NO. _____

In the
Supreme Court of the United States

SOARING EAGLE CASINO AND RESORT, an enterprise of the Saginaw Chippewa Indian Tribe of Michigan,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for Writ of Certiorari to the U.S. Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

For more than sixty years, the National Labor Relations Board correctly declined to exercise jurisdiction over tribal operations on tribal lands. But in recent years, the Board has belatedly asserted the extraordinary power to regulate the on-reservation activities of sovereign Indian tribes, precipitating a three-way circuit split in the process. Nothing in the text of the National Labor Relations Act changed in that interval; it contains no language granting the Board authority over Indian tribes. Nor has the language of various Indian treaties, like those between the Saginaw Chippewa Indian Tribe and the United States, changed; they continue to recognize the Tribe's authority to exclude non-members. And despite the Board's complete lack of expertise in Indian law, the Board now dictates that some tribal operations are subject to the NLRA and others are not based on its evaluation of the centrality of certain functions to tribal sovereignty and subtle differences in treaty language.

This case presents two questions, both of which have divided the courts of appeals:

(1) Does the National Labor Relations Act abrogate the inherent sovereignty of Indian tribes and thus apply to tribal operations on Indian lands?

(2) Does the National Labor Relations Act abrogate the treaty-protected rights of Indian tribes to make their own laws and establish the rules under which they permit outsiders to enter Indian lands?

PARTIES TO THE PROCEEDING

Petitioner Soaring Eagle Casino and Resort was the Petitioner and Cross-Respondent in the Sixth Circuit. Respondent National Labor Relations Board was the Respondent and Cross-Petitioner in the Sixth Circuit.

CORPORATE DISCLOSURE STATEMENT

Petitioner Soaring Eagle Casino and Resort is a governmental enterprise of the Saginaw Chippewa Indian Tribe of Michigan. The Tribe is a federally recognized Indian Tribe. It has no parent corporation and has issued no stock.

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PETITION FOR WRIT OF CERTIORARI

For the first six decades of its existence, the National Labor Relations Board ("Board" or "NLRB") never sought to exercise jurisdiction over tribal operations on Indian lands. And for good reason. Under longstanding principles of inherent tribal sovereignty—as well as the treaties that many tribes have signed with the United States—Congress must clearly express any intent to limit tribal sovereignty or abrogate treaty rights. Nothing in the National Labor Relations Act ("NLRA") or its legislative history, which are entirely silent regarding whether the Board has jurisdiction over tribes, comes close.

In 1998, even though there had been no change to either the text of the NLRA or the relevant Indian treaties, the Board began to assert jurisdiction over tribal labor policy and tribal operations on Indian lands. Remarkably, even though the Board had neither experience nor expertise in matters of Indian law, it created and sought to apply an amorphous jurisdictional test that involves an ad hoc balancing of tribal sovereignty against the Board's own policy concerns. More recently, the Board has also drawn distinctions between tribes based on subtle differences in treaty language.

Today, more than a decade after the Board's initial foray onto Indian reservations, the law in this area is—to put it charitably—a mess. The Tenth Circuit has correctly held that the Board lacks jurisdiction over tribal labor policy because nothing in the NLRA clearly abrogates tribes' inherent sovereignty. In reaching that holding, the Tenth Circuit rejected the Ninth Circuit's opposite approach,

which presumes that federal statutes abrogate tribal sovereignty unless Congress clearly states otherwise. The D.C. Circuit, in contrast, has upheld the Board's jurisdiction over Indian tribes under a balancing test—a test that is different from but no less amorphous than the Board's balancing test—based on that court's determination that the NLRA does not abrogate tribal sovereignty *too much*.

The Sixth Circuit further deepened this acknowledged split. In a 2-1 decision in *NLRB v. Little River Band of Ottawa Indians Tribal Gov't*, 788 F.3d 537 (6th Cir. 2015), the panel majority followed the Ninth Circuit's approach and held that even a statute that is entirely silent regarding its applicability to Indian tribes (such as the NLRA) can displace a tribe's sovereign authority. Judge McKeague dissented, arguing that the majority's approach was contrary to longstanding principles of Indian law and that the court should have instead followed the Tenth Circuit's approach.

Just three weeks after the *Little River* decision, a separate panel of the Sixth Circuit issued its decision in this case, which underscored this confusion. The panel expressly disagreed with *Little River* (while reluctantly applying it) and then split 2-1 over whether language in the Saginaw Chippewa's Treaties with the United States made an outcome-determinative difference, an issue that implicates a separate circuit split. Quite remarkably, the Sixth Circuit then denied en banc review in this case and *Little River*, even though a majority of the six judges to consider the statutory issue agreed that the Board lacks jurisdiction.

The net result of all of this is that the Board—an agency with absolutely no expertise in Indian law—is exercising authority over some (but not all) tribal operations on tribal lands, drawing lines based on its own evaluation of tribal sovereignty and subtle differences in treaty language, unless the tribe is fortunate enough to be able to seek review in the Tenth Circuit. This situation is wholly untenable. A tribe's sovereignty should turn on neither the happenstance of whether its reservation lies within the Tenth Circuit nor the Indian-law determinations of the Labor Board. Instead, tribal sovereignty should turn on statutory or treaty language, which in this case both point toward the same conclusion: the Board's exercise of jurisdiction is *ultra vires*.

OPINIONS BELOW

The Sixth Circuit's opinion is published at 791 F.3d 648 and reproduced at Pet.App.1-58. The Board's order is published at 361 NLRB No. 73 and reproduced at Pet.App.61-66. That order adopts in full an earlier order, which is published at 359 NLRB No. 92 and reproduced at Pet.App.67-110.

JURISDICTION

The Sixth Circuit issued its decision on July 1, 2015, and denied a timely petition for rehearing en banc on September 29, 2015. Pet.App.59-60. On December 16, 2015, Justice Kagan extended the time to file a petition for certiorari until February 26, 2016. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY AND TREATY PROVISIONS INVOLVED

The Treaty of 1855, 11 Stat. 633, is reproduced at Pet.App.111-19, and the Treaty of 1864, 14 Stat. 657, is reproduced at Pet.App.120-30. The relevant provisions of the NLRA, 29 U.S.C. §§152, 158(a), are reproduced at Pet.App.131-36.

STATEMENT OF THE CASE

A. The Board's Newfound Desire To Assert Jurisdiction Over Tribes

Indian tribes are "domestic dependent nations that exercise inherent sovereign authority." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014). As dependent sovereigns, tribes are subject to Congress' plenary authority. But, "unless and until Congress acts, the tribes retain their historic sovereign authority." *Id.* This Court has long held that courts may construe a federal statute as impairing tribal sovereignty only if Congress clearly expresses its desire to reach that result. *See*, *e.g.*, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149-52 (1982).

