Nos. 15-1034, 15-1024

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.

LITTLE RIVER BAND OF OTTAWA INDIANS TRIBAL GOVERNMENT,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE UTE MOUNTAIN UTE TRIBE AND THE STATE OF COLORADO AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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Interest of *Amici Curiae*

The Ute Mountain Ute Tribe ("UMUT"), is a federally-recognized Indian tribe that regulates and operates tribal gaming on its lands in the exercise of its rights of self-government, and in accordance with the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-21, and also operates other tribal enterprises.

The Ute Mountain Ute Tribe has entered into a compact with amicus State of Colorado,[1] authorizing it to conduct gaming on tribal lands. This intergovernmental agreement represents a solemn commitment between sovereigns, entered into based upon mutual respect and the understanding that each party has a right to self-government. Under this compact, the UMUT conducts class III gaming subject to requirements that the Tribe and Colorado have negotiated to serve the best interests of their people and the public policies of each sovereign.

The National Labor Relations Board ("NLRB" or the "Board") has recently reversed its sixty-year

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[1] No person or entity other than *amici curiae* and their counsel authored this brief in whole or in part. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission of the brief. Amicus State of Colorado files as of right under Rule 37.4. The parties were notified of the intention of amici curiae to file as required by Rule 37.2 and all parties have consented to the filing of this brief.

understanding that it has no jurisdiction over the operations of tribal governments and tribal enterprises, and has brought enforcement actions against sovereign tribal governments and their enterprises. Two such enforcement actions have been upheld by Sixth Circuit and are now pending before this Court on Petitions for Certiorari: *Soaring Eagle Casino & Resort, an Enter. of the Saginaw Chippewa Indian Tribe of Michigan & Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. (UAW),* 361 NLRB No. 73 (Oct. 27, 2014) (adopting previous Decision and Order, published at 359 NLRB No. 92 (2013)), and *Little River Band of Ottawa Indians Tribal Gov't & Local 406, Int'l Bhd. of Teamsters*, 359 NLRB No. 84 (Mar. 18, 2013), along with the corresponding Sixth Circuit opinions in *Soaring Eagle Casino & Resort v. NLRB,* 791 F.3d 648 (6th Cir. 2015) and *NLRB v. Little River Band of Ottawa Indians Tribal Government*, 788 F.3d 537 (6th Cir. 2015).

Amici support the positions of the Soaring Eagle Casino and Resort ("Soaring Eagle"), an enterprise of the Saginaw-Chippewa Tribe of Michigan ("Saginaw-Chippewa"), and the Little River Band of Ottawa Indians Tribal Government ("Little River Band") in their respective and separate Petitions for Writs of Certiorari, both of which concern the Board's invalid assertion of jurisdiction over Indian tribes.

The governmental-commercial test upon which the Board relies to apply the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. §§ 151-69 (2006), to Indian tribes, which the Board laid out

in *San Manuel Indian Bingo & Casino*, 341 NLRB 1055, 1057-64 (2004), affirmed *San Manuel Indian Bingo & Casino v. N.L.R.B.*, 475 F.3d 1306 (D.C. Cir. 2007) and has since applied to the two orders at issue here, and which was adopted by the Sixth Circuit in *Little River Band* and reluctantly followed by a subsequent panel in *Soaring Eagle*, is a false dichotomy entirely contrary to established federal law. Both of the Board's Decision and Orders are contrary to federal law and should be vacated.

Like the Saginaw-Chippewa and Little River Band, the UMUT relies on its casino and other enterprises to fund basic government services, but, unlike those tribes, it is located within the Tenth Circuit, where it is clear that they have the authority to regulate its own labor relations. *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1199 (10th Cir. 2002). Amici urge this Court to grant certiorari, reverse the Sixth Circuit, and ensure that other tribes enjoy the same freedom and self-government as the Tenth Circuit tribes.

