No. 15-1034

In the Supreme Court of the United States

SOARING EAGLE CASINO AND RESORT, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

Under the National Labor Relations Act, the term "employer" is defined as *not* including "the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof." 29 U.S.C. 152(2). The questions presented are as follows:

1. Whether the National Labor Relations Board has jurisdiction over an Indian tribe as an employer with respect to its operation of a tribally created, owned, and controlled gambling, hospitality, and entertainment complex, which is located on tribal land but competes in interstate commerce against non-tribal enterprises.

2. Whether the court of appeals erred in determining that a general right of exclusion in a treaty with an Indian tribe does not, without more specificity, preclude application of the National Labor Relations Act to the tribe.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, treaties, and statutes:

Treaties and statutes—Continued: Page

Miscellaneous:

Miscellaneous—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-58) is reported at 791 F.3d 648. The decisions and orders of the National Labor Relations Board (Pet. App. 61-66, 67-110) are reported at 361 N.L.R.B. No. 73 and 359 N.L.R.B. No. 92.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 2015. A petition for rehearing was denied on September 29, 2015 (Pet. App. 59-60). On December 16, 2015, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including February 26, 2016. The petition was filed on February 12, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, has "empowered" the National Labor Relations Board (Board) "to prevent any person from engaging in any unfair labor practice * * * affecting commerce." 29 U.S.C. 160(a). "[I]n passing the [NLRA], Congress intended to and did vest in the Board the fullest *jurisdictional* breadth constitutionally permissible under the Commerce Clause." *NLRB* v. *Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963) (per curiam). As relevant here, some unfair labor practices are committed by "employer[s]." 29 U.S.C. 158(a). The NLRA defines the term "employer" to include "any person acting as an agent of an employer, directly or indirectly," but not to include

> the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act * * *, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

29 U.S.C. 152(2).

b. In 1976, the Board first considered the application of the NLRA to an enterprise owned and operated by a federally recognized Indian tribe on its reservation. See *Fort Apache Timber Co.*, 226 N.L.R.B. 503 (1976). The Board concluded that the tribal council and its timber enterprise were "implicitly exempt as employers" within the meaning of Section 152(2), reasoning that tribes are "governmental entit[ies] recognized by the United States" and the tribe was, "*qua* government, acting to direct the utilization of tribal resources through a tribal commercial enterprise on

the tribe's own reservation." *Id.* at 504, 506 & n.22. The Board reiterated that reasoning in *Southern Indian Health Council, Inc.*, 290 N.L.R.B. 436, 437 (1988), which involved a tribal health clinic operated by a tribal consortium on reservation land. The Board declined to extend that reasoning to off-reservation tribal enterprises in *Sac & Fox Industries, Ltd.*, 307 N.L.R.B. 241, 242-245 (1992).

c. In *San Manuel Indian Bingo & Casino*, 341 N.L.R.B. 1055 (2004), enforced, 475 F.3d 1306 (D.C. Cir. 2007), the Board revisited its jurisprudence concerning Indian tribes as employers. The Board concluded that its prior cases had failed to strike "a satisfactory balance between the competing goals of Federal labor policy and the special status of Indian tribes in our society and legal culture." 341 N.L.R.B. at 1056. The Board explained that, since its initial decisions, "Indian tribes and their commercial enterprises have played an increasingly important role in the Nation's economy" and have "become significant employers of non-Indians and serious competitors with non-Indian owned businesses." *Ibid.* After reconsidering the text, purpose, and legislative history of the NLRA, the Board concluded that Indian tribes are "employers" within the meaning of Section 152(2) and do not fall within that provision's exceptions. *Id.* at 1057-1059.

The Board then addressed whether "Federal Indian policy" required the Board to decline jurisdiction over a tribally owned and operated casino, and determined that it did not. *San Manuel*, 341 N.L.R.B. at 1059-1062 (emphasis omitted). To evaluate that question, the Board adopted the approach used by several courts of appeals to address the application to Indian tribes of other federal statutes—an approach it called the

"*Tuscarora–Coeur d'Alene* standard." *Id.* at 1059-1061. That approach began with this Court's statement in *Federal Power Commission* v. *Tuscarora Indian Nation*, 362 U.S. 99 (1960), that "a general statute in terms applying to all persons includes Indians and their property interests." *Id.* at 116; see also *id.* at 120 (noting that "general Acts of Congress apply to Indians as well as to all others in the absence of a clear expression to the contrary"). In *Donovan* v. *Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (1985), the Ninth Circuit, in holding that the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*, applied to a tribal enterprise, adopted that statement from *Tuscarora* as a general rule. But *Coeur d'Alene* concluded that a general federal statute would nevertheless be inapplicable to an Indian tribe if "(1) the law touches exclusive rights of self-governance in purely intramural matters; (2) the application of the law to the tribe would abrogate rights guaranteed by Indian treaties; or (3) there is proof * * * that Congress intended the law not to apply to Indians on their reservation." 751 F.2d at 1116 (citation, internal quotation marks, and brackets omitted).

Applying that approach in *San Manuel*, the Board concluded that the NLRA is "a statute of general applicability." 341 N.L.R.B. at 1059. It further concluded that the NLRA's application would not implicate "critical self-governance issues" where the tribal activities in question—the operation of a casino that "employs significant numbers of non-Indians" and "caters to a non-Indian clientele"—are "commercial in nature" rather than "governmental." *Id.* at 1061.

