NO. 15-1034

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

REPLY BRIEF FOR PETITIONER

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After more than sixty years of acknowledging that it lacks jurisdiction over Indian tribes, the National Labor Relations Board now asserts the extraordinary power to abrogate tribal sovereignty based on its own ad hoc assessment of whether certain tribal enterprises are "governmental" or "commercial." The Board has advanced that position in three different courts of appeals, each of which has applied a different test and reached a different conclusion. The circuits are also divided on the related question of whether a statute of general applicability such as the National Labor Relations Act can displace a tribe's treaty-based right to exclude non-Indians from tribal lands.

Recognizing the importance of these issues and the need for clear guidance about the scope of its jurisdiction, the Board did not oppose rehearing en banc before the Sixth Circuit. Yet the Board now urges this Court to deny certiorari even as it concedes (at 13) that the circuits have taken "different analytical approaches" to the question of whether the NLRA extends to tribes.

Notwithstanding the Board's plea to postpone review until courts that have already spoken speak again or until Congress takes further action (on legislation that the Executive actively opposes), this Court's immediate intervention is plainly warranted. As the many *amici* in this case (including individual tribes, national tribal organizations, and the States of Michigan and Colorado) have made clear, the current state of affairs is intolerable. As matters now stand, the Labor Board—an agency with zero expertise in Indian law—is exercising authority over some (but not

all) tribal operations on tribal lands, and drawing lines based on an artificial governmental/commercial distinction that bears no relation to the reality of how tribal governments are structured. Nothing in the NLRA grants the Board the remarkable authority it now claims, and nothing in centuries of Indian law supports the notion that a statue completely silent about Indian tribes permits a federal agency to abrogate tribal sovereignty and tribal treaty rights. The petition should be granted.

I. The Court Should Grant Certiorari To Address Whether The NLRA Abrogates Tribal Sovereignty.

A. The Circuits Are Divided Over Whether the NLRA Applies to Tribes.

The Board correctly concedes (at 13) that the Sixth Circuit, Tenth Circuit, and D.C. Circuit "take different analytical approaches" to the question of whether federal statutes should be construed as abrogating tribal sovereignty. The Sixth Circuit presumes that generally applicable regulatory statutes apply to tribes; the Tenth Circuit requires a clear statement from Congress before applying regulatory statutes to tribes; and the D.C. Circuit attempts to assess "the extent to which application of the general law will constrain the tribe with respect to its governmental functions." Pet.17-21. The upshot is that the D.C. Circuit and Sixth Circuit have allowed the Labor Board to abrogate tribal sovereignty and exercise jurisdiction over tribes, while the Tenth Circuit has held that the NLRA does not "strip[] tribes of their retained sovereign authority." *NLRB v.*

Pueblo of San Juan, 276 F.3d 1186, 1195 (10th Cir. 2002) (en banc).

Although the Board concedes a split over the relevant "analytical approach," it nonetheless argues (at 13-14) that there is no "square conflict." For example, the Board attempts to distinguish the Tenth Circuit's decision in *Pueblo of San Juan* on the ground that it addressed the tribe's authority when acting in its "sovereign" capacity, as opposed to its "proprietary" capacity. But even assuming there were some workable line between a tribe's "commercial" and "governmental" activities—and there is not, *see infra*—the Tenth Circuit's reasoning applies with full force in both contexts. *All three judges* on the panel below recognized that the Tenth Circuit had "rejected" the approach taken by the Sixth Circuit. Pet.App.46. And Judge McKeague emphasized in *Little River* that the Tenth Circuit had "considered … and definitively rejected" the same arguments accepted by the *Little River* majority. *NLRB v. Little River Band of Ottawa Indians Tribal Gov't*, 788 F.3d 537, 561 (6th Cir. 2015) (McKeague, J., dissenting).

Notably, the Board's own actions are inconsistent with its narrow reading of *Pueblo San Juan*. Last year, the Board declined to assert jurisdiction over a tribal casino in Oklahoma operated by the Chickasaw Nation. *See Chickasaw Nation*, 362 N.L.R.B. No. 109 (2015). Although the Board claimed that it was declining jurisdiction based on the outcome of its sovereignty-balancing test, it is surely no coincidence that the *Chickasaw* case arose in a jurisdiction within the Tenth Circuit, in which *Pueblo of San Juan* is binding precedent.