Amici particularly urge this Court to grant cert on both issues, and in both cases, rather than focusing solely on the question of application of particular treaty language to the NLRA. Unlike the 1864 Treaty of the Saginaw-Chippewa, the 1868 Treaty with the Tabaquache, Muache, Capote, Weeminuche, Yampa, Grand River, and Uintah bands of Ute Indians, 15 Stat. 619 ("Ute Treaty"), does not guarantee to the UMUT the right to exclude federal agents from the Reservation – but it is nonetheless a sovereign tribe, with sovereign prerogatives that may not be abrogated without a

clear statement by Congress. A decision that focuses on the treaty rights of the Saginaw-Chippewa, rather than the broader protections afforded by tribal sovereignty could potentially have an adverse effect on the amici and other similarly situated tribes.

Summary of the Argument

The Supreme Court should grant the Soaring Eagle Casino and Resort's and the Little River Bay Band's petitions for certiorari to protect the inherent sovereignty of American Indian tribes, as understood by both tribes and states like Colorado, and to resolve the circuit split among the Sixth, Tenth, and District of Columbia Circuits regarding the application of the NLRA to tribal employees. Because the circuit split has been thoroughly briefed by the Petitioners, this brief will focus on explaining why it is so important to the protection of tribal sovereignty that the Court hear this case and reverse the Sixth Circuit and NLRB – an issue where amici can offer their own special expertise.

The position first taken by the Board in *San Manuel Indian Bingo* and now upheld by the Sixth Circuit threatens tribal sovereignty because it imposes on tribal governments an unworkable dichotomy between commercial and governmental activities that is alien to the actual operation of these governments and contrary to federal law and because the application of the NLRA to tribal operations is a violation of longstanding principles of tribal sovereignty that are well-established through treaty rights, federal statute, Supreme Court precedent, and federal policy.

The Board has claimed authority to divide tribal governmental activity into two categories, "traditional tribal or governmental functions" and "commercial business[es]," and to apply the NLRA to any tribal activities that it deems are the latter. *San*

Manuel Indian Bingo, 341 NLRB at 1057-64. This is an area where the Board has no expertise whatsoever, and its attempt to apply these principles shows that it has little understanding of the challenges faced by tribes or the unique solutions that tribes have adopted to enable them to provide basic services to their members and to reduce their reliance on federal funds.

Indian tribes are reliant upon commercial economic development to fund basic governmental functions. Due to the lack of traditional sources of revenue available to other governmental entities – i.e., property and income taxes – tribal governments rely on commercial businesses to raise the funds necessary to run their governments. This reality is appreciated and supported by federal policy, Supreme Court case law, and congressional action – as well as the policies of States like Colorado.

In applying a governmental-commercial distinction, the Board would necessarily restrict tribal governments from becoming self-sufficient, economically-developed sovereigns, as encouraged by both the Executive and Legislative Branches. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546-47 (1985) ("We therefore now reject, as unsound in principle and unworkable in practice, a rule . . . that turns on a judicial appraisal of whether a particular governmental function is "integral" or "traditional." Any such rule leads to inconsistent results at the same time that it disserves principles of democratic self-governance, and it breeds inconsistency precisely because it is divorced from those principles.")

The Board views tribal gaming enterprises as "typical commercial enterprise[s]" to which the Act applies. *Id*. at 1064. But Congress has made clear: Indian gaming, as a commercial activity, is an essential government function. In the only piece of federal legislation that squarely addresses Indian gaming, the Indian Gaming Regulatory Act, Congress recognized that "the operation of Indian gaming as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). Because of the importance of gaming to tribal governments, Congress, in IGRA, also placed exclusive regulatory authority in tribal governments themselves, including authority over the employment of personnel. 25 U.S.C. § 2702(2).

Similarly, this Court has recognized that commercial development, and gaming in particular, is an essential economic condition of tribal governments and that governmental-commercial distinctions are unworkable. The Supreme Court held in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), that Indian tribes conduct gaming as a governmental activity, in order to raise revenues to operate their governments and provide essential governmental services to their communities. In fact, this Court has refused to limit tribal sovereign protections to governmental, and not commercial activities. *See Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2037 (2014) (refusing to restrict tribal immunity to noncommercial activities) (citing *Kiowa Tribe v. Mfg. Tech., Inc.*, 523 U.S. 751 (1998)).