As "the final step" in its analysis, the Board considered "whether policy considerations militate in favor of

or against the assertion" of the Board's jurisdiction as a matter of discretion. *San Manuel*, 341 N.L.R.B. at 1062. In doing so, it "balance[d] the Board's interest in effectuating the policies of the [NLRA] with its desire to accommodate the unique status of Indians in our society and legal culture." *Ibid.* The Board declined to adopt a categorical rule either exempting or including tribes. *Ibid.* But it explained that "[r]unning a commercial business is not an expression of sovereignty in the same way that running a tribal court system is," and that tribes "affect interstate commerce in a significant way" when they "participate in the national economy in commercial enterprises, when they employ substantial numbers of non-Indians, and when their businesses cater to non-Indian clients and customers." *Ibid.* By contrast, the Board continued, its "interest in regulation" is "lessened" when a tribe is fulfilling "traditional tribal or governmental functions." *Id.* at 1063.

In *San Manuel*, the Board asserted jurisdiction over a tribal casino, 341 N.L.R.B. at 1063-1064, and its decision was upheld by the D.C. Circuit in *San Manuel Indian Bingo & Casino* v. *NLRB*, 475 F.3d 1306 (2007). In a companion case decided the same day, the Board declined to exercise jurisdiction over a tribal health clinic because it was serving a governmental function by "provid[ing] free health care to Indians." *Yukon Kuskokwim Health Corp.*, 341 N.L.R.B. 1075, 1076-1077 (2004).

2. The Soaring Eagle Casino and Resort (Casino or petitioner) is an enterprise of the Saginaw Chippewa Indian Tribe of Michigan (Tribe), a federally recognized Indian tribe with more than 3000 members. Pet. App. 2-3. The Tribe is a successor to signatories of an August 2, 1855 Treaty with the Chippewas, 11 Stat.

633 (Pet. App. 111-119), and an October 18, 1864 Treaty with the Chippewa Indians of Saginaw, Swan Creek, and Black River, 14 Stat. 657 (Pet. App. 120-130). See Pet. App. 2. The 1864 treaty set aside the present reservation for petitioner's "exclusive use, ownership, and occupancy," reserving a right to exclude non-Indians. *Id.* at 2-3.

As authorized by the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701 *et seq.*, and a compact with the State of Michigan, the Tribe owns and operates the Casino, which is located on land held in trust for the Tribe by the United States. Pet. App. 3. In addition to gaming facilities, the Casino has restaurants, bars, entertainment facilities, and a hotel. *Id.* at 81. It is open around the clock, and has about 3000 employees, 7.4% of whom are tribal members. *Ibid.* It serves about 20,000 mostly non-Indian customers each year, advertises throughout Michigan, and competes directly with non-tribal casinos near Detroit. *Id.* at 4-5, 81. Casino revenue provides about 90% of the Tribe's income. *Id.* at 4-5.

The Tribal Council has adopted a no-solicitation policy, which is contained in the Casino employees' handbook and constrains their ability to solicit and post materials on the Casino's premises. Pet. App. 5-6. In 2010, petitioner, after giving her several warnings, fired a housekeeper for violating the no-solicitation policy by discussing a union-organizing campaign with a fellow housekeeper. *Id.* at 6-7.

3. In 2011, the Board's Acting General Counsel issued an administrative complaint, alleging that petitioner had committed unfair labor practices in violation of the NLRA by maintaining an unlawful no-solicitation policy in its handbook, by barring employ-

ees from union discussions in the Casino hallway, and by suspending and then discharging a housekeeper for engaging in union activities at the Casino. Pet. App. 75. Petitioner denied the allegations and denied that the Board had jurisdiction over it. *Id.* at 75-76.

After a hearing, an administrative law judge (ALJ) ruled that it was appropriate for the Board to assert its jurisdiction over petitioner as an employer and that petitioner had committed the unfair labor practices alleged in the complaint. Pet. App. 75-110. In addressing the jurisdictional question, the ALJ relied on the Board's 2004 decision in *San Manuel* and determined that it was appropriate to assert jurisdiction over the Tribe's operation of the Casino. *Id.* at 88-96. The ALJ concluded that the Casino "is a commercial venture that generates income for the Tribe," "serves predominantly nontribal customers, competes with nontribal casinos, and employs mostly nontribal members." *Id.* at 92. The ALJ also rejected petitioner's contention that its treaties precluded jurisdiction under the NLRA, concluding that those treaties "provide[] nothing more than a general right of exclusion" and that "a general right to exclude non-Indians from tribal land, without more, is insufficient to bar the application of Federal laws to commercial entities on Indian reservations." *Id.* at 93-94.

Petitioner filed exceptions with the Board, challenging the assertion of jurisdiction but not the unfair-labor-practice findings. Pet. App. 62 n.1, 68. The Board's initial decision (*id.* at 67-74) was vacated and remanded by the court of appeals because two of the participating Board members had been recess appointees whose appointments were invalid under *NLRB* v. *Noel Canning*, 134 S. Ct. 2550 (2014). Pet. App. 61-62.

On remand, the Board—acting through three Senate-confirmed members—considered de novo the ALJ's decision and the record in light of the exceptions and briefs. Pet. App. 62. It agreed with the rationale of the vacated decision and order, which it incorporated by reference. *Ibid.* In the incorporated decision, the Board affirmed the ALJ's "rulings, findings, and conclusions." *Id.* at 68 (footnote omitted).

4. In the court of appeals, petitioner contested the Board's jurisdiction but not the finding of unfair labor practices if jurisdiction existed. Pet. App. 9. The court held that the Board has jurisdiction over the Casino's employment practices and enforced the Board's order. *Id.* at 2, 53.

a. The court of appeals first considered, de novo, the effect of petitioner's treaties on the Board's ability to exercise jurisdiction under the NLRA. Pet. App. 12-24. The court noted that this "Court demands a clear statement of intent for the abrogation of Indian treaty rights," and it concluded that the NLRA does not evince any specific intention to abrogate treaty rights. *Id.* at 15, 18. Nevertheless, the court explained that the "first" step of its analysis was a determination of "the scope of the specific treaty rights at issue" on the basis of "'the treaty language itself[,] * * * with any ambiguities resolved in favor of the Indians.'" *Id.* at 14-15 (quoting *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 206 (1999)).

