No. 15-1024

In the Supreme Court of the United States

LITTLE RIVER BAND OF OTTAWA INDIANS TRIBAL GOVERNMENT, 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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QUESTION 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 question presented is as follows:

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.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-52a) is reported at 788 F.3d 537. The decisions and orders of the National Labor Relations Board (Pet. App. 53a-62a, 63a-85a) are reported at 361 N.L.R.B. No. 45 and 359 N.L.R.B. No. 84.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 2015. A petition for rehearing was denied on September 18, 2015 (Pet. App. 86a). On December 8, 2015, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including February 15, 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. Petitioner is the government of the Little River Band of Ottawa Indians (Band), a federally recognized Indian tribe with more than 4000 enrolled members. Pet. App. 2a. As authorized by the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701 *et seq.*, and a compact with the State of Michigan, petitioner oper-

ates the Little River Casino Resort (Resort). Pet. App. 2a. The Resort, which is located on land held in trust for the Band by the United States, comprises a casino with over 1500 slot machines, gaming tables, and bingo; a 1700-seat event center; a 292-room hotel; a 95-space RV park; three restaurants; and a lounge. *Id.* at 65a. The Resort's 905 employees include 107 tribal members and 27 members of other Indian tribes. *Id.* at 3a. As with the employees, most of the Resort's customers are non-Indians who live outside the Band's trust lands. *Ibid.* The Resort's annual gross revenues exceed $20 million. *Id.* at 2a. Under IGRA, the casino's net revenues may be used only for funding the tribal government, for the general welfare of the Band and its members, and for other limited purposes. *Id.* at 2a-3a; see 25 U.S.C. 2710(b)(2)(B). Casino revenue provides more than half of petitioner's total budget and substantially funds many key tribal-government departments. Pet. App. 3a, 66a.

In 2005, the Band's Tribal Council enacted a Fair Employment Practices Code (FEPC) to govern a variety of employment and labor matters. Pet. App. 3a. Articles XVI and XVII govern labor organizations and collective bargaining in the "public" sector (including the Resort, which accounts for 905 of petitioner's 1150 employees). *Id.* at 3a, 66a-67a & n.2. The FEPC authorizes petitioner to determine "the terms and conditions under which collective bargaining may or may not occur," requires unions to obtain licenses, excepts certain subjects from the duty to bargain in good faith, and prohibits strikes. *Id.* at 67a.

3. In December 2010, the Board's Acting General Counsel issued an administrative complaint, alleging that petitioner had violated 29 U.S.C. 158(a)(1) by

publishing and maintaining certain FEPC provisions and related regulations governing the organizational and bargaining rights of Resort employees. Pet. App. 63a n.1. Petitioner denied that the Board had jurisdiction, but otherwise conceded the alleged violation. *Ibid.* The parties filed a stipulation of facts, which the Board approved, transferring the proceeding to itself for consideration. *Ibid.*

The Board's initial decision, Pet. App. 63a-85a, 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. 53a-54a.

On remand, the Board—acting through three Senate-confirmed members—considered de novo the stipulated record and the parties' briefs. Pet. App. 54a. It agreed with the rationale of the vacated decision and order, which it incorporated by reference. *Ibid.* In the incorporated decision, the Board had relied on its 2004 decision in *San Manuel* and determined it was appropriate to exercise jurisdiction over the Resort. *Id.* at 69a-71a. The Board explained that the challenged provisions of the FEPC "are not directed toward tribal intramural matters" and are not addressed exclusively to employment relationships between petitioner and "governmental employees, such as employees of the Tribal Court system or Tribal police personnel." *Id.* at 73a-74a. Instead, the FEPC "purport[s] to limit or deny the rights given under federal law to (mostly non-Indian) employees of a tribal commercial enterprise operating in interstate commerce." *Id.* at 74a. The Board concluded it would make "little sense" to allow a tribe to avoid its respon-

sibility to submit to federal regulation of employers "merely by enacting statutes or ordinances that were inconsistent with Federal law." *Ibid.*

Having exercised jurisdiction, the Board found, as petitioner conceded, that the FEPC violates the NLRA as applied to the Resort's employees because it explicitly restricts NLRA-protected activity, or employees would reasonably construe it as doing so. Pet. App. 54a-56a. The Board ordered petitioner to cease and desist from enforcing the conflicting provisions and either rescind them or notify current and former employees of their inapplicability. *Id.* at 56a-60a.