The Board insists that applying the NLRA to tribal gaming enterprises would "do[] little harm to the Indian tribes' special attributes of sovereignty." *San Manuel Indian Bingo,* 341 NLRB at 1063. That contention is also simply wrong. Subjecting Indian tribes to the Board's power to divide their governments into "governmental" and "commercial" pieces, and subordinating their sovereignty to the requirements of the NLRA, as enforced by the Board, would destroy Indian tribes' rights of self-government, which include the right to determine their own form of government, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62-64 (1978), to make their own laws and be ruled by them, *Williams v. Lee*, 358 U.S. 217, 220 (1959), to engage in and regulate economic activity, *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983), and to conduct gaming to raise revenue to operate their governments and provide tribal services. *Cabazon*, 480 U.S. at 216-19 (1987). Labor regulation is an exercise of a tribe's "authority as sovereign." *Pueblo of San Juan*, 276 F.3d at 1199.

For the same reasons, applying the NLRA would limit the tribes' right to conduct gaming under IGRA in order to raise revenue for essential tribal governmental functions. Congress never authorized this result. The NLRA is silent with respect to Indian tribes, and under settled law, silence is an insufficient basis on which to apply a statute that would abrogate tribal rights of self-government. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 17-18 (1987); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982)("the proper inference from silence is

that [sovereignty] remains intact"); *Pueblo of San Juan*, 276 F.3d at 1192.

Argument

I. The Court should Grant Certiorari to Clarify that the "Governmental-Commercial Distinction, as Applied to Tribes, is a False Dichotomy that Grants to Inexpert Federal Agencies Extensive Powers to Evaluate and Categorize Tribal Activities that Properly Fall Outside their Jurisdiction.

A. Tribal Governments Rely on Commercial Economic Development to Fund Basic Government Services.

Tribes are reliant upon commercial ventures to fund basic government functions, preventing any successful distinction between a "commercial" versus a "governmental" activity. The rule adopted by the Sixth and District of Columbia Circuits, along with the Ninth Circuit in other contexts, grants to federal agencies the power to regulate necessary tribal government activities as if they were private businesses, interfering with the fundamental right of tribal members to make their own laws and be ruled by them, *Williams v. Lee*, 358 U.S. at 220. This is an important issue, and worthy of consideration by this Court.

Like the Saginaw-Chippewa and Little River Band, the UMUT relies on economic development on its sovereign lands to provide revenue for the Tribe's

governmental functions.[2] At the time of the 2000 census, the average per capita income of UMUT tribal members was $8,159 and "[t]he percentage of UMUT families below the poverty rate was 38.5%." *Ute Mountain Ute Tribe v. Homans*, 775 F. Supp. 2d 1259, 1275-766 (D.N.M. 2009) *rev'd and remanded sub nom. Ute Mountain Ute Tribe v. Rodriguez*, 660 F.3d 1177 (10th Cir. 2011). Commercial development on the UMUT's tribal lands through the Tribe's hotel and casino, oil and gas development, and agricultural enterprises is vitally important for the UMUT—it provides much needed employment to tribal members and also helps finance the UMUT's tribal government. These developments "cannot be understood as mere profit-making ventures that are wholly separate from the Tribe['s] core governmental functions." *Bay Mills Indian Cmty.*, 134 S. Ct. at 2043 (Sotomayor, J., concurring).

Thus, the Board's contention that "[r]unning a commercial business is not an expression of sovereignty in the same way that running a tribal court system is," *San Manuel Indian Bingo*, 341 NLRB at 1062, fundamentally misstates federal

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[2] The Soaring Eagle Casino serves as the Saginaw-Chippewa's primary source of revenue, generating approximately ninety percent of Tribal income, meaning that the Tribes thirty-seven Governmental departments and 159 programs – including the police department, tribal courts system, and fire department – are ninety percent funded by casino revenue. *Soaring Eagle Casino & Resort Decision and Order*, 359 NLRB No. 92 at *6. The Little River Band's resort "provides over half of the budget, and substantially funds" multiple governmental agencies. *Little River Band of Ottawa Indians Tribal Gov't Decision and Order*, 359 NLRB No. 84 at *2.