For the first six decades of its existence, the Board did not exercise jurisdiction over tribes on their reservations. The Board occasionally asserted jurisdiction over *non-tribal* employers operating on Indian reservations. *See, e.g., Navajo Tribe v. NLRB*, 288 F.2d 162, 164 (D.C. Cir. 1961). But it simultaneously acknowledged that "Federal Indian law and policy preclude Board jurisdiction" over *tribal* operations in Indian country. *Fort Apache Timber Co.*, 226 N.L.R.B. 503, 506 (1976). The Board followed this Court's precedent and refused to abrogate tribal

sovereignty because the NLRA had not "specifically provided to the contrary." *Id.*

But in 1998, the Board changed course. It argued that the NLRA preempted a tribe's right-to-work ordinance. The district court granted summary judgment to the tribe and the Tenth Circuit (sitting en banc) affirmed. *See NLRB v. Pueblo of San Juan*, 276 F.3d 1186 (10th Cir. 2002). The court concluded that the tribe "retains the sovereign power to enact its right-to-work ordinance … because *Congress has not made a clear retrenchment of such tribal power as is required to do so validly*." *Id.* at 1191 (emphasis added). The Tenth Circuit also rejected the Board's reliance on *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960). *Tuscarora* noted in passing that federal statutes of general applicability presumptively apply to *individual* Indians, but the Tenth Circuit emphasized that this dictum "does not apply where an Indian tribe has exercised its authority as a sovereign." 276 F.3d at 1199.

Undeterred, the Board again attempted to assert jurisdiction over a tribe in 2004, even though nothing had changed in the text of the NLRA or federal Indian law since the Tenth Circuit's decision. *See San Manuel Indian Casino Emps. Int'l Union*, 341 N.L.R.B. 1055, 1059 (2004). The Board asserted that this intrusion into tribal sovereignty was needed because tribal enterprises were becoming "serious competitors with non-Indian owned businesses." *Id.* at 1062.

As support for its assertion of jurisdiction, the Board cited the very same dictum from *Tuscarora* that

the Tenth Circuit had found inapposite. *Id.* at 1059-60. The Board made clear that it was not asserting jurisdiction over all tribes. Instead, it would consider, on a case-by-case basis, "whether policy considerations militate in favor of or against the assertion of the Board's discretionary jurisdiction." *Id.* at 1062. The Board concluded that this "new standard" would "better accommodat[e] the need to balance the Board's interest in furthering Federal labor policy with its responsibility to respect Federal Indian policy." *Id.* at 1055-59. The Board embraced that amorphous balancing of competing policies even though it readily concedes that its "'expertise and delegated authority'" pertain to the former and not the latter. Pet.App.11.

In *San Manuel Indian Casino v. NLRB*, 475 F.3d 1306, 1311 (D.C. Cir. 2007), the D.C. Circuit departed from the Tenth Circuit's holding and upheld the Board's assertion of jurisdiction over tribes, albeit under a test different from (but no more administrable than) the balancing test the Board applies. The court acknowledged that "*Tuscarora*'s statement is of uncertain significance" and is "in tension with the longstanding principles that (1) ambiguities in a federal statute must be resolved in favor of Indians, and (2) a clear expression of Congressional intent is necessary before a court may construe a federal statute so as to impair tribal sovereignty." *Id.*

The D.C. Circuit nonetheless concluded (without citation) that "[t]he total impact on tribal sovereignty at issue here amounts to some unpredictable, but probably modest, effect on tribal revenue and the displacement of legislative and executive authority that is secondary to a commercial undertaking." *Id.* at

1315. Under its new sliding-scale approach to tribal sovereignty, the court concluded 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 [a tribal casino]." *Id.* (emphasis added).

B. The Saginaw Chippewa Tribe, the Treaties, and the Casino

The Saginaw Chippewa Indian Tribe of Michigan ("Tribe") is a federally recognized Indian tribe with sovereign authority over its territory in central Michigan. The Isabella Reservation was set apart for the Tribe by Executive Order in 1855 and secured by treaties in 1855 and 1864. Pet.App.111-19, 120-30. For many years, the Reservation lacked any meaningful economic opportunity, and tribal members lived in substandard housing without running water, accessible only by unpaved roads. C.A.App.239, 256.[1]

In 1998, the Tribe opened the Soaring Eagle Casino and Resort ("Casino"), which brought "tremendous socio-economic change" to the Reservation. C.A.App.250-51. Under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §2702, and the Tribe's own laws, C.A.App.96-98, the Tribe operates the Casino on tribal trust land as a governmental endeavor to "provide a funding source for the exercise of tribal sovereignty and the operation of tribal governmental programs and services," C.A.App.61-62. The Tribe relies on the Casino "to raise the funds necessary to finance and expand its social, health, education and governmental services

[1] "C.A.App." refers to the Appendix in the Sixth Circuit.

programs, increase employment within the Reservation and improve the Tribe's on-Reservation economy." C.A.App.60. The Casino generates 90% of the Tribe's governmental income and is used to fund nearly all of the Tribe's 37 departments and 159 programs. Pet.App.5.

These programs could not exist without the Casino's governmental revenue stream. C.A.App.225-26. Any disruption of the Casino's operations would have a "devastating" impact on the Tribe and its provision of government services. C.A.App.248. The Tribal Council accordingly maintains "very detailed" oversight of the Casino. C.A.App.219. For example, the Tribal Council hires all Casino management, requires regular reports from the Casino's departmental managers, and approves all of the Casino's contracts with outside vendors. C.A.App.218-19, 228-29. The Tribal Council's enactments, including its employment policies, reflect the "cultural values and the heritage of [the] community." C.A.App.215.

Tribal law also makes clear that the Tribe retains the power to exclude individuals from its sovereign territory, including the Casino. C.A.App.147-51. The right to exclude is grounded in the Tribe's inherent sovereignty and secured by the Treaties of 1855 and 1864. Those Treaties protect the Tribe's right to govern itself and exclude unwanted persons from the Reservation. Pet.App.121. While negotiating the 1855 and 1864 Treaties, tribal negotiators specifically bargained for the Tribe's right to exclude unwanted intruders from the Reservation in perpetuity. Pet.App.78 n.8; C.A.App.161-62, 216, 272-74.