4. The court of appeals agreed that the NLRA applies to the Resort and enforced the Board's order. Pet. App. 2a, 34a.

a. The court of appeals recognized that the NLRA is a statute of general applicability and that Congress has not expressly addressed whether or how it should apply to Indian tribes. Pet. App. 8a. But the court declined to give deference to the Board's construction because in its view the case turned on questions of "federal Indian law and policy," which it regarded as being outside the Board's "particular expertise." *Id.* at 9a. Accordingly, it reviewed the question of the NLRA's applicability to petitioner de novo. *Id.* at 10a.

After reviewing this Court's cases about tribal sovereignty, the court of appeals concluded that "inherent tribal sovereignty has a core and a periphery. At the periphery, the power to regulate the activities of nonmembers is constrained, extending only so far as 'necessary to protect tribal self-government or to control internal relations.'" Pet. App. 14a-15a (quoting *Montana* v. *United States*, 450 U.S. 544, 564 (1981)). The court concluded that this Court had "anticipated" in

Tuscarora "that federal statutes of general applicability may implicitly divest Indian tribes of their sovereign power to regulate the activities of non-members." *Id.* at 15a. The court noted that several other circuits had applied the *Coeur d'Alene* framework "to determine the exceptions to the presumptive application of a general federal statute." *Id.* at 17a; see *id.* at 18a-19a (citing cases). It concluded that "the *Coeur d'Alene* framework accommodates principles of federal and tribal sovereignty." *Id.* at 24a.

Applying that framework, the court of appeals further concluded 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 tribes. Pet. App. 25a. It then concluded that petitioner could not show that applying the NLRA to the Resort would undermine "tribal self-governance in purely intramural matters." *Ibid.* (quoting *Coeur d'Alene*, 751 F.2d at 1116). It found that the FEPC provisions that conflict with the NLRA do not qualify as intramural self-governance, but instead regulate the labor-organizing activities of Resort employees, most of whom are not tribal members. *Id.* at 25a-26a. The court rejected petitioner's argument that its law promotes tribal self-sufficiency because it targets activities (especially labor strikes) that could jeopardize Resort revenues. *Id.* at 27a. The court reasoned that tribes "are not shielded from general federal statutes because the application of those statutes may incidentally affect the revenue streams of tribal commercial operations that fund tribal government." *Id.* at 28a. The court also determined that IGRA, which provides a statutory basis for regulation of gaming on

Indian lands and has a goal of promoting tribal self-sufficiency, does not exempt commercial gaming activities from all other federal regulation. *Id.* at 29a-30a. It distinguished this Court's cases finding state-law regulations inapplicable to tribes, because the relationship between the federal government and Indian tribes is "vastly different" from the relationship between the States and tribes. *Id.* at 30a.

The court of appeals also rejected petitioner's contention that the NLRA itself indicates an intention to exempt tribes. Pet. App. 32a. Petitioner invoked Congress's failure to abrogate tribal sovereign immunity when it created a private right of action to enforce collective-bargaining agreements in 29 U.S.C. 185(a). Pet. App. 32a. But the court noted that Congress often distinguishes between private and other means of enforcement and that tribes "have no sovereign immunity against the United States." *Ibid.*

Finally, the court of appeals declined to read Section 152(2)'s exclusion of States and local governments from the definition of "employer" as implicitly exempting Indian tribes as well. Pet. App. 33a-34a. If Congress had wished to exclude tribes, the court stated, they would have been included in the "explicit list of exemptions to 'employer.'" *Id.* at 33a.

b. Judge McKeague dissented. Pet. App. 34a-52a. In his view, the 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 34a. He would have adopted "the analysis employed by the Tenth Circuit" in *NLRB* v. *Pueblo of San Juan*, 276 F.3d 1186 (2002) (en banc), which had rejected the *Coeur d'Alene* framework. Pet.