The majority of the court of appeals concluded that the treaties here grant the Tribe "a general right of exclusion," but, unlike some other treaties, do not "give the Tribe the specific power to condition authorization and entry of government agents" and do not "detail with any level of specificity the types of activi-

ties the Tribe may control or in which it may engage." Pet. App. 23. The court held that such a "general right of exclusion, with no additional specificity, is insufficient to bar application of federal regulatory statutes of general applicability" and therefore does not "bar[] application of the NLRA to the Casino." *Id.* at 23-24.[1]

b. The court of appeals then addressed "whether the Tribe's inherent sovereignty rights preclude application of the NLRA to the on-reservation Casino." Pet. App. 24. The court held that, for purposes of that question, it was bound by the earlier decision of another panel in *NLRB* v. *Little River Band of Ottawa Indians Tribal Government*, 788 F.3d 537 (6th Cir. 2015), petition for cert. pending, No. 15-1024 (filed Feb. 12, 2016).

The *Little River Band* panel, applying de novo review, enforced an order of the Board that exercised jurisdiction over another tribally owned and operated casino as an employer under the NLRA. 788 F.3d at 544, 556. Like the Board in *San Manuel*, *supra*, the court in *Little River Band* adopted the *Coeur d'Alene* framework, which it noted had been applied by several other circuits and which it concluded "accommodates principles of federal and tribal sovereignty." *Id.* at 547, 551. Applying that framework, the court held that the NLRA is a generally applicable, comprehensive statute, which was intended by Congress to reach as broadly as constitutionally permissible and is therefore presumptively applicable to Indian tribes. *Id.* at 551.

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[1] Judge White dissented from this part of the majority's opinion and would have found that application of the NLRA to the Casino is barred by the Tribe's right under the 1864 treaty to the exclusive use, ownership, and occupancy of reservation lands. Pet. App. 54-58.

The court further concluded that application of the NLRA to the tribal casino would not undermine tribal self-governance, which does not include a "right to conduct commercial enterprises free of federal regulation," and that there is no "proof that Congress intended the NLRA not to apply to Indians on their reservations." *Id.* at 553, 555.

Although the court of appeals in this case recognized that it was bound by the prior decision, it disagreed with *Little River Band*'s analysis and holding. Pet. App. 26. The court would have "reject[ed] the *Coeur d'Alene* framework for determining the reach of federal statutes of general applicability" and instead structured its analysis on "guidance" it "glean[ed] from" *Montana* v. *United States*, 450 U.S. 544 (1981), and *Nevada* v. *Hicks*, 533 U.S. 353 (2001). Pet. App. 50. In the absence of clear congressional intent to apply a statute "to the activities of Indian tribes," it would have asked whether a "generally applicable federal regulatory statute impinges on the Tribe's control over its own members and its own activities." *Id.* at 35. In particular, it concluded that, in this case, the Casino's no-solicitation policy and termination of the housekeeper should have been permitted as an exercise of the Tribe's authority under *Montana* to enter into a commercial relationship with a nonmember and "place conditions on its contractual relationship[]." *Id.* at 37-38; see *Montana*, 450 U.S. at 565.

5. Petitioner sought rehearing en banc, which the court of appeals denied. Pet. App. 59-60.

ARGUMENT

Petitioner contends that the Board generally lacks jurisdiction over tribal governments acting as employers (Pet. 21-25) and, more specifically, that the Board

lacks jurisdiction over petitioner's employment actions in light the Tribe's treaty rights (Pet. 25-30). Those arguments lack merit. The court of appeals correctly sustained the Board's exercise of jurisdiction over petitioner as an employer under the NLRA for purposes of its operation of the Casino, which is a large commercial enterprise that employs over 90% non-Indians, has mostly non-Indian patrons, and competes against non-tribal enterprises in interstate commerce. Pet. App. 4-5, 81. Although petitioner reads the decision below as conflicting with those of other circuits, there are no conflicts with respect to the questions presented here. Moreover, the pendency in another circuit of a case challenging the Board's jurisdiction over a tribal casino and Congress's active consideration of legislation that would address the issue counsel further against this Court's review at this time. The petition for a writ of certiorari should be denied.[2]

1. a. With respect to the first question presented, petitioner contends (Pet. 17) that, in following *NLRB* v. *Little River Band of Ottawa Indians Tribal Government*, 788 F.3d 537 (6th Cir. 2015), petition for cert. pending, No. 15-1024 (filed Feb. 12, 2016), the decision below is part of "a clearly defined three-way split of authority." But, as petitioner notes, the only current conflict is a disagreement about what "approach" to use in "analyzing whether the Board has jurisdiction over tribes" (Pet. 19)—not any disagreement about the correct answer to the question presented here.

Before the decision in *Little River Band*, only one other court of appeals had addressed whether the

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[2] The first question presented in this case is also presented in *Little River Band of Ottawa Indians Tribal Government* v. *NLRB*, petition for cert. pending, No. 15-1024 (filed Feb. 12, 2016).

NLRB may exercise jurisdiction over an Indian tribe in its capacity as an employer in a commercial enterprise. In that case, the D.C. Circuit agreed with the Board's assertion of jurisdiction over a tribe's operation of a casino. See *San Manuel Indian Bingo & Casino* v. *NLRB*, 475 F.3d 1306 (2007). As discussed above (see pp. 3-5, *supra*), the Board had asserted jurisdiction over the tribal casino after considering the general presumption and specific exceptions articulated in *Donovan* v. *Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1115-1116 (9th Cir. 1985), and then evaluating "whether policy considerations militate in favor of or against the assertion of the Board's discretionary jurisdiction." *San Manuel Indian Bingo & Casino*, 341 N.L.R.B. 1055, 1062 (2004), enforced, 475 F.3d 1306 (D.C. Cir. 2007).

