No. 15-

IN THE

Supreme Court of the United States

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

PETITION FOR A WRIT OF CERTIORARI

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February 12, 2016

QUESTION PRESENTED

Whether the National Labor Relations Board exceeded its authority by ordering an Indian tribe not to enforce a tribal labor law that governs the organizing and collective bargaining activities of tribal government employees working on tribal trust lands.

PARTIES TO THE PROCEEDINGS

Petitioner Little River Band of Ottawa Indians Tribal Government was the respondent below.

Respondent National Labor Relations Board was the petitioner below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Little River Band of Ottawa Indians Tribal Government ("the Band") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit's opinion is reported at *NLRB* v. *Little River Band of Ottawa Indians Tribal Government*, 788 F.3d 537 (6th Cir. 2015), and reproduced at Petition Appendix ("App.") 1a-52a. The Sixth Circuit's order denying the petition for rehearing en banc is unpublished and reproduced at App. 86a. The National Labor Relations Board's decisions are published at 359 NLRB No. 84 (2013) and 361 NLRB No. 45 (2014), and reproduced at App. 63a-85a and App. 53a-62a, respectively.

JURISDICTION

The Sixth Circuit entered judgment on June 9, 2015, and denied the petition for rehearing en banc on September 18, 2015. App. 86a. On December 8, 2015, Justice Kagan extended the time for filing the petition to February 15, 2016. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

29 U.S.C. § 152(2) provides: "The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof[.]" Other relevant provisions are attached at App. 87a-123a.

INTRODUCTION

This petition raises the important question whether Congress vested the NLRB with the power to nullify tribal labor relations laws governing the tribes' employment of public employees working on tribal trust lands. This critical question is the subject of a direct conflict among the courts of appeals. A sharply divided Sixth Circuit held that the NLRB may strike down such laws. It squarely rejected the contrary decision of the Tenth Circuit in *NLRB* v. *Pueblo of San Juan*, 276 F.3d 1186 (10th Cir. 2002) (en banc), sustaining tribal labor laws, and departed from the reasoning (but not the result) of the D.C. Circuit's decision in *San Manuel Indian Bingo & Casino* v. *NLRB*, 475 F.3d 1306 (D.C. Cir. 2007). *See* App. 21a-23a, 33a-34a. "[C]reat[ing] a circuit split" was "unwis[e]," Judge McKeague explained in dissent, because the decision below "is authorized neither by Congress nor the Supreme Court" and "encroaches on Congress's plenary and exclusive authority over Indian affairs." *Id.* at 34a. In fact, the Sixth Circuit divided twice over: a second panel of the Sixth Circuit agreed with Judge McKeague, declaring that it would have followed the Tenth Circuit. *Soaring Eagle Casino & Resort* v. *NLRB*, 791 F.3d 648, 663 (6th Cir. 2015).

This conflict has its origins in two approaches to statutory interpretation and two potentially "conflicting Supreme Court canons of interpretation," *San Manuel*, 475 F.3d at 1310. The Tenth Circuit correctly looks first to the text of the statute and then, if ambiguity remains, deems controlling this Court's long line of cases holding that tribal sovereignty is not abrogated unless Congress clearly signals its intent to do so. *See*, *e.g.*, *Michigan* v. *Bay*

Mills Indian Cmty., 134 S. Ct. 2024, 2037 (2014); *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 143-44 (1980). Recognizing that an Indian tribe possesses authority to regulate labor relations and other economic activity on tribal lands, and that the NLRA does not indicate any intention by Congress to regulate tribal sovereigns, *San Juan*, 276 F.3d at 1198-99, the en banc Tenth Circuit held that tribal labor relations laws are not preempted by the NLRA, *id.* at 1191-92.