Consistent with the Tribe's Treaties and inherent sovereignty, tribal law provides that a non-member who enters and works within the Reservation "does so only as a guest upon invitation of the Tribe." C.A.App.147. The Tribal Council has adopted specific rules for Casino employees that are listed in an Associate Handbook. Pet.App.5. The handbook includes a neutral no-solicitation policy that is not targeted at labor solicitation, but prohibits all employees from soliciting at the Casino for any purpose. Pet.App.5-6.

Throughout 2009 and 2010, a Casino employee (who is not a member of the Tribe) repeatedly violated the Tribe's policies by engaging in unapproved union solicitation on the Reservation. The Tribe progressively disciplined and eventually terminated that employee for violating its employment law. Pet.App.6-7.

C. Proceedings Before the Board

At a labor union's request, the Board filed a complaint against the Tribe, alleging that the Tribe's application of its law to the employee in question violates the NLRA. The Tribe defended on the ground that the Board lacks jurisdiction over the Casino because the NLRA does not expressly apply to tribes and does not abrogate either the Tribe's inherent sovereign authority or its rights under the 1855 and 1864 Treaties.

In the proceedings before an Administrative Law Judge, the Board demonstrated that its expertise does not extend beyond labor law to Indian law. For example, when the Tribe offered expert testimony concerning the Indian negotiators' understanding of

certain treaty provisions, the union and Board objected that Indian understanding of the Treaties—a foundational tenet of Indian-treaty interpretation—was irrelevant. C.A.App.261, 266. The ALJ also noted several times that he was unfamiliar with the governing law, remarking that "this seems like a very unusual situation … *is all very—appears to be very new to me*." C.A.App.259-60, 262 (emphasis added).

Despite his obvious lack of expertise with federal Indian law and policy, the ALJ applied the Board's *San Manuel* policy-balancing test, *see supra* at 5-6, and unsurprisingly concluded that labor policy triumphed. The ALJ downplayed the impact on tribal sovereignty, concluding that: (1) "applying the Act to the Tribe's casino operations would not interfere with its rights of self-governance of intramural matters"; and (2) "application of the Act does not abrogate the Tribe's treaty right to exclude nontribal members from its land." Pet.App.92, 95. The ALJ thus asserted "discretionary jurisdiction over the Tribe," Pet.App.96, ordered the Tribe to "cease and desist" from applying its no-solicitation law, and ordered the employee to be reinstated with full backpay, Pet.App.105-08.

The Board subsequently affirmed the ALJ's "rulings, findings, and conclusions." Pet.App.9. Cross-petitions to the Sixth Circuit followed. After a voluntary remand in the wake of *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), a constitutionally composed Board reconsidered the matter de novo and reaffirmed the ALJ's original decision. Pet.App.62.

D. Proceedings Before the Sixth Circuit

The Tribe again appealed to the Sixth Circuit, and its case was fully briefed and argued before a panel of

that court. But before the panel could issue its decision in this case, another Sixth Circuit panel issued its own decision in *NLRB v. Little River Band of Ottawa Indians Tribal Government*, 788 F.3d 537 (6th Cir. 2015). Like this case, *Little River* raised the question of whether the Board has jurisdiction over a tribe, but (unlike this case) *Little River* did not address whether the Board's assertion of jurisdiction was foreclosed by a treaty-based right to exclude. *See* Pet.App.26 n.9 ("no treaty right at issue" in *Little River*).

1. The *Little River* panel held by a 2-1 vote that the Board could exercise jurisdiction over a tribal casino located on tribal land. The panel followed the approach of the Ninth Circuit, under which "federal laws generally applicable throughout the United States apply with equal force to Indians on reservations." *Little River*, 788 F.3d at 547 (quoting *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1115 (9th Cir. 1985)). In other words, the panel concluded that "aspects of inherent tribal sovereignty can be *implicitly divested by comprehensive federal regulatory schemes that are silent as to Indian tribes.*" *Id.* at 548 (emphasis added). In reaching that holding, the panel emphasized that it "[does] not agree" with the Tenth Circuit's decision in *Pueblo of San Juan*, which held that federal statutes of general applicability "do not presumptively apply" where a tribe has "'exercised its authority as a sovereign.'" *Id.* at 549-50.

Judge McKeague dissented, arguing that the panel majority's decision "impinges on tribal sovereignty, encroaches on Congress's plenary and

exclusive authority over Indian affairs, conflicts with Supreme Court precedent, and unwisely creates a circuit split." *Id.* at 556. Judge McKeague explained why the panel's reliance on *Tuscarora* was misplaced. *Id.* at 557-59. He chided the Board for its "[e]xtraordinary" decision to continue asserting jurisdiction over tribes even after the Tenth Circuit's decision in *Pueblo of San Juan*. *Id.* at 559. And he argued that the Tenth Circuit's approach "is true to the governing law and should be adopted in the Sixth Circuit as well." *Id.* at 561.

2. Just 22 days after the *Little River* panel issued its decision, a different panel of the Sixth Circuit issued its decision in this case. The court concluded that it was bound by circuit precedent to follow *Little River* and affirm the Board's jurisdiction over the Casino. Pet.App.25-26. But, remarkably, *all three members of the panel* joined a lengthy opinion explaining why they believed *Little River* was incorrectly decided.

In particular, whereas the *Little River* majority adopted the Ninth Circuit's approach from its *Coeur d'Alene* decision, the panel in this case would have rejected that approach because it "fails to respect the historic deference that the Supreme Court has given to considerations of tribal sovereignty in the absence of congressional intent to the contrary." Pet.App.51-52. Applying *Montana v. United States*, 450 U.S. 544 (1981), the panel would have held that "the Tribe as a sovereign" may "choose to place conditions on its contractual relationships with … nonmembers." Pet.App.38. Thus, "if writing on a clean slate," the panel would have held that "the

Tribe has an inherent sovereign right to control the terms of employment with nonmember employees at the Casino, a purely tribal enterprise located on trust land." Pet.App.42.

Because this case, unlike *Little River*, implicates treaty rights as well as the Tribe's inherent sovereignty, the panel also addressed (and divided over) the separate question whether "the language of the 1855 and 1864 Treaties prevent[s] application of the NLRA to the Casino's activities." Pet.App.12. The panel majority found this question "close" but concluded that a "general right of exclusion" in a treaty is "insufficient to bar application of federal regulatory statutes of general applicability." Pet.App.23.