Indian policy. The Self-Determination policy embraces *both* tribal economic development and tribal courts, *and* relies on the former to raise the revenues needed to operate the latter. They are inseparable.

This reliance on additional revenue streams that might be characterized as "commercial" is not unique to Tribes. State governments, for example, operate lotteries, which have similarities to the tribal casinos at issue here and are a source of funds for government programs. In Colorado the state lottery is housed within the Colorado Department of Revenue, Colo. Rev. Stat. § 24-35-202 (2015), and provides funds for Great Outdoors Colorado (an open space program), the Conservation Trust Fund, Colorado Parks and Wildlife, and the Building Excellent Schools Today program. *See* Colo. Rev. Stat. § 33-60-104 (2015); Colorado Lottery, 2014 Annual Review, available at http://fb.coloradolottery.com/AnnualReview2014/. Government entities in Colorado also provide services, such as bus and train transportation that might be considered "commercial" if provided by non-government entities. Thus, the commercial-governmental distinction urged by the NLRB is just as unworkable for state and local governments as it would be for tribes. Treating tribes differently in this respect is unsupported by both law and sound public policy.

B. Federal Indian Policy Has Long Recognized The Encouragement of Governmental and Commercial Activity as Synonymous Goals.

The inseparability of tribal commercial development and governmental activity is the bedrock of the federal policy of Self-Determination. For nearly half a century, the federal government, both the Executive and Legislative branches, has been committed to strengthening tribal self-government through tribal economic development.

President Nixon initiated the commitment in 1970, stating in his historic Self-Determination Message that "it is critically important that the Federal government support and encourage efforts which help Indians develop their own economic infrastructure." Message from the President of the United States Transmitting Recommendations for Indian Policy, H.R. Doc. No. 91-363, at 7 (1970). President Barack Obama expressly reaffirmed the federal government's commitment to "honor treaties and recognize tribes' inherent sovereignty and right to self-government under U.S. law . . . by . . . promoting sustainable economic development . . . ." Exec. Order No. 13,647, 78 Fed. Reg. 39,539 (June 26, 2013).

From the 1970s to the present, the Legislative Branch has also continuously supported tribal government efforts to generate economic development through various pieces of legislation, including: the Indian Self-Determination and Educational Assistance Act, 25 U.S.C. §§ 450-458bbb, in which Congress committed to "supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and *developing the economies of their respective communities*," 25

U.S.C. § 450a(b) (emphasis added); the Indian Tribal Energy Development and Self-Determination Act of 2005, 25 U.S.C. §§ 3501-3506; and the Native American Business Development, Trade Promotion and Tourism Act of 2000, 25 U.S.C. §§ 4301-4307.

As this Court explained, "both the tribes and the Federal Government are firmly committed to the goal of promoting tribal self-government, a goal embodied in numerous federal statutes." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334-36 (1983) (citations omitted). The Court should grant today to reaffirm that commitment which "encompasses far more than encouraging tribal management of disputes between members, but includes Congress' overriding goal of encouraging 'tribal self-sufficiency and economic development.'" *Id*.

C. The Board's Governmental-Commercial Test is Unprincipled, Unworkable, and Produces Arbitrary Results.

This Court should intervene to prevent the Board from imposing a governmental-commercial test that so clearly violates federal law, and that will doubtless be adopted by other federal agencies if the Board is successful here. Only Congress can impose such a distinction as a basis for limiting Indian rights; the Board has no such authority. The distinction on which the *San Manuel* test relies is "unsound in principle and unworkable in practice," as this Court found when rejecting the very same test as a means of restricting Congress' commerce

powers over state governments, *Garcia*, 469 U.S. at 546, and must be rejected for that reason too.

The Board's governmental-commercial test is a distorted extrapolation of inapplicable Supreme Court *dicta*, taken from *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960). This *dicta* has been adopted by the Ninth Circuit in *Donovan v. Coeur d'Alene Tribal Farm,* 751 F.2d 1113 (9th Cir. 1985) as a multifactor test for the application of general federal statutes to tribes, and now by the Board. *Soaring Eagle Casino and Resort* Decision and Order, 359 NLRB No. 92 at *10.