In short, absent this Court's intervention, tribes that are fortunate enough to be located within the Tenth Circuit will remain free to enforce their own labor policies, while tribes in the Sixth Circuit (or whose cases are appealed to the D.C. Circuit) will be forced to subordinate their sovereign laws to rules dictated by the Labor Board. The circuit split is well-defined and ripe for this Court's immediate review.

B. The Sixth Circuit's Holding Is Flatly Contrary to This Court's Precedents.

As all three judges on the panel below recognized, the legal framework adopted by the Sixth Circuit "overly constrains tribal sovereignty, 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, and is inconsistent with … Supreme Court directives." Pet.App.51-52. Indeed, even the Board offers only a halfhearted defense of the Sixth Circuit's approach. It argues (at 19) that "there is no need" to decide whether the Sixth Circuit adopted the appropriate framework because the decision was at least "correct in its three fundamental points." But even that tepid defense goes too far. On each of those "three fundamental points," the Board betrays its utter lack of familiarity with controlling principles of Indian law.

1. First, the Board draws exactly the wrong inference from the NLRA's silence regarding Indian tribes. The Board insists (at 19-21) that tribes are covered by the NLRA because they are not *expressly* exempt from the definition of "employer." But that argument cannot be squared with the "enduring principle of Indian law" that Congress must

"unequivocally express" its intent to abrogate tribal sovereignty. *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2031-32 (2014). Needless to say, statutory silence does not amount to an unequivocal expression of Congressional intent. "[T]he proper inference from silence … is that [tribal] sovereign power … remains intact." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 n.14 (1982); *accord Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985) ("ambiguous provisions" must be "construed liberally in favor of the Indians").

Adherence to that clear-expression rule is especially warranted in the context of the NLRA, which draws a bright line between public and private employers, with only the latter subject to the NLRA's provisions. *See* NCAI-NIGA Br.12-14. It is exceptionally unlikely that Congress intended, by its silence, to single out Indian tribes as the *only* domestic sovereigns subject to the NLRA. The far better inference to draw from the statutory silence is that—consistent with longstanding principles of Indian law—Congress never intended the NLRA to abrogate tribal sovereignty. *Id.* at 15-21. Indeed, for nearly 70 years, the Board itself took the position that tribes were exempt from the NLRA as public employers. *See Fort Apache Timber Co.*, 226 N.L.R.B. 503 (1976).[1]

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[1] The Board notes (at 6, 19-20) that tribal casinos "affect[] commerce" and "compete[] with other casinos in interstate commerce." But the Board does not have blanket jurisdiction over "commerce"; its jurisdiction is limited to "employers." Whether tribal casinos engage in "commerce" is thus entirely beside the point.

2. The Board further contends (at 21-24) that even if a tribe's "governmental functions" are exempt from the NLRA, its "commercial activities" are not. But that distinction is "unsound in principle and unworkable in practice." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546-47 (1985). After years of attempting to draw a similar line with respect to Congress' Commerce Clause powers, this Court concluded that "[t]here is not, and there cannot be, any unchanging line of demarcation between essential and non-essential governmental functions." *Id.* at 546.

The Board concedes that "[i]t is, of course, true that tribal gaming operations 'cannot be understood as … wholly separate from the Tribes' core governmental functions.'" BIO 23-24 (quoting *Bay Mills*, 134 S. Ct. at 2043 (Sotomayor, J., concurring)). Yet in this case the Board nonetheless tries to separate the Casino—a tribal governmental enterprise operating on tribal reservation land that generates 90% of the Tribe's governmental income—from the Tribe's "rights of self-governance." Pet.App.92. Given the Casino's paramount role in tribal governance, the Board's attempt to separate "governmental" functions from "commercial" functions is an exercise in futility. *See also* NCAI-NIGA Br.3-11 ("many commercial enterprises underlie or intersect with the operation of [tribal] government"); Ute-Colorado Br.9-16.