Judge White dissented in relevant part. She agreed that "*Little River* was wrongly decided" and controlling, but nonetheless believed that the Tribe's treaty rights made an outcome-determinative difference. She emphasized that "the Tribe … has treaty rights protecting its on-reservation activities," and that "the Tribe would reasonably have understood" the right to exclude in its 1855 and 1864 Treaties "to mean that the federal government could not dictate, in any way, what the Tribe did on the land it retained." Pet.App.54-56. She concluded that the Tribe's "power to place conditions on a non-member's entry necessarily includes the power to regulate, without federal interference, the non-member's conditions of employment." Pet.App.57.

* * *

In the end, four of the six judges to consider the relevant issues in this case and *Little River* concluded

that the Board lacks jurisdiction over tribal operations on tribal lands. But through happenstances of timing, the Board effectively prevailed by a 2-4 vote.

Both Petitioner and the Little River Band sought rehearing en banc. The Board agreed that en banc review was appropriate in light of the "extensive critique in *Soaring Eagle* of the panel's rationale." Board Resp. to Pet. for Reh'g at 5, No. 14-2239 (6th Cir. Aug. 28, 2015). Yet, quite remarkably, the Sixth Circuit denied both petitions for rehearing. This Petition followed.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari to address two closely related questions about the scope of federal authority over Indian tribes, both of which have divided the lower courts. The Court should grant certiorari on both questions to ensure that it has before it each of the possible defenses to the Board's assertion of jurisdiction over Indian tribes. And the Court should grant certiorari now, before the Board goes any further in balancing away the sovereignty of tribes.

I. First, the Court should grant certiorari to resolve an acknowledged three-way split of authority over whether the NLRA abrogates tribes' inherent sovereign authority to control their own employment decisions on tribal lands. The Tenth Circuit holds that the NLRA does not abrogate tribal sovereignty because nothing in the statute reflects a clear and unambiguous congressional intent to regulate tribes. In stark contrast, the Sixth Circuit now applies the exact opposite presumption, holding that the Board has jurisdiction because nothing in the NLRA

specifically *excludes* tribes. And the D.C. Circuit crafted a third rule, holding that it will evaluate the Board's jurisdiction over tribes on a case-by-case basis depending on that court's perception of the *degree* of intrusion into tribal sovereignty.

The Sixth Circuit's approach to inherent tribal sovereignty is flatly inconsistent with this Court's Indian law jurisprudence. Whereas this Court has repeatedly held that only a clear expression from Congress can *divest* tribes of their inherent sovereignty, the Sixth Circuit has inverted that rule, holding that federal statutes apply to tribes unless Congress has expressly *protected* tribal sovereignty. Under a proper application of this Court's precedents, this should have been an easy case. Nothing in the NLRA even remotely suggests that Congress gave the Board—an agency with no expertise whatsoever regarding Indian law—the power to abrogate tribal sovereignty.

II. Second, the Court should grant certiorari to address the related question of whether and under what circumstances a federal statute may override a treaty-based right to exclude. Many tribes, including the Saginaw Chippewa, have signed treaties with the United States that guarantee the right to determine who may enter the tribe's reservation. This Court has repeatedly emphasized that a tribe's right to exclude necessarily includes the subsidiary power to place conditions on the circumstances in which non-Indians will be allowed to enter and remain within a reservation.

Once again, this Court applies a clear-expression rule *in favor* of tribal sovereignty and against

inadvertent abrogation of treaty obligations. And once again the Sixth Circuit somehow flipped that into a clear-expression rule *against* tribal sovereignty. That holding deepens another circuit split and is an independent ground for decision, as Judge White's dissent demonstrated. The Tenth Circuit properly holds that only a clear expression of congressional intent can abrogate a treaty-protected right to exclude. In stark contrast, the Seventh, Ninth, and now Sixth Circuits hold that even a federal statute that is silent as to Indian tribes can override treaty language. If the decision below stands, the end result will be that the "federal government's agreement with the Tribe is worth no more than the paper on which it was written." Pet.App.58 (White, J., dissenting).

III. Absent this Court's intervention, the Labor Board will continue to usurp Congress' power to regulate Indian affairs and will continue to tinker with Indian law issues and treaty-interpretation questions wholly outside its ken. To be clear, the Board's position is not that all tribes are subject to the NLRA. Rather, the Board reserves the right to draw fine distinctions between tribal functions (with casinos covered but other tribal operations not) and between tribes (based on the nuances of treaty interpretation). This dynamic has nothing to recommend it. Article I of the Constitution grants *Congress*, not the Board, plenary and exclusive authority over Indian affairs. And the application of the NLRA to tribes should turn on statutory or treaty language, not on the happenstance of whether a tribe is located in the Tenth Circuit or on fine distinctions drawn by an administrative agency with no expertise in Indian law.

I. The Sixth Circuit's Holding That The NLRA Displaces Tribes' Inherent Sovereign Authority Deepens An Acknowledged Circuit Split And Is Wrong On The Merits.

A. The Circuits Are Divided Over Whether the NLRA Displaces Inherent Tribal Authority.

In the wake of the Sixth Circuit's decisions in this case and *Little River*, there is a clearly defined three-way split of authority over whether and under what circumstances the Board may exercise jurisdiction over tribes.

1. The Tenth Circuit, sitting en banc, has squarely rejected the Board's attempt to override a labor ordinance enacted by an Indian tribe. In *Pueblo of San Juan*, the tribe adopted a right-to-work ordinance that applied to all "employment on Pueblo lands." 276 F.3d at 1189. The Board brought suit to enjoin that ordinance, arguing that it conflicted with, and was thus preempted by, the NLRA.

The Tenth Circuit disagreed. After carefully examining the relevant precedents from this Court, the Tenth Circuit concluded that divestiture of a tribe's inherent sovereign authority "will only be found where Congress has manifested its clear and unambiguous intent to restrict tribal sovereign authority." *Id.* at 1194. Especially in light of the canon "requiring resolution of ambiguities in favor of Indians," courts "do not lightly construe federal laws as working a divestment of tribal sovereignty," and should do so "*only where Congress has made its intent clear*." *Id.* at 1194-95 (emphasis added).

Applying those principles, the Tenth Circuit had little difficulty rejecting the Board's assertion of jurisdiction. All agreed that "neither the legislative history of the NLRA, nor its language, make any mention of Indian tribes." *Id.* at 1196. And "[s]ilence is not sufficient to establish congressional intent to strip Indian tribes of their retained inherent authority to govern their own territory." *Id.* The Tenth Circuit thus concluded that "Congress did not intend by its NLRA provisions to preempt tribal sovereign authority to enact its right-to-work ordinance." *Id.* at 1200.