Although the D.C. Circuit declined to embrace the *Coeur d'Alene* framework, it explained that its analysis only "differed slightly from that of the Board." *San Manuel*, 475 F.3d at 1318. It reached the same result as the Board, concluding that "the NLRA does not impinge on the Tribe's sovereignty enough to indicate a need to construe the statute narrowly against application to employment at the [c]asino." *Id.* at 1315. The court noted that its conclusion was also "consistent" with those of several other circuits that had applied the *Coeur d'Alene* framework to evaluate "the application of federal employment law" to commercial activities of tribes. *Ibid.* Moreover, the D.C. Circuit explained that it relied on "the same factors" as the Board: the casino's status as "a purely commercial enterprise that employs significant numbers of non-Indians and caters to a non-Indian clientele who live

off the reservation." *Id.* at 1318 (citations, internal quotation marks, and alteration omitted).

The Sixth Circuit reached the same result as the D.C. Circuit, and did so by distinguishing the operation of "commercial gaming" enterprises from the activities of "tribal self-government." *Little River Band*, 788 F.3d at 553-554. There is accordingly no conflict between the Sixth and D.C. Circuits that would warrant this Court's review.

b. Petitioner asserts (Pet. 19) that "[t]he Sixth Circuit's approach unquestionably conflicts with the Tenth Circuit's holding" in *NLRB* v. *Pueblo of San Juan*, 276 F.3d 1186 (2002) (en banc). Those two decisions did take different analytical approaches, but there is no square conflict between them. In explaining its approach, the Tenth Circuit said it does "not lightly construe federal laws as working a divestment of tribal sovereignty and will do so only where Congress has made its intent clear that we do so." *Id.* at 1195. It therefore declined to read the NLRA as "stripping tribes of their retained sovereign authority to pass right-to-work laws and be governed by them," *ibid.*—even though the provision of the NLRA expressly reserving the power to adopt right-to-work laws refers only to "State or Territorial law," 29 U.S.C. 164(b).

If the Tenth Circuit were to take the same approach to the issue in this case—whether the NLRA applies to a tribe in its capacity as an employer in a commercial enterprise—the result could perhaps create a conflict with the D.C. and Sixth Circuits. But the en banc court in *Pueblo of San Juan* expressly disclaimed so broad a ruling. It emphasized that it was not addressing "the general applicability of federal labor law" and,

further, that the tribal right-to-work ordinance in that case did "not attempt to nullify the NLRA or any other provision of federal law." 276 F.3d at 1191. Moreover, when it distinguished the references to statutes of general applicability in *Federal Power Commission* v. *Tuscarora Indian Nation*, 362 U.S. 99 (1960), the Tenth Circuit distinguished between a tribe's "proprietary" interests and its "sovereign" interests. 276 F.3d at 1198-1200. Thus, it explained that its decision to sustain the tribal right-to-work ordinance (in the absence of express federal statutory authorization) was protecting the tribe's exercise of "its authority as a sovereign * * * rather than in a proprietary capacity *such as that of employer* or landowner." *Id.* at 1199 (emphasis added).

A more recent Tenth Circuit decision has characterized *Pueblo of San Juan* as holding that "Congressional silence exempted Indian tribes from the [NLRA]." *Dobbs* v. *Anthem Blue Cross & Blue Shield*, 600 F.3d 1275, 1284 (2010). But *Dobbs*, which was not about the NLRA, still recognized the distinction in the Tenth Circuit's decisions "between cases in which an Indian tribe exercises its property rights and cases in which it 'exercise[s] its authority as a sovereign.'" *Id.* at 1283 n.8 (quoting *Pueblo of San Juan*, 276 F.3d at 1199). The Tenth Circuit has not yet addressed the question at issue here: whether the NLRA applies to a tribe acting in its capacity as an employer in the commercial sphere.

c. Petitioner also contends (Pet. 30-32) that there is a conflict with respect to the second question presented: whether the Tribe's particular treaty-based right to exclude nonmembers from its reservation precludes application of the NLRA. There is, however, no con-

flict. The decision below did not reject the standard used in the allegedly conflicting decision in *Donovan* v. *Navajo Forest Products Industries*, 692 F.2d 709 (10th Cir. 1982). Instead, just like the Seventh, Ninth, and Tenth Circuits, it stated that this Court "demands a clear statement of intent for the abrogation of Indian treaty rights." Pet. App. 15 (citing *United States* v. *Dion*, 476 U.S. 734, 739-740 (1986), and *South Dakota* v. *Bourland*, 508 U.S. 679, 687 (1993)); see *U.S. Dep't of Labor* v. *Occupational Safety & Health Review Comm'n*, 935 F.2d 182, 184 (9th Cir. 1991) (requiring express congressional abrogation of treaty rights); *Smart* v. *State Farm Ins. Co.*, 868 F.2d 929, 932-933 (7th Cir. 1989) (same); *Navajo Forest Prods.*, 692 F.2d at 712 (same).