Even if a workable line could be drawn between a tribe's governmental and commercial activities, Congress surely did not vest the *Labor Board* with the authority to draw that line. Whatever the Board's expertise in labor law, it is manifestly ill-equipped to

evaluate the extent to which an Indian tribe's revenue-raising activity is "governmental" or "commercial." To the extent Congress granted anyone the authority to draw that line with respect to tribal casinos, it is the Secretary of the Interior, who may disapprove a tribal-state IGRA compact on the ground that it violates any "provision of Federal law." 25 U.S.C. §2710(d)(8)(B)(ii). Notably, the Secretary regularly approves IGRA compacts that contain labor provisions inconsistent with the NLRA, which only underscores the NLRA's inapplicability to tribes. *See* CNIGA Br.5-8.[2]

3. Finally, the Board asserts (at 24-28) that applying the NLRA to tribal casinos does not divest tribes of their inherent sovereignty. But that contention has been rejected by the Tenth Circuit, the D.C. Circuit, and four of the six judges to consider the question in the Sixth Circuit. *See Pueblo of San Juan*, 276 F.3d at 1195 ("Preempting tribal laws divests tribes of their retained sovereign authority."); *San Manuel Indian Casino v. NLRB*, 475 F.3d 1306, 1314-15 (D.C. Cir. 2007) ("[A]pplication of the NLRA to employment at the Casino will impinge, to some extent, on these governmental activities."); *Little River*, 788 F.3d at 556 (McKeague, J., dissenting) (applying the NLRA to tribes "impinges on tribal sovereignty").

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[2] The Board notes (at 23) that "Congress itself has distinguished between Indian tribes' governmental and commercial activities" in ERISA. If anything, this shows that Congress knew how to draw such a line when it intended to do so, but did *not* drawn such a distinction in the NLRA.

It blinks reality to suggest that subjecting a tribe to Board jurisdiction would not infringe upon its sovereignty. Most notably, the NLRA's provisions protecting the right to strike could cripple tribal governments and destroy tribes' ability to provide public services for their members. *See* USET Br.7-11 (noting tribes' "non-negotiable need for stability in governmental operations"). The Saginaw Chippewa Tribe is particularly vulnerable to strike threats, as revenues from the Soaring Eagle Casino fund 90% of the Tribe's programs and services. Pet.App.38. An NLRA-protected strike would have catastrophic implications for the Tribe's government operations and social programs and, in turn, its sovereignty.

Even aside from the threat of strikes, the Board seeks the extraordinary power to decide—tribe by tribe and enterprise by enterprise—the extent to which tribes may "make their own laws and be ruled by them." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980). Indeed, in this case, the Board ordered the Tribe to reinstate a former employee who was dismissed for repeated violations of tribal law, and ordered the Tribe to "cease and desist" from applying its own no-solicitation law. Pet.App.105-08.

And that is just the beginning. The Board has also arrogated unto itself the power to displace tribal right-to-work laws, invalidate tribal employment-preference laws, and force tribes to bargain unit-by-unit for the "right" to enforce other tribal laws, including IGRA-required mandates. *See* Ute-Colorado Br.23-24; USET Br.11-17, 23; CNIGA Br.16-17. The Board's assertion of jurisdiction over tribal enterprises

cuts directly at tribes' sovereign lawmaking power and ignores this Court's directive that "vague or ambiguous federal enactments must always be measured" against the "important 'backdrop'" of "traditional notions of Indian self-government." *White Mountain Apache*, 448 U.S. at 143.

II. The Court Should Grant Certiorari To Address Whether The NLRA Displaces Treaty Rights.

The decision below also deepens a closely-related circuit split over whether generally applicable statutes apply to tribes whose treaties with the United States protect the tribes' rights to exclude non-Indians from their reservations. Pet.25-32. The Board quibbles (at 14) over whether that split is best framed as a disagreement about the *scope* of treaty rights or the *abrogation* of treaty rights, but that distinction is beside the point. There is no question that a generally applicable federal statute yields to a treaty right in the Tenth Circuit, but not in the Sixth, Seventh, or Ninth Circuits. *Compare, e.g.*, *Donovan v. Navajo Forest Prods. Indus.*, 692 F.2d 709, 714 (10th Cir. 1982) ("[W]e shall not permit divestiture of the tribal power … merely on the predicate that federal statutes of general application apply to Indians just as they do to all other persons."), *with* Pet.App.23 ("[A] general right of exclusion … is insufficient to bar application of federal regulatory statutes of general applicability.").

