largely customer-free cafeteria to soliciting *anyone* outside "immediate patient care areas" like "operating rooms" and "x-ray areas" (*see Holy Cross Health*, 2017 NLRB Lexis 385, *50 (2017)); from soliciting employees in a back-of-the-house break room to soliciting patrons in restrooms and restaurants. App. 69. Guest areas are now fair game and protections for solicitation seem to increase the further into one an employee goes (*see Aqua-Aston Hospitality, LLC*, 2016 NLRB Lexis 402, *51-53 (2016)), which means the order in this case that strikes down a prohibition on employees "distributing literature [to customers] in 'guest areas'" (*see* App. 40) presents a very real threat of privacy intrusions and business disruptions both far and near.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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