The relevant point in this case was not about the correct standard or about whether the NLRA is sufficiently clear to displace any treaty right, but about the *antecedent* question of whether there is any treaty right that triggers a clear-statement rule. See Pet. App. 14-15 ("We *first* consider the scope of the specific treaty rights at issue here. * * * Once the scope of rights reserved by a treaty is determined, we look to see whether Congress intended to abrogate those rights.") (emphasis added). At that first step of the analysis, the decision below concluded that the general reference in the Tribe's 1864 treaty to its right to "exclusive use, ownership, and occupancy" of its lands (*id.* at 121) did not provide the same rights as did the treaty in *Navajo Forest Products*, which had specially addressed which kinds of "officers, soldiers, agents and employees of the government" would "ever be permitted to pass over" Navajo land. 692 F.2d at 711 (citation omitted). In other words, the court expressly

found *Navajo Forest Products* to be "distinguishable" because the tribal treaties were materially different. Pet. App. 23; see also *Smart*, 868 F.3d at 935 (finding that the applicable treaty provisions in that case "simply convey[ed] land within the exclusive sovereignty of the [t]ribe" and therefore did "not delineate specific rights in a manner comparable to the treaty in *Navajo Forest Products*"). Indeed, neither petitioner nor the dissent below identifies any decision that, in more than three decades since *Navajo Forest Products* was decided, extends its reasoning to a tribal treaty with a general right of "exclusive use, ownership, and occupancy" akin to the one at issue here. There is accordingly no conflict on the second question presented.

d. In addition to the absence of a direct conflict in the courts of appeals, two further considerations reinforce the conclusion that review by this Court is unwarranted at this time. First, 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); *NLRB* v. *Casino Pauma*, No. 16-70756 (docketed Mar. 21, 2016). That court will be able to take account of the reasoning in the Sixth Circuit's decisions in this case and *Little River Band*, as well as the D.C. Circuit's decision in *San Manuel*.[3]

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[3] The Ninth Circuit has not addressed the NLRA's applicability to tribal-casino operations. In *NLRB* v. *Chapa De Indian Health Program, Inc.*, 316 F.3d 995 (2003), it applied *Coeur d'Alene* to a health-care organization that, although a "tribal organization," was neither owned nor controlled by the tribe or by tribal members; that operated at facilities on non-Indian land; that had 40% non-Indian patients; and that had 55% non-Indian staff members. *Id.*

Second, Congress is currently considering legislation that could effectively moot the question of the Board's jurisdiction over Indian tribes. On November 17, 2015, the House of Representatives passed H.R. 511, the Tribal Labor Sovereignty Act of 2015, which would expand the list of entities excepted from the NLRA's definition of employer in 29 U.S.C. 152(2) by adding "any Indian tribe, or any enterprise or institution owned and operated by an Indian tribe and located on its Indian lands." 161 Cong. Rec. H8260, H8272 (daily ed. Nov. 17, 2015). A related bill, S. 248, is pending in the Senate and was favorably reported by the Indian Affairs Committee in September 2015. S. Rep. No. 140, 114th Cong., 1st Sess. (2015).

If that bill is enacted, it will not be the first time that Congress has acted to clarify how labor-related laws apply to Indian tribes. In 2006, it amended the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, to specify that the "governmental plan[s]" exempted from preemption claims include not just plans covering federal, state, or local government employees (which were already mentioned), but also plans for employees of "Indian tribal government[s]" when "substantially all" of their services "are in the performance of essential governmental functions but not in the performance of commercial activities." 29 U.S.C. 1002(32). Whether or not the pending bill is enacted in its current or in a modified

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at 997, 1000. The court held that the Board was not "plainly lacking" jurisdiction over the organization, but it "emphasize[d] the limited nature" of its "preliminary" decision, which did not "resolv[e] the issue of the Board's jurisdiction." *Id.* at 1002.

form, Congress's active consideration of the issue counsels against this Court's intervention at this time.[4]

2. The court of appeals correctly sustained the Board's exercise of jurisdiction over the Casino as an employer under the NLRA, thereby ensuring that petitioner's employees receive the important statutory protections the NLRA affords to workers generally in businesses affecting commerce. Applying the NLRA is consistent with the Act's broad scope and purposes, because the Casino is a large commercial enterprise that employs 92.6% non-Indians, has mostly non-Indian patrons, and competes in interstate commerce against non-tribal enterprises. Pet. App. 4-5, 81. Applying the NLRA to the Casino is also consistent with affording respect to tribal sovereignty; while the Tribe unquestionably has inherent sovereignty, recognized in IGRA, to establish and operate the Casino, it does so subject to Congress's exercise of its power to regulate the commerce in which the Tribe has chosen to participate.

In the decision that controlled the decision below, the court of appeals determined that the *Coeur d'Alene* framework, which has been employed by several courts of appeals in sustaining the application of other federal statutes to commercial enterprises operated by Indian tribes, appropriately "accommodates principles

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[4] On the day of the House vote, the Executive Office of the President issued a statement that opposed the bill "as currently drafted," because it would not make the tribal exemption from the Board's jurisdiction contingent on a tribe's adoption of "labor standards and procedures * * * reasonably equivalent to those in the [NLRA]." Executive Office of the President, *Statement of Administration Policy: H.R. 511—Tribal Labor Sovereignty Act of 2015* (Nov. 17, 2015), https://www.whitehouse.gov/sites/default/files/omb/legislative/sap/114/saphr511h_20151117.pdf.

of federal and tribal sovereignty." *Little River Band*, 788 F.3d at 548, 551. But there is no need here to determine whether that framework should be used to evaluate the applicability to Indian tribes of all federal statutes, or even of all such statutes regulating commerce and affecting tribal commercial enterprises. Here, the Board's analysis, and that of the *Little River Band* court, was certainly correct in its three fundamental points: (1) the NLRA itself does not exempt tribes from the definition of "employer" in 29 U.S.C. 152(2); (2) it was reasonable for the Board to distinguish between tribes' performance of governmental functions and their engagement in large-scale commercial operations; and (3) applying the NLRA to Indian tribes in their capacity as employers in the commercial context does not divest them of sovereign authority.

a. The NLRA confers upon the Board a broad power to prevent "any person from engaging in any unfair labor practice * * * affecting commerce," 29 U.S.C. 160(a), and it defines "'employer'" as "includ[ing] any person acting as an agent of an employer, directly or indirectly." 29 U.S.C. 152(2). As relevant here, the statute further specifies that "'employer' * * * shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof." *Ibid.* The Board's determination that tribes are not thereby exempted from the definition of "employer" is correct and, at a minimum, entitled to deference.