App. 39a-40a, 43a-44a. He also believed that this Court's recent decision in *Michigan* v. *Bay Mills Indian Community*, 134 S. Ct. 2024 (2014), while "not controlling," "highlights the incorrectness of the majority's analysis" by employing a "robust" conception of "tribal sovereignty," by declining to draw a distinction "between actions of tribal self-governance and commercial activities," and by requiring "a clear congressional statement to abrogate the tribe's immunity" from suit. Pet. App. 47a-49a.

5. Three weeks after the decision below, another panel of the Sixth Circuit considered the Board's exercise of jurisdiction over another tribal casino. In *Soaring Eagle Casino & Resort* v. *NLRB*, 791 F.3d 648 (6th Cir. 2015), petition for cert. pending, No. 15-1034 (filed Feb. 12, 2016), the panel recognized that it was bound by the prior decision in this case, *id.* at 662, but explained its disagreement with the adoption and application of the *Coeur d'Alene* framework. *Ibid.*

6. Petitioner sought rehearing and rehearing en banc, which the court of appeals denied, over the dissent of Judge McKeague. Pet. App. 86a.

ARGUMENT

Petitioner contends (Pet. 19-28) that the Board lacks jurisdiction over tribal governments acting as employers. That argument lacks merit. The court of appeals correctly sustained the Board's assertion of jurisdiction over petitioner as an employer under the NLRA for purposes of its operation of the Resort, which is a large commercial enterprise that employs 85% non-Indians, has mostly non-Indian patrons, and competes against non-tribal enterprises in interstate commerce. Pet. App. 2a-3a. Although petitioner reads the decision below as conflicting with those of two

other circuits, there is not any conflict with respect to the question presented here. Moreover, the pendency of a case presenting the same issue in another circuit 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.[1]

1. Petitioner contends that the decision below "conflicts with decisions of other courts of appeals." Pet. 13 (capitalization altered). But, as petitioner concedes, the only current conflict is a disagreement about "the proper approach to interpreting the NLRA's application to Indian tribes" (Pet. 16)—not any disagreement about the correct answer to the question presented.

a. Before the decision below, only one other court of appeals had addressed whether the NLRB may exercise jurisdiction over an Indian tribe in its capacity as an employer in a commercial enterprise. In that case, as here, 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*,

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[1] The same question is presented in *Soaring Eagle Casino & Resort* v. *NLRB*, petition for cert. pending, No. 15-1034 (filed Feb. 12, 2016), in which the court of appeals followed (while criticizing) the decision in this case. See p. 11, *supra*.

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 decision below 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." Pet. App. 28a-29a. There is accordingly no conflict between the decision below and the D.C. Circuit that would warrant this Court's review.

b. Petitioner asserts (Pet. 14) that there is a "sharp conflict" between the decision below and *NLRB* v. *Pueblo of San Juan*, 276 F.3d 1186 (10th Cir. 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 different 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).

As petitioner notes (Pet. 14), 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. 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 *Soaring Eagle Casino*, as well as the D.C. Circuit's decision in *San Manuel*.[2]

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[2] As petitioner notes (Pet. 13 n.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.* at 997, 1000. The court held that the Board was not "plainly lacking" jurisdiction over the

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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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.[3]

2. 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 Resort, thereby ensuring that the Resort'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 Resort is a large commercial enterprise that employs 85% non-Indians, has mostly non-Indian patrons, and competes in interstate commerce against non-tribal enterprises. Pet. App. 2a-3a. Applying the NLRA to the Resort is also consistent with affording respect to tribal sovereignty; while the Band unquestionably has inherent sovereignty, recognized in IGRA, to establish and operate the Resort, it does so subject to Congress's exercise of its power to regulate the commerce in which the Band has chosen to participate.