The Sixth Circuit majority followed a very different path. Finding no express treatment of tribes in the NLRA's text, it applied the statement from *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. The Sixth Circuit thus presumed that the NLRB had jurisdiction over Indian tribes. In so doing, the majority neglected to perform a careful analysis of the NLRA's text and context, and rejected the argument that in operating a government casino under the Indian Gaming Regulatory Act ("IGRA"), the Band was acting as a public employer with sovereign authority to regulate its employees on tribal trust lands. It also ignored that *Tuscarora* did not involve an issue of tribal sovereign authority, *id.* at 110-15 (a fact the Tenth Circuit explained, *San Juan*, 276 F.3d at 1198-99). Contrary to the NLRA's text and this Court's repeated instruction that courts should not infer that Congress has abrogated tribal sovereignty absent a clear legislative statement, the decision below subjects tribal governments to organizing and collective bargaining rules aimed at *private*

employers, and makes Indian tribes the only public employers in the United States covered by the Act.

The Tenth Circuit's approach and decision are correct. Congress did not give the Board power to displace tribal labor relations laws that a sovereign enacts to govern public employees, much less the laws a tribal sovereign enacts to govern its own public employees working on tribal lands. The NLRA only regulates private employers, *NLRB* v. *Catholic Bishop of Chi.*, 440 U.S. 490, 504 (1979); the Act's definition of "employer" excludes public-sector employers as a category, and the Act's private enforcement mechanism is not designed for public employers (since the Act does not waive the immunity of any sovereign). From the beginning, the NLRB itself has concluded that it lacks jurisdiction over all manner of public employers *not* listed by name in the NLRA's "employer" definition—including U.S. territories, U.S. possessions, the District of Columbia, and, until recently, Indian tribes. The Board's prior conclusion that tribes are not "employers" was consistent with this Court's repeated instruction that courts should not infer that Congress has abrogated tribal sovereignty absent a clear legislative statement.

The Board's root justification for expanding its jurisdiction to a sovereign employer—its conclusion that the Band was engaged in "commercial," not "governmental," activity—is untethered to the text, contrary to law, and arbitrary. It is inconsistent with the statutory text because the NLRA divides the jurisdictional world into public and private employers, not governmental and commercial spheres. It is contrary to law because the Board cannot rewrite Congress's determination in IGRA

that *tribal* gaming is per se governmental, that *tribal* gaming facilities must operate under inter-governmental compacts between states and tribes, and that *tribal* gaming revenues must be used exclusively for public purposes. *See Bay Mills*, 134 S. Ct. at 2037. And it is arbitrary because it permits the Board to create and use a free-form balancing test to decide when any individual tribal entity is subject to tribal labor relations laws or to the Board's standards.[1]

This Circuit split should not be tolerated. It subjects Indian tribes in different circuits to vastly differing legal regimes. Unlike all other public employers in the United States, tribes in the Sixth Circuit may not forbid public-employee strikes and must bargain collectively under the shadow of the crippling consequences such strikes would visit upon a tribe's ability to discharge essential government functions. Meanwhile, dozens of tribes in the Tenth Circuit must operate under the conflicting authorities emanating from the Tenth and D.C. Circuits. The Band is particularly vulnerable to strike threats. As IGRA contemplates, the Band relies heavily on gaming revenues to fund its courts, educational programs, law enforcement services, and other governmental functions. *See infra* at 9. The Band is far from alone in this respect. For scores of Indian tribes, this issue is therefore of paramount importance. The Sixth Circuit's decision expands the NLRB's jurisdictional reach without legislative

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[1] The D.C. Circuit made a similar error in *San Manuel*, although it assigned to the courts (not the Board) the decision whether a tribe's particular sovereign activities are governmental "enough" to be exempted from Board jurisdiction. 475 F.3d at 1317.

authorization, while also contravening this Court's decisions and important congressional policies embodied in IGRA and other federal laws enacted to enhance tribal sovereignty and self-sufficiency. The petition should be granted.