As this Court has "consistently declared," the NLRA "vest[s] in the Board the fullest *jurisdictional* breadth constitutionally permissible under the Commerce Clause." *NLRB* v. *Reliance Fuel Oil Corp.*, 371

U.S. 224, 226 (1963) (per curiam). It has also explained that "courts must take care to assure that exemptions from NLRA coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach." *Holly Farms Corp.* v. *NLRB*, 517 U.S. 392, 399 (1996). And it has recognized that the Board "is entitled to considerable deference" when defining terms in the NLRA. *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 891 (1984).[5] Here, the Casino has mostly non-Indian employees and mostly non-Indian customers, and it competes with other casinos in interstate commerce. Pet. App. 4-5, 81. The Board correctly determined that labor practices at the Casino affect commerce within the scope of Congress's authority under the Commerce Clause and therefore fall within the Board's statutory jurisdiction. See *NLRB* v. *Fainblatt*, 306 U.S. 601, 604-607 (1939); 29 U.S.C. 152(7).

Petitioner nevertheless suggests that the exception in Section 152(2) for specified governmental entities—"the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof"—was intended to exempt all "sovereigns" from the Board's jurisdiction. Pet. 22. But the statute by its terms excludes

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[5] The Court later explained that it does not "defer[] to the Board's *remedial* preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA," *Hoffman Plastic Compounds, Inc.* v. *NLRB*, 535 U.S. 137, 144 (2002) (emphasis added), and it held that the Board's award of back pay to aliens not authorized to work as a remedy for an unfair labor practice was inconsistent with employment prohibitions in the Immigration and Nationality Act, *id.* at 144-152. But the Court did not question *Sure-Tan*'s holding that the Board's interpretation of statutory terms is entitled to deference and that aliens not authorized to work are included within the definition of "employee."

only certain governments, not all "sovereigns," and it fails to mention Indian tribes. Section 152(2) thus contrasts with other statutes in which Indian tribes are expressly excluded from definitions of "employer," such as Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e(b)(1), and Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. 12111(5)(B)(i). And, well before *San Manuel*, the Board had applied the NLRA to at least one other unlisted category of sovereign: foreign sovereigns when they are engaged in commercial activities in the United States. See *State Bank of India* v. *NLRB*, 808 F.2d 526, 530-534 (7th Cir. 1986), cert. denied, 483 U.S. 1005 (1987).

b. Even assuming that Congress would have intended for unlisted entities to have the benefit of a governmental exemption akin to the one in Section 152(2), the Board's exercise of jurisdiction over Indian tribes has not extended to their performance of "traditional tribal or governmental functions" of the sort in which federal, state, and local governments typically engage. *San Manuel*, 341 N.L.R.B. at 1063. Rather, jurisdiction has been exercised over operations such as large-scale casinos that are "typical commercial enterprise[s] operating in, and substantially affecting, interstate commerce," as well as "employ[ing] non-Indians" and "cater[ing] to non-Indian customers." *Ibid.*

That focus on commercial activities dovetails with the NLRA's vesting of authority in the Board to prevent unfair labor practices "affecting commerce." 29 U.S.C. 160(a); see also 29 U.S.C. 151 (declaration of federal policy in NLRA to remove "substantial obstructions to the free flow of commerce"). And, while petitioner says that "nothing in the statute authorizes the Board to draw distinctions among tribal opera-

tions," Pet. 34, the Board's exercise of discretion to decline jurisdiction is not unique to tribal employers. The Board "has never exercised its full jurisdiction" under the NLRA. *Guss* v. *Utah Labor Relations Bd.*, 353 U.S. 1, 3 (1957); see *NLRB* v. *Denver Bldg. & Const. Trades Council*, 341 U.S. 675, 684 (1951) ("[T]he Board sometimes properly declines to [assert jurisdiction], stating that the policies of the Act would not be effectuated by its assertion of jurisdiction in [a particular] case."); cf. 29 U.S.C. 164(c)(1) ("The Board, in its discretion, may, by rule of decision * * * , decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction[.]").

Specifically criticizing the Board's focus on commercial activities, petitioner asserts that this Court "has squarely rejected the notion that a tribe's 'commercial activities' are distinct from its sovereign interest in 'self-governance.'" Pet. 21 (quoting *Michigan* v. *Bay Mills Indian Community*, 134 S. Ct. 2024, 2037 (2014)). But *Bay Mills* recognized that sovereign *immunity from suit* presents a different question than whether the sovereign is subject to the substantive provisions of applicable law. 134 S. Ct. at 2034-2035 & n.6. This case involves the latter question, and Indian tribes (like States) do not enjoy sovereign immunity from suits by the United States (here, through the Board) to enforce substantive law. See *Alden* v. *Maine*, 527 U.S. 706, 755-756 (1999) (noting sovereign immunity does not bar a suit "brought by the United States itself" against a State to enforce, *inter alia*, "obligations imposed by the Constitution and by federal

statutes"—there, the Fair Labor Standards Act of 1938); *EEOC* v. *Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1075 (9th Cir. 2001). Moreover, the Board has long distinguished between commercial and noncommercial activities to limit its assertions of jurisdiction over other kinds of employers, including foreign-governmental entities and nonprofit organizations.[6] And Congress itself has distinguished between Indian tribes' governmental and commercial activities. Under ERISA, for instance, a plan for employees of an "Indian tribal government" will be considered a "governmental plan" only if "substantially all" of the employees' services as "employee[s] are in the performance of essential government functions but not in the performance of commercial activities (whether or not an essential government function)." 29 U.S.C. 1002(32).