2. Whereas the Tenth Circuit applies this Court's presumption that federal statutes that are silent regarding Indian tribes do *not* divest tribes of their sovereign authority, the Sixth Circuit now applies the exact opposite presumption. In its *Little River* decision—which the lower court used to rule against the Tribe in this case—the Sixth Circuit held that "a federal statute creating a comprehensive regulatory scheme *presumptively applies to Indian tribes*." *Little River*, 788 F.3d at 547 (emphasis added). To reach that holding, the court applied "the framework set forth in" the Ninth Circuit's decision in *Coeur d'Alene*. *Id.* at 548; *accord Coeur d'Alene*, 751 F.2d at 1116 (rejecting "the proposition that Indian tribes are subject only to those laws of the United States expressly made applicable to them").

Under that framework, the Sixth Circuit held that the NLRA "applies to the Band's operation of the casino unless the Band can show either that the Board's exercise of jurisdiction 'touches exclusive rights of self-governance in purely intramural

matters' or that 'there is proof by legislative history … that Congress intended [the NLRA] not to apply to Indians on their reservations.'" *Little River*, 788 F.3d at 551 (quoting *Coeur d'Alene*, 751 F.2d at 1116). Finding no clear indication that Congress did *not* intend for the NLRA to apply to Indian tribes, the Sixth Circuit affirmed the Board's jurisdiction over the Little River Band's tribal casino. *Id.* at 551-55.

The Sixth Circuit's approach unquestionably conflicts with the Tenth Circuit's holding in *Pueblo of San Juan*. As Judge McKeague explained in *Little River*, the Tenth Circuit "considered … and definitively rejected" the very same arguments that the Sixth Circuit found controlling. *Id.* at 561 (McKeague, J., dissenting). Similarly, all three Sixth Circuit judges on the panel in this case disagreed with "the *Little River* majority's adoption of the *Coeur d'Alene* framework [and] its analysis of Indian inherent sovereign rights." Pet.App.26. And all three judges further recognized that "[t]he Tenth Circuit … has rejected the *Coeur d'Alene* framework." Pet.App.46. There is no question that this case would have been decided differently if it had arisen in the Tenth Circuit.

3. The D.C. Circuit has taken yet another approach to analyzing whether the Board has jurisdiction over tribes. In *San Manuel*, the Board alleged that a tribe denied union representatives access to a tribal casino in violation of the NLRA. The D.C. Circuit found the issue to be "particularly difficult" in light of "conflicting Supreme Court canons of interpretation" and the fact that a tribal casino was "strongly commercial" but also "in some sense

governmental." 475 F.3d at 1310. The court thus adopted a sliding-scale test under which the "determinative consideration" is "the *extent* to which application of the general law will constrain the tribe with respect to its governmental functions." *Id.* at 1313 (emphasis added). If "such constraint will occur," then "a clear expression of Congressional intent" is needed to displace the Tribe's authority. But if the statute "relates only to the extra-governmental activities of the tribe … then application of the law might not impinge on tribal sovereignty." *Id.*

Conducting its own balancing of the tribe's sovereign interests, the D.C. Circuit concluded (without citation) that allowing the Board to regulate a tribal casino would have an "unpredictable, but probably modest, effect on tribal revenue and the displacement of legislative and executive authority." *Id.* at 1315. The court held that this "limited impact" "does not impinge on the Tribe's sovereignty *enough* to indicate a need to construe the [NLRA] narrowly against application to employment at the Casino." *Id.* (emphasis added).

Thus, whereas the Tenth Circuit applies a presumption in favor of tribal authority and the Sixth and Ninth Circuits apply a presumption against tribal authority, the D.C. Circuit "applies a fact-intensive analysis of the tribal activity at issue and a policy inquiry comparing the federal interest in the regulatory scheme at issue with the federal interest in protecting tribal sovereignty." Pet.App.50. In short, the D.C. Circuit has "steered a middle course" that "depart[s] from established principles of Indian law" but does not go quite as far as the "*Coeur d'Alene*

approach." *Little River*, 788 F.3d at 559-60 (McKeague, J., dissenting).

B. The Sixth Circuit's Holding is Flatly Contrary to this Court's Precedents.

This Court's review is imperative not only because of the three-way circuit split but also because the Sixth Circuit's decision to permit Board jurisdiction over a tribe's on-reservation activities is flatly contrary to an unbroken line of this Court's precedents.

1. This Court has repeatedly reaffirmed, as recently as two years ago, that "[a]lthough Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government." *Bay Mills*, 134 S. Ct. at 2032. It is an "enduring principle of Indian law" that Congress must "unequivocally express" its intent to abrogate tribal sovereignty. *Id.* at 2031-32. Where tribal sovereignty is at stake, courts must "tread lightly in the absence of clear indications of legislative intent." *Merrion*, 455 U.S. at 149.

A tribe's "general authority, as sovereign" includes the power "to control economic activity within its jurisdiction." *Id.* at 137. And this Court has squarely rejected the notion that a tribe's "commercial activities" are distinct from its sovereign interest in "self-governance." *Bay Mills*, 134 S. Ct. at 2037; *accord Kiowa Tribe of Okla. v. Mfg. Techs.*, 523 U.S. 751, 757-58 (1998) (refusing to "draw [a] distinction" between "tribal self-governance" and tribal "commercial activity").

Under those precedents, this should have been an easy case. The Tribe's no-solicitation policy was

designed "to control economic activity within [the Tribe's] jurisdiction," *Merrion*, 455 U.S. at 137, and reflects a sovereign judgment about the operation of tribal businesses on tribal land. And the Casino is integral to the Tribe's sovereignty; it is a tribal-government enterprise that funds 90% of the Tribe's programs and plays a paramount role in tribal governance. But the Board ordered the Tribe to cease and desist from applying tribal law at a tribal casino on tribal land.

Nothing in the NLRA gives even the slightest indication that Congress intended for the Board—which admits it lacks any expertise in Indian law—to intrude upon the Tribe's inherent sovereignty. If Congress wanted to single out tribal casinos for special treatment, it had every opportunity to do so in IGRA. Instead, in both 1935 (when it enacted the NLRA) and 1988 (when it passed IGRA), Congress did not evince the slightest intent to treat sovereign Indian tribes like ordinary private-sector employers.[2] Indeed, given that when Congress squarely considered applying the NLRA to government employers, it expressly exempted them, *see* 29 U.S.C. §152(2), it strains credulity to think that tribes are the *only* sovereigns subject to the Board's jurisdiction.

2. In holding to the contrary, the Sixth Circuit relied heavily on this Court's statement in the 1960

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[2] Congress is well aware of how to include Indian tribes in a regulatory scheme when it chooses to do so. For example, in the Federal Power Act, Congress granted the power to condemn "'tribal lands embraced within Indian reservations.'" *Tuscarora*, 362 U.S. at 114.