In contesting the Board's jurisdiction, petitioner contends both that the NLRA should be construed as exempting all "public employers," which in its view includes a tribally owned and operated casino (Pet. 19-24), and that the exercise of federal jurisdiction under the NLRA significantly infringes upon important trib-

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[3] 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.

al sovereign interests (Pet. 24-28). Both of those contentions are wrong. 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 of federal and tribal sovereignty." Pet. App. 17a-18a, 24a. 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 court of appeals, 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).[4] Here, the Resort has mostly non-Indian employees and mostly non-Indian customers, and it competes with other casinos, including non-Indian casinos, located in Michigan, other States, and Canada. Pet. App. 151a-152a. The Board correctly determined that labor practices at the Resort 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).

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[4] 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."

Petitioner would nevertheless read Section 152(2)'s exception 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"—as a synecdoche for all "*public* employers." Pet. 20. But the statute by its terms excludes only certain governments, not all "public employers," 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 "public" employer: 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). Petitioner is therefore incorrect in asserting (Pet. 31) that the NLRA is inapplicable to "[a]ll other public employers" besides Indian tribes.

Petitioner notes (Pet. 20) that the Board has, under a regulation first adopted in 1936, treated the term "*State*" as "includ[ing] the District of Columbia and all States, Territories, and possessions of the United States." 29 C.F.R. 102.7; see 1 Fed. Reg. 208 (1936). The absence of tribes in a list created less than a year after the NLRA was enacted would not support petitioner's contention that Congress expected its exemption for States to extend to Indian tribes. But the regulation does not even purport to construe the statute. Instead, it addresses "[t]he term *State*" only "as used herein," which means as used within part of *the*

Board's own rules and regulations. 29 C.F.R. 102.7. Those regulations do not address when governmental entities should be treated as employers. Nor do they contain any mentions of "State" that would shed light on that question. Instead, they define "*employer*" entirely by reference to Section 152(2). 29 C.F.R. 102.1. The Board's regulations therefore do not support petitioner's attempt to read Section 152(2) as a generic exclusion for all public employers.[5]

Petitioner's additional arguments are also unavailing. As petitioner notes, Congress exempted federal, state, and municipal employees from the definition of "employer" in part to preserve the status quo, under which "government employees did not usually enjoy the right to strike." Pet. 23 (quoting *NLRB* v. *Natural Gas Util. Dist.*, 402 U.S. 600, 604 (1971)). But that does not indicate that Congress intended to exempt other sovereigns that it failed to mention, at least with respect to employees working in a commercial enterprise rather than performing traditional governmental

[5] The Board's decisions have not addressed whether the District of Columbia or Territories are excepted from the statutory definition of employer. Such treatment might be justified because the District of Columbia and Territories have sometimes been seen as being included in a statutory reference to a "State." See, *e.g.*, *United States* v. *District of Columbia*, 897 F.2d 1152, 1156 n.4 (D.C. Cir. 1990) (R.B. Ginsburg, J.) ("[T]he extent to which [the District of Columbia's] rights and responsibilities, as defined under a particular statute, resemble those of a state must be determined by ascertaining congressional intent on a case-by-case basis."). Or it might be justified because any sovereign power vested in the District or a Territory—unlike that possessed by States and Indian tribes—derives from the United States. Either rationale would stand or fall on grounds independent of petitioner's contentions that the NLRA should not be read to impinge upon tribal sovereignty.