Petitioner describes (Pet. 22) the Casino as "integral to the Tribe's sovereignty," noting that it "funds 90% of the Tribe's programs" and therefore "plays a paramount role in tribal governance." Petitioner further notes (Pet. 34) that IGRA addressed "tribal casinos at length" without indicating "that the NLRA applies to the operations sanctioned by the IGRA." It is, of course, true that tribal gaming operations "can-

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[6] In *State Bank of India*, the Board asserted jurisdiction over the commercial activities of a bank owned by a foreign government. 808 F.2d at 530-534. And in *World Evangelism, Inc.*, 248 N.L.R.B. 909 (1980), enforced, 656 F.2d 1349 (9th Cir. 1981), the Board asserted jurisdiction over a hotel and retail complex operated to fund a nonprofit religious organization. It explained that, "[a]lthough it is the Board's general *practice* to decline jurisdiction over nonprofit religious organizations, the Board does assert jurisdiction over those operations of such organizations which are, in the generally accepted sense, commercial in nature." 248 N.L.R.B. at 913-914.

not be understood as . . . wholly separate from the Tribes' core governmental functions." Pet. 34 (quoting *Bay Mills*, 134 S. Ct. at 2043 (Sotomayor, J. concurring)). But the special status of tribal gaming in this respect does not render the activities associated with operating a casino *noncommercial* in a sense that would render the NLRA inapplicable or the Board's exercise of jurisdiction improper. IGRA itself does not indicate that Congress regarded tribal gaming as exempt from non-tribal regulation. To the contrary, with respect to class III gaming, "[e]verything * * * in IGRA affords tools (for either state or federal officials) to regulate gaming on Indian lands." *Id.* at 2034 (majority opinion). And IGRA contemplates that non-gaming-related federal law will continue to apply. The Secretary of the Interior may disapprove a tribal–state compact (and thereby prevent a casino from operating) on the ground that it violates "any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands." 25 U.S.C. 2710(d)(8)(B)(ii).

c. For related reasons, petitioner's principal contention—that the Board's assertion of jurisdiction over employment practices in tribal casinos "*divest*[*s*] tribes of their inherent sovereignty," Pet. 15—is also mistaken.

There is no question that the Tribe has inherent authority to operate a casino on its lands, and to hire employees in that enterprise. Nothing in the NLRA prevents it from doing so. The NLRA simply regulates one aspect of the employment relationships that are formed in that commercial enterprise, because of their connection to commerce.

The NLRA is broadly applicable and preemptive. See *NLRB* v. *Natural Gas Util. Dist.*, 402 U.S. 600,

603-604 (1971) ("Congress had in mind no . . . patchwork plan for securing freedom of employees' organization and of collective bargaining. The [NLRA] is federal legislation, administered by a national agency, intended to solve a national problem on a national scale.") (citation omitted); see also *Chamber of Commerce of U.S.* v. *Brown*, 554 U.S. 60, 65 (2008) (describing its preemptive effects). That means it may properly be applied by the Board to regulate employment in commercial entities that tribes have chosen to establish and operate in the exercise of their inherent authority.

Contrary to petitioner's view (Pet. 15, 21-22), such federal regulations do not divest tribes of their inherent sovereign power or infringe upon that power. The Court made a directly parallel point when it held that the Railway Labor Act applied to the state-operated railroad in *California* v. *Taylor*, 353 U.S. 553 (1957). The State contended that the statute would interfere with its "'sovereign right' * * * to control its employment relationships." *Id.* at 568. The Court recognized that the State was indeed "acting in its sovereign capacity in operating [the railroad]," but explained that it "necessarily so acted in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government." *Ibid.* (citation and internal quotation marks omitted). The same is true here with respect to the NLRA and tribes operating commercial enterprises.

Moreover, the Board and court of appeals in *Little River Band* correctly concluded that compliance with the NLRA in the context of commercial casino operations does not threaten tribal self-government. In *California* v. *Cabazon Band of Mission Indians*, 480

U.S. 202 (1987), the Court recognized Congress's commitment to tribal self-government and self-sufficiency, *id.* at 216-217, and held that tribal gaming operations were exempt from state jurisdiction where such gaming was regulated but not prohibited by state law. IGRA reiterates that commitment, validates gaming as a source of tribal revenues, and provides for, but specifies the degree of, *state* jurisdiction. But neither *Cabazon* nor IGRA suggests that gaming operations attracting large numbers of patrons from outside the reservation are not commercial enterprises insofar as their intrinsic operations, their role in the economy, and their relationships with patrons are concerned. Neither do they suggest that tribes' relationships with their employees must be exempt from other *federal* regulation. Federal requirements for participation in interstate commerce—including those in the NLRA—are routinely followed by viable businesses.

Cabazon held that the *State's* interest in barring the gaming operations at issue there was insufficient to outweigh "the compelling federal and tribal interests" supporting tribal gaming as a revenue source. 480 U.S. at 221-222. That holding was consistent with the general framework of federal Indian law, which protects Indian tribes from intrusion by the States. See *Oklahoma Tax Comm'n* v. *Sac & Fox Nation*, 508 U.S. 114, 123 (1993) (noting the "deeply rooted policy in our Nation's history of leaving Indians free from state jurisdiction and control") (citation and internal quotation marks omitted). Here, by contrast, petitioner claims the right not only to earn revenue through gaming, consistent with federal interests and protected from state law (except as permitted by IGRA), but also to disregard a *federal* labor law that neither regu-

lates gaming operations nor precludes gaming profits. The relationship of the United States to Indian tribes is fundamentally different from that of the States, for Congress has broad power with respect to Indian tribes as well as the regulation of commerce. See *United States* v. *Lara*, 541 U.S. 193, 200 (2004). This Court has never suggested that such tribal enterprises are categorically exempt from statutes enacted by Congress to ensure important rights and protections for employees and customers of such enterprises in the exercise of its broad power over commerce. Here, the right at issue—"the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer"—is one this Court has described as "fundamental." *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937).