Tuscarora decision that it is "now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests." *Tuscarora*, 362 U.S. at 116. That reliance was badly misplaced. "While the *Tuscarora* statement has blossomed into a 'doctrine' in some courts … closer inspection of the *Tuscarora* opinion reveals that the statement is in the nature of dictum and entitled to little precedential weight." *Little River*, 788 F.3d at 557 (McKeague, J., dissenting).

The pertinent question in *Tuscarora* was whether the Federal Power Act authorized a power-plant operator to exercise eminent domain power over tribal land. 362 U.S. at 115. That question had a straightforward answer because the definitions in the Federal Power Act expressly encompassed "'tribal lands embraced within Indian reservations.'" *Id.* at 118. Thus, unlike the NLRA, the Federal Power Act gave "every indication that, within its comprehensive plan, *Congress intended to include lands owned or occupied by any person or persons, including Indians*." *Id.* (emphasis added).

Moreover, *Tuscarora* addressed only issues of land ownership, not "questions pertaining to the tribe's sovereign authority to govern the land." *Pueblo of San Juan*, 276 F.3d at 1198. The sentence in *Tuscarora* regarding statutes of general applicability was "made in the context of property rights, and [does] not constitute a holding as to tribal sovereign authority to govern." *Id.* at 1199. Indeed, all three cases that the Court cited in support of that proposition addressed whether federal tax statutes

applied to *individual Indians*.[3] Those cases did not address the very different question of when a federal statute should be construed as displacing a *tribe's* inherent sovereign authority.

In all events, in the fifty-plus years since *Tuscarora* was decided, this Court has never even *cited* that sentence again, much less suggested that it stands for the sweeping proposition embraced by the Sixth Circuit. Instead, this Court has emphasized that *Tuscarora* "expressly reaffirmed" the clear-expression rule *in favor of* Indian sovereignty. *See Cty. of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 248 n.21 (1985). *Tuscarora* is entirely consistent with this Court's oft-repeated holding that federal statutes should be construed as intruding upon inherent tribal sovereignty only if there is a clear indication that Congress intended that result.

3. Finally, the D.C. Circuit's ad hoc sovereignty-balancing test—a modified version of the test the Board applies—has nothing to recommend it. That approach interprets statutes based on a judicial evaluation of the *degree* of intrusion into the tribe's sovereignty, rather than a proper evaluation of congressional intent. *See San Manuel*, 475 F.3d at 1315.

Moreover, neither the Board nor the D.C. Circuit has specified how much intrusion into tribal sovereignty is "enough" to foreclose application of the NLRA. Indeed, any attempt to balance tribal

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[3] *See Okla. Tax Comm'n v. United States*, 319 U.S. 598 (1943); *Superintendent of Five Civilized Tribes v. Comm'r*, 295 U.S. 418 (1935); *Choteau v. Burnet*, 283 U.S. 691 (1931).

sovereignty interests against federal labor law policies would "not really [be] appropriate, since the interests on both sides are incommensurate." *Bendix Autolite Corp. v. Midwesco Enters.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment). Much like "judging whether a particular line is longer than a particular rock is heavy," *id.*, the D.C. Circuit's test is incoherent in theory and unworkable in practice.

II. The Sixth Circuit's Holding That The NLRA Abrogates The Tribe's Treaty-Based Right To Exclude Is Wrong And Conflicts With Other Courts' Approaches To Treaty Rights.

In addition to holding that the NLRA displaces the Tribe's inherent sovereign authority, the Sixth Circuit also held—over a dissent from Judge White—that the NLRA abrogates the Tribe's treaty rights. That ruling is wrong in its own right and also implicates another circuit split over how employment statutes like the NLRA interact with rights of exclusion secured by treaties between tribes and the United States. This Court should grant certiorari to consider both questions presented because they are independently certworthy and because the Tribe's treaty-based rights provide an alternative basis for finding the NLRA inapplicable. As Judge White's dissent makes clear, the Tribe's treaties with the United States would foreclose the Board's jurisdiction even if *Little River* were correctly decided.

A. The Sixth Circuit Failed to Give Proper Weight to the Tribe's Treaty Rights.

1. In the 1800s, the United States entered into treaties with a number of Indian tribes. Those treaties often involved a cession of tribal lands in exchange for

payment from the United States and formal recognition of the tribe's sovereignty over a defined reservation. *See*, *e.g.*, Pet.App.2-3; *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 175 (1999); *United States v. Dion*, 476 U.S. 734, 737 (1986). Many of those treaties also recognized the tribes' unconditional right to exclude non-Indians from tribal lands, as well as the "lesser power to place conditions" on the circumstances in which non-Indians would be allowed to enter and remain within a reservation. *Merrion*, 455 U.S. at 144.

This Court has long protected Indian treaty rights, both out of respect for tribal sovereignty and in recognition that "treaties were imposed upon [tribes] and they had no choice but to consent." *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970). Three canons of treaty interpretation ensure that Indian treaty rights are not "easily cast aside." *Dion*, 476 U.S. at 739. *First*, this Court "interpret[s] Indian treaties to give effect to the terms as the Indians themselves would have understood them." *Mille Lacs*, 526 U.S. at 196. That is, "[h]ow the words of the treaty were understood by [the Indians], rather than their critical meaning, should form the rule of construction." *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 582 (1832).

Second, treaties involving tribes "are construed more liberally than private agreements," *Choctaw Nation v. United States*, 318 U.S. 423, 431 (1943), with any ambiguous provisions "resolved in [the Indians'] favor," *McClanahan v. Ariz.*, 411 U.S. 164, 174 (1973); *accord Mille Lacs*, 526 U.S. at 200 ("[T]reaties are to be interpreted liberally in favor of the Indians.").

Third, this Court applies a clear-expression rule to protect Indian treaty rights from congressional abrogation. Although Congress has plenary power to abrogate treaties, this Court has repeatedly "required that Congress' intention to abrogate Indian treaty rights be clear and plain." *Dion*, 476 U.S. at 738. Indeed, *only* Congress can divest a tribe of core aspects of its sovereignty such as its land or treaty rights. *See*, *e.g.*, *Solem v. Bartlett*, 465 U.S. 463, 470 (1984) ("[O]nly Congress can divest a reservation of its land and diminish its boundaries."); *United States v. Celestine*, 215 U.S. 278, 285 (1909). And when Congress does choose to abrogate treaty rights, "it must clearly express its intent to do so." *Mille Lacs*, 526 U.S. at 202.