STATEMENT OF THE CASE

1. *Background*. The Little River Band is a federally recognized Indian tribe, 25 U.S.C. § 1300k-2(a), with over 4,000 enrolled members, most of whom live on or near the Band's aboriginal lands on Michigan's Lower Peninsula. The Band has adopted a Constitution that has been approved by the Secretary of the Interior under the Indian Reorganization Act of 1934. *Id.* §§ 461-479 ("IRA"). The Constitution vests legislative power in a Tribal Council, which is empowered "[t]o exercise the inherent powers of the … Band by establishing laws … to govern the conduct of members of the … Band and other persons within its jurisdiction." App. 149a, 155a (alteration in original).

The Tribal Council has promulgated laws governing employment and labor relations on the reservation. In 2005, the Council enacted the Band's Fair Employment Practices Code ("Code") to address employment discrimination, family medical leave, and minimum wages. App. 158a. In 2007, the Tribal Council determined that the Band's best interests would be advanced by allowing its public employees to engage in collective bargaining, subject to regulations designed to protect the Band's revenues and welfare. *Id.* at 159a.

Thus, the Tribal Council added a new Article XVI to govern "Labor Organizations and Collective Bargaining" in the Band's public sector. App. 158a-159a. Like the public-sector labor relations laws of

most states and the federal government, Article XVI, *inter alia*: (i) defines the rights and duties of public employers in collective bargaining; (ii) requires labor organizations engaged in organizing public employees to be licensed; (iii) establishes procedures and remedies for addressing unfair labor practice complaints; (iv) prohibits employee strikes and employer lockouts; (v) establishes processes to resolve bargaining impasses through mediation and arbitration; (vi) adopts a right-to-work provision (meaning that neither union membership nor the payment of union dues may be made a condition of employment); and (vi) vests the Tribal Court with jurisdiction to enforce the Code and collective bargaining agreements. *Id.* at 159a-164a. Subsequently, the Council enacted Article XVII to give primacy to the Code's dispute-resolution mechanisms, including by requiring exhaustion of tribal remedies.

Articles XVI and XVII regulate the Band's "public employers," defined as any "subordinate economic organization, department, commission, agency, or authority of the Band," including its IGRA gaming operations. App. 3a, 160a, 161a. Both Articles have been fully and productively implemented. A Neutral Election Official administers and oversees union elections. Regulations governing the licensing of labor organizations have been promulgated, and numerous licenses have issued. Band entities and labor organizations have engaged in collective bargaining, and several agreements have been executed. Unfair labor practice allegations and bargaining impasses have been resolved. *Id.* at 165a-166a. The Band's authority to continue to regulate its public-sector

employment relations—including at its IGRA gaming operations—is at stake here.

2. *IGRA and the Little River Casino.* Congress has recognized that few tribes have a reliable tax base, and that this revenue shortfall impedes the IRA's central goal of fostering effective tribal self-government. Accordingly, to promote "tribal economic development, self-sufficiency and strong tribal governments," and regulate "the conduct of gaming on Indian lands," Congress enacted IGRA, 25 U.S.C. §§ 2701-2721. Significantly, Congress instructed that net revenues from gaming

> are *not* to be used for purposes other than—(i) to fund tribal government operations or programs; (ii) to provide for the general welfare of the Indian tribe and its members; (iii) to promote tribal economic development; (iv) to donate to charitable organizations; or (v) to help fund operations of local government agencies[.]

Id. § 2710(b)(2)(B) (emphasis added); *see also id.* § 2710(d)(1)(A)(ii). Congress also directed that IGRA gaming operations must be "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State." *Id.* § 2710(d)(1)(C).

The Band's Constitution authorizes the Tribal Council to conduct reservation gaming under IGRA. In 1998, the Band entered into a compact with Michigan governing the conduct of class III gaming activities on the Band's trust lands. The Band chartered an instrumentality, the Little River Casino Resort, to manage these operations. The Casino is a subordinate organization of the Band, administered by a Board appointed by the Tribal Council. App. 156a.