Finally, although petitioner never endorses its reasoning, the decision below, if not bound by *Little River Band*, would have held that the Casino's actions in this case were appropriate under the Tribe's inherent power under *Montana* v. *United States*, 450 U.S. 544, 565 (1981), to "regulate * * * the activities of nonmembers who enter into consensual relations with the tribe or its members." Pet. App. 37-42. The United States, of course, agrees that Indian tribes have broad authority to regulate nonmembers' activities on tribal land. See, *e.g.*, U.S. Amicus Br. at 11-18, *Dollar Gen. Corp.* v. *Mississippi Band of Choctaw Indians*, No. 13-1496 (argued Dec. 7, 2015). And nonmembers may enter into enforceable agreements to comply with tribal law. But employees cannot, even voluntarily, prospectively waive their federal labor rights under

the NLRA. See *National Licorice Co.* v. *NLRB*, 309 U.S. 350, 364 (1940).

More fundamentally, as explained above, the NLRA does not deprive a tribe of its underlying inherent authority to enter into employment or other consensual relationships with nonmembers, or to regulate those relationships. Indeed, tribal regulation of employment and other commercial relationships can be an important area of cooperation by tribes with federal enforcement agencies in the exercise of the tribes' sovereign power, just as it can be for the States. But if an aspect of those consensual relationships or a tribe's regulation of them is inconsistent with the NLRA, federal law must prevail, just as it prevails over state law under the Supremacy Clause when the two are in conflict.

3. With respect to the second question presented, petitioner contends (Pet. 25-30) that, whether or not the Board may as a general matter exercise jurisdiction over tribes as employers in commercial enterprises, it is barred from exercising jurisdiction here by the Tribe's treaty-based right to "exclusive use, ownership, and occupancy" of its reservation. In petitioner's view, the NLRA lacks a "'clear and plain' congressional intent 'to abrogate Indian treaty rights.'" Pet. 28 (quoting *Dion*, 476 U.S. at 738). But as the court of appeals explained, the first step in determining whether a tribe's treaty right bars application of a federal law is to determine "the scope of the rights" reserved by the particular treaty. Pet. App. 14. Only then does the question arise as to whether any abrogation of those rights was sufficiently clear. *Id.* at 15. Here, the court of appeals correctly found that, because the Tribe does not have any specific treaty right that di-

rectly conflicts with the NLRA, application of the statute does not abrogate any treaty right. *Id.* at 19-24.

The 1855 treaty with the Tribe's predecessor provided that the United States would "withdraw [certain lands] from sale, for the benefit of said Indians." Pet. App. 111. The 1864 treaty set lands aside for the "exclusive use, ownership, and occupancy" of the Tribe's predecessor. *Id.* at 121. It is undisputed that, as the court of appeals determined, the language of those treaties, construed in light of canons of treaty construction, reserves to the Tribe a general right of exclusion. *Id.* at 23. But, as the court further explained, the treaties do not specify any requirements petitioner may impose upon agents of the federal government enforcing federal law, or identify specific types of activities the Tribe may control as a condition of entry onto lands reserved to the Tribe. *Ibid.*

The decision below correctly recognized that the treaties here are distinguishable from those which have been held to exempt Indian tribes from generally applicable federal laws. Thus, the treaty at issue in *Navajo Forest Products* set forth a specific right to exclude certain federal employees from Navajo lands. 692 F.2d at 711.[7] Here, by contrast, the general right

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[7] In *Winstar World Casino*, the Board declined jurisdiction over the Chickasaw Nation based on specific treaty language "forever secur[ing the tribe] from, and against, all laws * * * except such as may, and which have been enacted by Congress, to the extent that Congress under the Constitution are required to exercise a legislation over Indian Affairs." 362 N.L.R.B. No. 109, 2015 WL 3526096, at *2 (June 4, 2015) (citation omitted). The Board found that application of the NLRA would abrogate the Chickasaw Nation's treaty rights because the NLRA "is not a law enacted by Congress in legislation specific to Indian Affairs" and contains no

of exclusion in the treaty that draws from the Tribe's right of "exclusive use, ownership, and occupancy" of the reservation (Pet. App. 121) is analogous to, and essentially the same as, the *inherent* right of exclusion that all tribes have with respect to their reservation lands. The courts of appeals that have considered such a general right to exclude or set conditions on non-members' entry have concluded that it does not preclude the application of a federal statute. See *U.S. Dep't of Labor*, 935 F.2d at 185-187; *Smart*, 868 F.2d at 934-935. Petitioner operates a casino, a large commercial enterprise that is open to the general public from outside its reservation, and it has hired thousands of employees to work there. In these circumstances, the Tribe's right of "exclusive use, ownership, and occupancy" of the reservation cannot be understood to bar the application of an otherwise-applicable federal law regulating employment in such an enterprise affecting commerce, or the entry of federal officers, if necessary, to enforce that law.

Petitioner notes (Pet. 27-28) that the Tribe's predecessor "successfully removed an unscrupulous missionary and a federal agent from its reservation in the 1800s." But the federal agent was apparently removed because of his "involve[ment] in land fraud," Pet. App. 77, rather than activities to enforce federal laws on the reservation. And there is no suggestion that the agent or the missionary had been granted rights or authority under federal law that were obstructed by their exclusions. That contrasts with petitioner's discharge of a housekeeper who was exercising a "fundamental right" under the NLRA to engage in "self-organization,"

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clear congressional intent to abrogate the Nation's treaty right to be "secure" from such laws. *Id.* at *4.

Jones & Laughlin Steel, 301 U.S. at 33—a right that she could not even have waived as a condition on her entering the Tribe's reservation, *National Licorice*, 309 U.S. at 364.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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