2. In the 1864 Treaty between the Tribe and the United States, the United States agreed to set aside the Reservation for the Tribe's "'exclusive use, ownership, and occupancy.'" Pet.App.3, 121. It is "undisputed" that "the Treaties preserved the Tribe's right to exclude non-Indians from living in the territory." Pet.App.3. And that power to exclude non-Indians "necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct." *Merrion*, 455 U.S. at 144; *see also Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 335 (2008) (tribe's "power to exclude" includes the "power to set conditions on entry").

The Tribe, from 1864 to the present, has shared that understanding of its treaty-based right to exclude. It is undisputed that the Tribe successfully removed an unscrupulous missionary and a federal

agent from its reservation in the 1800s. Pet.App.77-78. And, in modern times, the Tribe enacted laws describing the terms on which it could exclude persons from the Reservation. *Id.* At all times, the Tribe understood that it could impose conditions of entry "on those it permitted to enter." Pet.App.56 (White, J., dissenting); *see* C.A.App. 263-66, 272-74.

Exercising that sovereign right secured by treaty, tribal law unambiguously provides that any person who enters and works within the Reservation "does so only as a guest upon invitation of the Tribe." C.A.App.147. And tribal law provides that a "condition[] … on continued presence," *Merrion*, 455 U.S. at 144, is that invitees who work at the Casino must comply with Tribal law, including the no-solicitation policy. Yet the Board ordered the Tribe to reinstate (*i.e.*, invite back) the employee who had violated tribal law, in direct abrogation of the Tribe's treaty-protected right to exclude.

This Court's cases are clear that only Congress may abrogate rights protected by Indian treaties. *See Celestine*, 215 U.S. at 284. But the NLRA unquestionably lacks a "clear and plain" congressional intent "to abrogate Indian treaty rights," *Dion*, 476 U.S. at 738, as it is "entirely silent with respect to Indians and Indian tribes," Pet.App.18. Indeed, even the majority below conceded that "the Board [failed] to point to any other act of Congress, or even any legislative history, that would demonstrate Congress's intent to abrogate the rights established by the 1855 and 1864 Treaties." *Id.* Judge White correctly treated that silence as outcome-determinative. Pet.App.56.

The panel majority, by contrast, failed to follow this Court's precedent applying a clear-expression rule *in favor of* the Tribe's treaty rights and instead inverted that rule and applied a clear-expression rule *against* treaty rights. According to the panel, the 1864 Treaty's "general right of exclusion" does not shield the Tribe from federal regulation because the Treaty does not "detail with any level of specificity the types of activities the Tribe may control or in which it may engage." Pet.App.23. But that analysis is exactly backwards. Under this Court's precedents, it is the *statute*, not the treaty, that must provide the requisite specificity. The Tribe's treaty right of exclusion remains in force unless and until a statute specifically abrogates it. *See, e.g.*, *Mille Lacs*, 526 U.S. at 203 (finding no "'clear evidence'" of congressional intent to abrogate treaty).

It is thus irrelevant that the Treaty does not specifically address solicitation and does not "expressly state that the NLRA does not apply to the Tribe." Pet.App.55 (White, J., dissenting). Indeed, the panel majority's specificity requirement asks for the impossible. There is little doubt that, under the 1864 Treaty, the Tribe could have—and did—exclude unscrupulous visitors and even federal agents from the Reservation. The Tribe also retained the right to impose and enforce conditions on entry into tribal lands. The Tribe's authority to exclude a worker who enters the reservation as a guest and flagrantly disregards the rules clearly laid out in the handbook is just a modern analog of the treaty-based right to exclude. The Board's demand for more specificity 150 years after the fact would improperly render those

rights a nullity. *See*, *e.g.*, *United States v. Winans*, 198 U.S. 371, 380 (1905).

B. The Circuits Are Divided Over the Test for Determining Whether Treaty Rights Have Been Abrogated.

The decision below deepens a circuit split over whether generally applicable federal employment statutes abrogate treaties protecting tribes' right to exclude non-Indians. Whereas the Tenth Circuit appropriately applies a default rule in favor of treaty rights that can be displaced only by a clear expression from Congress, the Seventh, Ninth, and now the Sixth Circuits apply the opposite default rule. Applying the *Coeur d'Alene* framework in the treaty context, the Sixth, Seventh, and Ninth Circuits presume that generally applicable federal statutes apply to tribes and can be displaced only by treaty language that specifically addresses tribal commercial activities.

In *Donovan v. Navajo Forest Products*, 692 F.2d 709 (10th Cir. 1982), the Tenth Circuit addressed these principles to decide whether the Occupational Safety and Health Act (OSHA) abrogated tribal treaty rights. The treaty at issue—like the one here—protected the Navajo Tribe's broad right of exclusion, providing that "no persons except those herein so authorized … shall ever be permitted to pass over, settle upon, or reside in" tribal lands. *Id.* at 711. OSHA, like the NLRA, is silent regarding its applicability to Indian tribes.

Properly applying this Court's precedent, the Tenth Circuit held that the treaty protected the tribe from federal intrusion into a tribal business enterprise. Any limitations on treaty rights "must be

expressly stated or otherwise made clear from surrounding circumstances and legislative history." *Id.* at 712. Finding no such express statement in OSHA, the court refused to "permit divestiture of the tribal power to manage reservation lands so as to exclude non-Indians from entering thereon merely on the predicate that federal statutes of general application apply to Indians just as they do to all other persons." *Id.* at 714.

The Seventh and Ninth Circuits, like the panel majority below, have applied the exact opposite clear-expression rule. Instead of presuming the vitality of treaty rights and looking for a clear expression of abrogation, those courts assume the applicability of the *statute* and look for a clear expression in the *treaty*. In other words, those courts apply a default rule that "generally applicable statutes typically apply to Indian tribes," *Snyder v. Navajo Nation*, 382 F.3d 892, 895 (9th Cir. 2004), and hold that this default rule can be displaced only for "subjects specifically covered in treaties," *U.S. Dep't of Labor v. Occupational Safety & Health Review Comm'n* ("*U.S. DOL*"), 935 F.2d 182, 186 (9th Cir. 1991).