As Congress mandated, the Band uses IGRA gaming revenues to govern itself, discharge essential government functions, and provide economic opportunities for tribal members and others. App. 150a-151a, 152a-153a, 155a. Gaming revenues account for 100% of the budget of the Tribal Court and prosecutor's office; 80% of the budget for mental health and substance abuse services at the Band's Health Clinic; 77% of the budget for the Department of Family Services; and 62% of the budget for the Department of Public Safety. *Id.* at 153a-155a. Essentially all other Band revenues are supplied by the federal government. *Id.* at 153a.

3. *NLRB Decision.* In 2008, Local 406, International Brotherhood of Teamsters ("Teamsters"), filed a "Charge Against Employer" with the NLRB. The Teamsters alleged that the Band had engaged in an unfair labor practice, in violation of the NLRA, by asserting authority to govern labor relations and collective bargaining for public-sector employees working on reservation lands. App. 5a. The Band responded that the NLRB has no authority to charge the Band and sought declaratory and injunctive relief. *See Little River Band of Ottawa Indians* v. *NLRB*, 747 F. Supp. 2d 872, 881 (W.D. Mich. 2010). The district court held that administrative exhaustion principles barred the Band's claims. *Id.* at 890.

In December 2010, the NLRB's Acting General Counsel filed an unfair labor practice complaint against the Band, alleging that Code Articles XVI and XVII constitute unfair labor practices. App. 5a. The Band moved to dismiss, arguing that the NLRA exempts public employers, including Indian tribes, from NLRB jurisdiction, and that the Tribal Council

has sovereign and statutory authority to enact public-sector labor relations laws.

In 2013, the NLRB struck down certain provisions of Articles XVI and XVII as "unfair labor practices," on the ground that they differ from the NLRA's private-employer standards. In so ruling, the Board relied upon its decision in *San Manuel Indian Bingo & Casino*, 341 NLRB 1055, 1061 (2004), a split decision which had overruled the Board's longstanding position that it lacked jurisdiction over the on-reservation conduct of tribal governments. App. 69a & n.4 (overruling *Fort Apache Timber Co.*, 226 NLRB 503 (1976)).[2]

The Board's *San Manuel* decision adopted the so-called *Tuscarora-Coeur d'Alene* framework. Instead of looking first to the statute's text and context, that framework focuses on this Court's statement that "a general statute in terms applying to all persons includes Indians and their property interests," *Tuscarora*, 362 U.S. at 116. The framework also encompasses three exceptions, first created in *Donovan* v. *Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985). According to *Coeur d'Alene*, general statutes do *not* apply to Indians tribes 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 'by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations.'" *Id.* In *San Manuel*, the Board

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[2] The Court of Appeals vacated this decision following *NLRB* v. *Noel Canning*, 134 S. Ct. 2550 (2014). On remand, the Board re-adopted its initial conclusion. *See* App. 54a.

applied this framework to the NLRA and to tribal regulation of public-sector employees working on tribal trust lands. The Board found that none of the *Coeur d'Alene* exceptions applies to IGRA gaming facilities, and asserted that Board control over labor relations rules at these tribal workplaces would not "implicate … critical self-governance issues." 341 NLRB at 1061. The Board explained both the abandonment of its prior statutory interpretation and its construction of the *Coeur d'Alene* exceptions by characterizing tribal gaming under IGRA as "commercial" rather than "governmental." *Id.* at 1057-62. In recognition of the fact that these categories lack defined boundaries, the Board reserved to itself discretion *not* to apply the Act "when [tribes] are fulfilling traditionally tribal or governmental functions that are unique to their status as Indian tribes." *Id*. at 1062.

Here, the Board followed *San Manuel* and determined that the Band's public-sector labor laws may not be lawfully applied to the Little River Casino. The NLRB ordered the Band "*to rescind* [*its*] *application of the … Code"* or otherwise announce that it is no longer in effect. App. 80a (emphasis added).