In 2004, the Board abandoned its previously limited regulatory scope in favor of the "*Tuscarora-Donovan*" Rule, adopted in *San Manuel*. *Id.* The first factor of the Board's *Tuscarora-Donovan* test gives rise to the governmental-commercial distinction. *Id.*

This distinction is not supported by Supreme Court precedent. *Federal Power Commission v. Tuscarora Indian Nation*, the only Supreme Court authority relied on by the Board, is a termination era case that provides for, in *dicta*, the application of statutes of general applicability to the off-reservation property rights of individual Indians. 362 U.S. 99 (1960). It does not stand for the application of statutes of general applicability to tribal interests and it does not create a distinction in application between governmental and commercial activities. Yet, more than forty years after *Tuscarora* was decided, the Board extrapolated its holding to find that the commercial activities of

tribes and tribal entities were —contrary to longstanding practice—always within the regulatory scope of the NLRA, which it concluded was a statute of general applicability. *Id. (*citing *San Manuel*, 341 NLRB at 1055). Furthermore, the factors created by the Ninth Circuit's novel application of *Tuscarora* to tribes, which serves as the impetus for the governmental-commercial distinction, in no way creates an obligation for the Board to apply the same test to a rendering of its authority under the NLRA.

Where this Court has considered limiting tribal sovereign authority based on a commercial distinction, it has expressly rejected it unless, and until Congress explicitly does so. If tribal activity is to be divided into commercial and governmental categories for purposes of limiting Indian rights, only Congress can do so. *Kiowa Tribe.*, 523 U.S. 751. In *Kiowa*, the Court expressly rejected a commercial activity exception to tribal sovereign immunity, holding that it was up to Congress alone to decide whether to impose any such limitation on sovereign immunity. "Congress is in a position to weigh and accommodate the competing policy concerns and reliance interests" that proposals to limit tribal immunity present. *Id.* at 759. Similarly in *Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991), the Court *rejected* both the argument that "tribal business activities . . . are now so detached from traditional tribal interests that the tribal-sovereignty doctrine no longer makes sense," and the contention that tribal sovereign immunity should be limited to the tribal courts and internal affairs of tribal government. *Id.* at 510. The same principle

applies here: only Congress can determine whether to apply the NLRA to the so-called commercial activities of Indian tribes. Indisputably, Congress has not done so here.

This Court also rejected a government-commercial test in *Garcia*, where the Court found that judicial efforts to apply the governmental-commercial distinction was leading to a string of confusing and contradictory rulings by federal courts on what constitutes a "traditional," and (it was urged) therefore "governmental," function of government. 469 U.S. at 538. The *Garcia* Court, after comparing various cases that drew that line, concluded that "[w]e find it difficult, if not impossible, to identify an organizing principle that places each of the cases in the first group on one side of a line and each of the cases in the second group on the other side." 469 U.S. at 539.

The *Garcia* Court also rejected reliance on historical precedent to identify traditional functions because such an approach "prevents a court from accommodating changes in the historical functions of States, changes that have resulted in a number of once-private functions like education being assumed by the States and their subdivisions." *Id.* at 543-44. A standard that protected only "uniquely" governmental functions was likewise unmanageable and had been rejected elsewhere. *Id.* at 545 (citing *Indian Towing Co. v. United States*, 350 U.S. 61, 64-68 (1955) (rejecting such a standard for purposes of governmental tort liability)). The Board, and the Sixth Circuit, apply the very tests that were rejected by this Court.

II. Applying the NLRA to Indian Gaming is Barred by Federal Law Because it Would Abrogate Tribal Rights of Self-Government in the Absence of Congressional Authorization, Contrary to Long-Held Understandings of Tribes and States

The application of the NLRA to Indian Gaming is particularly problematic because, as Congress authorized and recognized in IGRA, this gaming has become a central and critical source of support for Tribes, including the UMUT, and a strike at a tribal casino would be devastating for tribal governments in much the same way a strike at the IRS or Treasury could be devastating to the federal government. This Court should grant certiorari to protect the tribes' right to manage their government affairs in accordance with their local needs and public policy.