In *U.S. DOL*, for example, the Ninth Circuit considered whether a tribe must permit OSHA inspectors onto its land despite treaty language setting aside the land for the tribe's "exclusive use." *Id.* at 184. Even though the case dealt with the same statute as *Navajo Forest Products* and with nearly identical treaty language, the Ninth Circuit's analysis and conclusion could not have been more different from the Tenth Circuit's. Instead of searching for a clear statement of abrogation in OSHA, the court

presumed that OSHA applied and searched for a clear exemption in the treaty. Because the treaty (unsurprisingly) did not expressly mention workplace safety issues, the Ninth Circuit refused to recognize a "conflict between the Tribe's right of general exclusion and the limited entry necessary to enforce [OSHA]." *Id.* at 186; *accord Smart v. State Farm Ins. Co.*, 868 F.2d 929, 934-35 (7th Cir. 1989) (holding that ERISA abrogated tribal treaty rights because the treaties did not protect a "specific … right that would be affected by application of ERISA").

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Although the Sixth, Seventh, and Ninth Circuits purported to distinguish the Tenth Circuit's *Navajo Forest Products* decision, that argument does not withstand scrutiny. In all four cases, the tribe possessed a treaty right to exclude unwanted outsiders, and in all four cases, the relevant federal statute said nary a word about Indian tribes. Yet the Tenth Circuit found the treaty language to be controlling and enforceable, while the other three circuits held that the federal statutes trumped any treaty rights.

Judge White's dissent demonstrates the importance of granting certiorari on both issues presented in this petition. While the right to exclude guaranteed to the Saginaw Chippewa in the 1864 Treaty can be construed as part of the sovereign authority of every tribe, the treaty language can also be construed as a wholly independent bulwark against the NLRA's applicability, as Judge White's dissent demonstrates. *See* Pet.App.54-58. If the Court grants plenary review to consider the NLRA's application to

tribes, it should have before it all the alternative theories that could support the Act's inapplicability.

III. Whether The Board Has Authority Over Tribes Is An Important And Recurring Issue That Merits The Court's Immediate Review.

Congress has "'plenary and exclusive'" power to legislate with respect to Indian tribes. *United States v. Lara*, 541 U.S. 193, 200 (2004). This Court has repeatedly recognized that Congress is the branch best-equipped "to weigh and accommodate the competing policy concerns" when deciding whether to limit the sovereignty or treaty rights of Indian tribes. *Bay Mills*, 134 S. Ct. at 2037-38 (quoting *Kiowa*, 523 U.S. at 759). The Board's newfound desire to assert jurisdiction over Indian tribes "encroaches on Congress's exclusive and plenary authority over Indian affairs." *Little River*, 788 F.3d at 556 (McKeague, J., dissenting).

Importantly, the Board has not simply declared that the NLRA applies to all tribal operations. Instead, the Board reserves the right to pick and choose among tribal operations based on its amorphous balancing test and its conception of whether the tribe is engaged in "traditionally tribal or governmental functions" or acting "in a manner consistent with [its] mantle of uniqueness." *San Manuel*, 341 N.L.R.B. at 1063. Employing that balancing test, at least to date, the Board has principally asserted jurisdiction over tribal casinos rather than other types of tribal operations. But that selective enforcement only underscores that the Board has usurped Congress' authority over the tribes. Just as nothing in the text of the NLRA provides any

support for asserting any jurisdiction over tribes, absolutely nothing in the statute authorizes the Board to draw distinctions among tribal operations depending on the Board's understanding of whether the operations are "traditionally tribal."

The Board's effort to single out tribal casinos from other tribal operations is particularly problematic for two reasons. First, Congress itself addressed the specific issue of tribal casinos at length in IGRA. Congress clearly envisioned that tribal gaming would compete with commercial gaming enterprises. Yet nowhere in the host of provisions regulating tribal gaming is there any indication that the NLRA applies to the operations sanctioned by IGRA. In other words, both the NLRA and IGRA are entirely silent about the application of the federal labor laws to tribes and tribal gaming. If there is any cause for treating tribal casinos differently from other tribal operations, that distinction must come from a Congress that has actively considered issues of Indian gaming, not from a specialized labor agency.

Second, the Board's effort to separate tribal casinos from other operations of tribal government betrays the Board's lack of expertise when it comes to Indian law and policy. When Congress enacted IGRA in 1988, it correctly predicted that "the operation of gaming by Indian tribes" would promote "tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. §2702(1). Tribes' gaming operations "cannot be understood as … wholly separate from the Tribes' core governmental functions." *Bay Mills*, 134 S. Ct. at 2043 (Sotomayor, J., concurring). Rather, Indian gaming is often the

revenue source that makes possible the rest of tribal government, including social programs, health care, and education. *See id.*; *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 218-20 (1987).

The Soaring Eagle Casino is a case in point. The Tribe relies on the Casino "to raise the funds necessary to finance and expand its social, health, education and governmental services programs, increase employment within the Reservation and improve the Tribe's on-reservation economy." C.A.App.60. The myriad governmental programs the Tribe administers today—such as police, fire, social service, and behavioral health programs—are a direct result of the Tribe's gaming operations. C.A.App.222-26, 239, 247-48. The Board's attempt to segregate gaming from tribal governance is an unworkable distinction that this Court has already rejected precisely because Congress has not drawn that line. *See Bay Mills*, 134 S. Ct. at 2037-39.

But the Board is not content just to distinguish among different kinds of tribal operations. It has also drawn distinctions among tribes based on its own interpretation of different Indian treaties. Although the Labor Board was unimpressed with the Saginaw Chippewa's treaty argument (despite unrebutted expert testimony establishing the continuing rights, Pet.App.3), it interpreted the language in the Chickasaw Tribe's treaty with the United States to foreclose application of the NLRA to the Chickasaw Nation (thereby avoiding review in the Tenth Circuit). *See Chickasaw Nation*, 362 N.L.R.B. No. 109 (2015).

Something is profoundly wrong when the Labor Board, an agency with absolutely no expertise in

Indian law, is parsing Indian treaties to deem some tribes exempt and most tribes subject to the NLRA. Indeed, this situation underscores the need for this Court's review. The NLRA's application to tribes should turn on neither the Board's interpretation of Indian law nor on the happenstance of whether a tribe is located within the confines of the Tenth Circuit. Instead, it should depend on clear language in congressional enactments and this Court's interpretative principles.

Unless this Court grants review, the application of the NLRA to a tribe will depend on three factors: (1) whether the tribe can petition for review to the Tenth Circuit; (2) whether the tribe has a treaty with the United States, and if so, how the Labor Board interprets the treaty; and (3) whether the Labor Board determines that the tribe is engaged in "traditionally tribal or governmental functions." *San Manuel*, 341 N.L.R.B. at 1063. This situation has nothing to recommend it. Only this Court can provide a clear and uniform answer that does not depend on a labor agency doing Indian law.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

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