functions of the sort typically engaged in by federal, state, and municipal employees. Nor does Congress's failure to abrogate tribal sovereign immunity when, in 1947, it authorized private "[s]uits for violations of contracts between an employer and a labor organization." 29 U.S.C. 185(a); see Pet. 22-23. Congress can, and sometimes does, impose legal obligations on Indian tribes without subjecting them to judicial enforcement at the behest of private parties. See, *e.g.*, *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 51-52, 65-66 (1978) (holding that the Indian Civil Rights Act of 1968 imposes substantive obligations on tribes but does not provide for private enforcement suits in federal court); cf. *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 512-514 (1991) (holding that a State may require a tribal store to collect sales tax from non-Indians but may not enforce that obligation against the tribe itself in court).[6]

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.*

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[6] Of course, tribal sovereign immunity does not prevent a *federal* agency, like the Board, from enforcing federal law in administrative proceedings or in court. See pp. 24-25, *infra*.

Petitioner contends (Pet. 4-5) that the Board's distinction between "commercial" and "governmental" functions or activities is "untethered to the [statutory] text" and arbitrarily allows the Board "to create and use a free-form balancing test to decide when any individual tribal entity is subject to * * * the Board's standards." Both of those objections are unsound. The Board's 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 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[.]").

Petitioner further suggests (Pet. 26) that the Board's distinction between governmental and commercial activities is "'untenable'" and "deeply misguided." But 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. 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.

In fact, Congress itself has distinguished between Indian tribes' governmental and commercial activities. Under ERISA, 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).

To be sure, the Court declined to distinguish between governmental and commercial functions in *Michigan* v. *Bay Mills Indian Community*, 134 S. Ct. 2024 (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. *Id.* 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).

Petitioner further errs in contending (Pet. 24-27) that, by virtue of IGRA, tribal-casino operations should not be regarded as commercial in nature. It is, of course, true that "tribal gaming under IGRA is not just ordinary commercial activity." Pet. 25 (quoting U.S. Amicus Br. at 29 n.7, *Bay Mills*, *supra* (No. 12-515)). Such gaming is specifically sanctioned and regulated by federal law. See *Bay Mills*, 134 S. Ct. at 2043 (Sotomayor, J. concurring) (noting that "tribal gaming operations cannot be understood as mere profit-making ventures that are wholly separate from the Tribes' core governmental functions"). 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).[7]

c. For related reasons, petitioner's ultimate contention—that the Board's assertion of jurisdiction over employment practices in tribal casinos would "infringe tribal sovereignty," Pet. 28—is also mistaken.

There is no question that the Band 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 *Natural Gas Util. Dist.*, 402 U.S. at 603-604 ("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 assertion, such federal regulations do not divest tribes of their inherent sovereign

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[7] There is no merit to petitioner's novel suggestion (Pet. 33-34), that a State could, through an IGRA compact, authorize or mandate a tribal law prohibiting NLRA-protected activity. Such laws are preempted even when enacted by States. See *Chamber of Commerce of U.S.* v. *Brown*, 554 U.S. 60, 65 (2008).

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 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 em-

ployees 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.[8]

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

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[8] Petitioner's speculation (Pet. 31-32) that a strike could cripple its gaming operation does not identify an irreconcilable conflict between the NLRA and IGRA-authorized gaming. Like other employers, the Resort has both legal and practical recourse against such an eventuality. No-strike clauses, for example, are common in collective-bargaining agreements, including in the casino industry. The Resort could also lawfully lock out employees to further bargaining demands, hiring replacements for the duration. See *International Bhd. of Boilermakers* v. *NLRB*, 858 F.2d 756, 759-760, 767-769 (D.C. Cir. 1988). In the event of an actual strike, it could hire replacement workers. See, *e.g.*, *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union* v. *NLRB*, 544 F.3d 841, 850 (7th Cir. 2008). And, like its non-tribal competitors, it can plan for the possibility of a strike as it plans for other contingencies, such as power outages, suppliers' inability to provide promised goods, or unexpected repairs.

also to disregard a *federal* labor law that neither regulates 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, petitioner invokes (Pet. 18, 27-28) its 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." 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.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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