IGRA expressly recognized that revenue generation through tribal gaming is essentially a governmental activity. IGRA identifies gaming "as a means of generating tribal governmental revenue." 25 U.S.C 2701(1). In fact, IGRA expressly requires that tribal gaming revenues be used only to fund tribal government operation and programs, provide for the general welfare of the tribe, promote tribal economic development, and for charitable and local purposes. *Id.* § 2710(b)(2)(B).

Tribal gaming cannot be conducted in the absence of a negotiated state-tribal gaming compact, and States and tribes have negotiated hundreds of

such compacts nationwide. Those compacts may address "any … subjects that are directly related to the operation of gaming activities," *id.* 2710(d)(3)(C)(vii), including labor relations *See*, *e.g.*, *In re Indian Gaming Related Cases*, 331 F.3d 1094, 1116 (9th Cir. 2003). Thus, States and tribes have the power to negotiate, and in many States they have in fact negotiated, compacts that contain labor-management rules and employee provisions that may differ from the rules the NLRB would impose. *See id*. The IGRA provides a mechanism through which the States and tribes may ensure that the laws and policies that apply to a tribal governments' gaming employees satisfy any State and tribal public policy interests and concerns. The NLRB would erode and fundamentally change this mechanism if it successfully established jurisdiction over tribal workers.

Amicus Colorado, for example, has negotiated a gaming compact with the UMUT. The Ute Mountain Ute Tribe and the State of Colorado Gaming Compact (1996) ("UMUT Compact"). This compact reflects both state and tribal policy of "generating Tribal revenues, thereby promoting Tribal economic development, self-sufficiency, and strong Tribal government," and "to ensure gaming is conducted in a manner consistent with the State's established policies, including but not limited to those set forth in the Colorado Constitution." UMUT Compact at 2.[3] This compact was negotiated based

[3] Colorado takes pride in being the only state that did not insist on revenue sharing from tribal casinos. Instead, Colorado's compacts with the UMUT and Southern Ute Indian Tribe

on the understanding that the affairs of these enterprises would be governed by tribal law, including tribal labor law, as was the longstanding practice of the Board. For example, the compact expressly provide that the licensing of employees is a tribal function, with input from the State Gaming Agency. *Id*. at § 4(B)(I)(b).

The Board's activities are an attempt to unilaterally rewrite these compacts and disturb the negotiated expectations of the parties. State and tribal governments alike have the right to be governed by the rule of law—not the unilateral actions of federal executive agencies that risk unlawfully impinging upon sovereign interests in a way not contemplated by Congress. *Cf. Wyoming v. U.S. Dep't of the Interior*, No. 15-cv-43, Order on Mots. for Prelim. Inj., 40 (D. Wyo. Sep. 30, 2015) (enjoining a federal rule seeking to displace state and tribal authority to regulate oil and gas operations and holding that the rule "infringe[d] on [the states' and a tribe's] sovereign authority and interests in administering their own regulatory programs"); *id.* at 36 ("[T]he [federal Bureau of Land Management] failed to consult with the [Ute Indian Tribe of the Uintah and Ouray Reservation] on a government-to-government basis in accordance with its own policies and procedures.").

The Board insists that exercising jurisdiction over tribal enterprises under its governmental-commercial test will "do[] little harm to the Indian

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provide that nearly all funds generated from gaming activities directly support tribal governments.

tribes' special attributes of sovereignty or the statutory schemes designed to protect them," *San Manuel*, 341 N.L.R.B. at 1063, and that the effects of the Act would not extend "beyond the tribe's business enterprises and regulate intramural matters." *Id.* at 1063-64. This contention is specious. Applying the NLRA to Indian tribes' regulation and operation of gaming pursuant to an authorized tribal-state compact would abrogate core elements of tribal rights of self-government, intrude on state sovereignty, and create a legal and administrative quagmire that would effectively deny Indian tribes and the states their proper roles and rights under IGRA.

A. The NLRA's Right to Strike Would Grant Labor Organizations the Power to Prevent Tribal Governments from Operating Until Their Demands are Met.