The Board (at 15-16) attempts to ascribe those divergent results to differences in the relevant treaty language, but its efforts are unavailing and offer a prime example of why the Labor Board should not be

interpreting Indian treaties. Although the treaty in this case uses somewhat different language from the treaty the Tenth Circuit addressed in *Navajo Forest Products*, the two treaties guarantee the exact same *substantive* right—*i.e.*, the right to decide whether and on what terms a non-Indian may enter the reservation. The *Navajo Forest Products* treaty provided that "no persons except those herein so authorized … shall ever be permitted to pass over, settle upon, or reside in" the Navajo territory, 692 F.2d at 711, while the treaty in this case protects the Tribe's "'exclusive use, ownership, and occupancy'" of its reservation. Pet.App.3. The right to prevent others from passing over territory is, of course, just another way to describe an "exclusive" right to use that territory. Yet the Tenth Circuit held that a silent statute (OSHA) *does not* abrogate the Navajo Nation's general exclusionary right, while the Sixth Circuit held that a silent statute (the NLRA) *does* abrogate the Saginaw Tribe's general exclusionary right.

In sum, the different outcomes across the circuits resulted not from a difference in treaty language, but from a square circuit split over when and how a federal statute can abrogate tribal treaty rights. Whereas the Tenth Circuit appropriately applies this Court's default rule that treaty rights can be displaced only by a clear expression from Congress, the Seventh, Ninth, and now the Sixth Circuits apply the opposite default rule.[3] This Court should grant certiorari to

[3] The Navajo reservation straddles the Arizona-New Mexico border and so lies within both the Ninth Circuit and the Tenth Circuit. The split over tribal treaty interpretation thus results in uncertainty even within the territory of a single tribe.

resolve this circuit split, to address the Board's role in treaty interpretation, and to ensure that the United States continues to honor its treaty obligations to the Tribe.

III. Both Issues Are Important And Recurring Ones That Warrant Immediate Review.

Faced with two clear circuit splits and a decision it can hardly defend, the Board tries to avoid review by asking this Court to stand by and await further developments while the Board tries its hand in applying Indian law principles. But as evidenced by the five *amicus* briefs from a diverse array of interested parties—including individual tribes, regional and national tribal groups, and multiple States—the ongoing uncertainty regarding the NLRA's applicability to tribal casinos has serious practical consequences and needs immediate resolution. *See* Michigan Br.17 ("[A]pplying the NLRA to the tribes would eliminate [the] opportunity for cooperative agreements between the tribes and states on labor issues."); NCAI-NIGA Br.1-3 ("[T]he Board's exercise of jurisdiction subjects Indian Tribes … to the potentially crippling threat of employee strikes."); CNIGA Br.19-20 (noting impossibility of complying with both the NLRA and IGRA compacts with California).

The Board (at 16) asks this Court to defer review until the Ninth Circuit issues a decision in the recently filed *Casino Pauma* case, but that approach has nothing to recommend it. The Ninth Circuit obviously has no power to overrule conflicting authority from the Tenth Circuit. And there is every reason to believe that the Ninth Circuit will continue

to apply its longstanding *Coeur d'Alene* doctrine, which rejects "the proposition that Indian tribes are subject only to those laws of the United States expressly made applicable to them." *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985). Waiting for the Ninth Circuit to reaffirm its erroneous position will do nothing to deepen the split or facilitate this Court's review.

The Board (at 17-18) fares even worse in urging this Court to deny certiorari in light of proposed legislation that would expressly exempt tribes from the NLRA. That contention cannot be taken seriously in light of the Board's concession (at 18 n.4) that the President *opposes* this legislation. Pending legislation that would likely draw a veto even if it were enacted provides a thin reed to ask this Court to decline review of two issues of national importance that have divided the lower courts.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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