Granting an Indian tribe's so-called "commercial" employees the right to strike under the Act, 29 U.S.C. § 157, would enable labor organizations to shut down tribal gaming enterprises, and halt the flow of revenue needed to support basic government functions in accordance with IGRA. *See* U.S.C. § 2710(b)(2)(B). The very operation of tribal government – the delivery of health care, elementary education, police and fire protection – would depend on whether the tribe met the demands of the labor organizations representing tribal employees. Tribal governments would have to choose between capitulating to those demands, and jeopardizing their communities' health, welfare, and safety – a Hobson's choice.

President Roosevelt warned that "a strike of public employees manifests nothing less than an intent on their part to prevent or obstruct the operations of Government until their demands are satisfied," calling such action "unthinkable and intolerable." Letter from President Roosevelt to the President of the National Federation of Federal Employees (Aug. 16, 1937) *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=15445. His words apply equally here. Although many state governments have chosen to take this risk, that choice should not be forced on tribes, who are perfectly capable of passing their own labor relations statutes. Congress could not possibly have intended such a complete divestiture of the Nation's right of self-governance in a statute which does not even mention Indian tribes. *San Juan*, 276 F.3d at 1196.

B. The NLRA Would Improperly Vest the Board with the Power to Restructure and Reorganize Tribal Governments.

If the Board had the jurisdiction it claims, it would then possess the power to split a tribal government into two parts – one part comprised of whatever the Board, in its sole discretion, decided were "commercial enterprise[s]," and the other of "traditional tribal government functions." *San Manuel,* 341 N.L.R.B. at 1062-63. All so-called "commercial enterprises" would be subject to the NLRA. The tribe's "traditional tribal government functions" might or might not be subject to the NLRA. Perhaps not, if the tribe was operating within the "particularized sphere of traditional tribal

or governmental functions," which the Board claims the power to define. *Id.* at 1063. But this would depend on how much "leeway" the Board decided to afford the tribe "in determining how they conduct their affairs." *Id.*

This rule will create enormous uncertainty because an unfair labor practice charge can be made at any time and is resolvable only by the Board, 29 U.S.C. § 160(a), and the Board has adopted a "case-by-case" balancing test for jurisdiction. *San Manuel Indian Bingo*, 341 NLRB at 1063. The tribe could not avoid the chilling effect of this uncertainty, or the time and cost of Board adjudications (many of which take years to complete, as these cases illustrate).

Within each "commercial enterprise" the Board would then have authority under the Act to determine what "bargaining units" to recognize. 29 U.S.C. § 159(b). The Board might recognize multiple bargaining units within each so-called "commercial enterprise," or it might choose to recognize just one – consisting of all "commercial enterprise[s]." The tribe's constitution, laws, and court rulings would be meaningless here – everything would be up to the Board.

Subjecting the tribal government to the Board's plenary power to restructure the tribe's government in this manner would virtually extinguish the tribe's rights to determine its own form of government, *Santa Clara Pueblo*, 436 U.S. at 62-64, to engage in economic activity through its government, *New Mexico*, 462 U.S. at 335, and to

make its own laws and be ruled by them. *Williams v. Lee*, 358 U.S. at 220.

C. Subjecting Indian Tribes to the Collective Bargaining Process Would Compel Tribes to Negotiate Over the Application of Their Own Laws.

Were Indian tribes required to engage in collective bargaining under the Act over "wages, hours, and other terms and conditions of employment" as defined in the Act, 29 U.S.C. § 158(d), any of the tribe's laws affecting employment, including those implementing IGRA's background and licensing requirements, *see* 25 U.S.C. § 2710(b)(2)(F), those required by the tribe's Compact, and the tribe's Indian preference in employment laws could be the subject of a collective bargaining request and potentially invalidated by the Board, by holding, for example, that an Indian employment preference interferes with collective bargaining rights held under the Act, or is discriminatory under the Act. 29 U.S.C. § 158(a)(1), (a)(3).

And at the end of the collective bargaining process, the tribe itself would be subject to a *de facto* statute – the collective bargaining agreement – which would govern all conditions of employment, and effectively void any and all inconsistent tribal law. There might well be as many such agreements as there were bargaining units. And the terms of each such agreement would be enforceable only by the Board under the Act, 29 U.S.C. § 160(a); the tribal courts would have no role in this process.

Under the Board's *San Manuel* Rule, a tribe could avoid these impacts only by limiting its activities to those that reflect "the unique status of Indians in our society and legal culture," as determined by the Board. 341 NLRB at 1062. The negative implications of the NLRA's application would extend to Indian Health Services, agricultural endeavors, and oil and gas operations.

III. This Court Should not Restrict the Question Presented to Treaty Issues, although the Court should Certainly Reaffirm the Federal Government's Obligation to Honor its Treaties.

Many tribes have entered into Treaties with the United States that guarantee their right to exclude persons from their Reservation, and the application of this treaty language is presented by the *Soaring Eagle* petition. Recently, in *Chickasaw Nation*, 362 NLRB No. 109 (June 4, 2015), the Board found that applying the NLRA to the Chickasaw Nation would "abrogate [its] treaty rights" based on specific language found in in one of the Tribe's treaties. [4]

The treaty entered into with various Ute bands, including the bands that became the modern UMUT, includes the right to exclude, but not the right to exclude federal officers. Ute Treaty, 15 Stat. 619. And many tribes are not party to any treaty,

[4] Not coincidentally, this was the only pending enforcement action that would have been reviewed in the Tenth Circuit. It is hard to escape the suspicion that the Board acted strategically to avoid establishing an unfavorable precedent.

and thus cannot rely on any specific treaty language in their disputes with the Board.

It is vitally important that the United States honor its treaty obligations, but it is also important that it respect the sovereignty of all federally recognized tribes. Amici ask this Court to posture these cases for review in a manner that enables the Court to respect the self-government rights of all federally recognized Tribes.

Congress' intent to abrogate treaty rights must "clear and plain." *United States v. Dion*, 476 U.S. 734, 738-39 (1985). This doctrine, however, extends beyond rights specifically included in an Indian treaty. As this Court held in *Iowa Mutual Insurance*, when a statute "makes no reference to Indians and nothing in the legislative history suggests any intent to render inoperative the established federal policy promoting tribal self-government . . . the proper inference from silence . . . is that the sovereign power . . . remains intact." 480 U.S. at 18 (quoting *Merrion*, 455 U.S. at 149 n.14). That holding reflects the longstanding rule that when tribal sovereignty is at stake, "we tread lightly in the absence of clear indications of legislative intent." *Santa Clara Pueblo*, 436 U.S. at 60. Any abrogation of tribes' sovereign right to self-government must be clearly expressed. *Merrion*, 455 U.S. at 149-52.

An analogous principle holds true when the federal government seeks to displace the sovereign functions of States like Colorado. *See, e.g.*, *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991) ("[I]nterference

with th[e] decision[s] of the people of [a state], defining their constitutional officers, would upset the usual constitutional balance of federal and state powers. … Th[e] plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.").

Congress, in the NLRA, never authorized the Board to exercise plenary power over tribal governments. The Act and its legislative history are utterly silent with respect to Indian tribes, *San Juan*, 276 F.3d at 1196; *San Manuel*, 341 NLRB at 1058. Indubitably, tribes should benefit from advantageous treaty language, but the same tribal activity is involved in each of these cases, an exercise in the Tribe's right of self-government. Any abrogation of tribal sovereignty must be clearly expressed, and should not be entrusted solely to the Board's inexpert reading of treaty language.

Conclusion

The Court should grant this petition for certiorari in order to reaffirm the Court's commitment to tribal sovereignty by clarifying the inconsistent application of the NLRA to tribes. The current federal policy with respect to Indians is self-determination through tribal self-government and that has been expressed through legislation, executive action, and Supreme Court precedent. The Board's governmental-commercial test at issue here is a major impediment to this explicit legislative and executive goal, and is inconsistent with federal law

Amici respectfully ask the Supreme Court to grant the Soaring Eagle Casino and Resort and the Little River Band's petitions for certiorari in their respective cases.

Respectfully submitted,

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