4. *Sixth Circuit Proceedings.* A sharply divided panel upheld the Board's order. The majority, finding the NLRA "silent as to Indian tribes," App. 8a, "beg[an] [its analysis] by reviewing the law governing the implicit divestiture of tribal sovereignty," *id.* at 10a. It then adopted the Board's *Tuscarora-Coeur d'Alene* framework and concluded that the *Coeur d'Alene* exceptions to the *Tuscarora* presumption were inapplicable. For two reasons, the majority concluded that the Board order requiring the Band to

rescind its public-employee labor relations law would *not* infringe upon the Band's sovereignty. First, it asserted that the Band's interest in applying its law to tribal employees working on reservation lands lies at the "periphery" of tribal sovereignty, and second, it observed that many Casino employees are non-members. *Id.* at 15a. The majority was unmoved by the Band's arguments that the NLRA's public-employer exclusion applies to Indian tribes and that Congress did not intend the Act to cover sovereigns "since Congress did not waive tribal sovereign immunity" with respect to private enforcement actions. *Id.* at 32a. The majority further rejected the Band's contention that Congress intended tribal gaming revenues to function as tax revenues to finance essential government services, *id.* at 27a-28a, and expressly disagreed with the Tenth Circuit's contrary decision in *San Juan*, *id.* at 21a.

Judge McKeague dissented. He explained in detail why the 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." App. 34a. He stated that the Tenth Circuit's decision in *San Juan* "is true to the governing law and should be adopted in the Sixth Circuit as well." *Id.* at 43a-44a. And, he observed that the panel decision contravened, *inter alia*, this Court's recent decision in *Bay Mills*, 134 S. Ct. at 2030-32, which had "reaffirmed the 'enduring principle of Indian law' that tribal sovereignty is retained unless and until Congress clearly indicates intent to limit it." App. 36a.

The Circuit denied rehearing en banc despite the NLRB's concession that it was warranted. *See* NLRB

Response to Pet. for Reh'g En Banc at 1 (Aug. 28, 2015) ("NLRB Resp."). App. 86a.

Shortly after the court decided this case, another Sixth Circuit panel considered the same question and "disagree[d] with the holding in *Little River*." *Soaring Eagle*, 791 F.3d at 662. After a thorough critique of the majority decision below, the *Soaring Eagle* panel held that "in light of our prior panel decision in *Little River*, we are bound to conclude that the NLRA applies to the Soaring Eagle Casino and Resort, and thus that the Board has jurisdiction." *Id.* at 675.

REASONS FOR GRANTING THE PETITION

I. *LITTLE RIVER* CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS AND OF THIS COURT.

A. The Courts Of Appeals Have Fractured Over Whether The NLRB Has Jurisdiction To Regulate Tribal Governments' Labor Relations Laws.

The decision below deepens an acknowledged conflict among the courts of appeals over the NLRB's jurisdiction to displace labor relations laws enacted by tribal governments. Like the Board, the majority below adopted the *Tuscarora* presumption and applied it to the NLRA, even though *Tuscarora* involved neither sovereign authority nor activity on tribal trust land. Like the Board, the majority also adopted the *Coeur d'Alene* exceptions to that presumption.[3] App. 6a. The majority concluded that

[3] Although the Ninth Circuit has not expressly addressed this precise question, it applied the *Tuscarora-Coeur d'Alene* framework (which it first authored) to another provision of the NLRA and, in doing so, upheld the NLRB's power to enforce

the Band's authority to enforce its public-sector labor relations law can be "implicitly divested by generally applicable congressional statutes." *Id.* at 21a.

The Sixth Circuit's approach stands in sharp conflict with the Tenth Circuit's. That Circuit started with the text and found it inappropriate to apply the *Tuscarora-Coeur d'Alene* framework to the NLRA. It recognized that tribal labor relations laws constitute a central sovereign concern and held that "Congress did not intend by its NLRA provisions to preempt tribal sovereign authority" over such laws. *San Juan*, 276 F.3d at 1197-98, 1200. *See also Dobbs* v. *Anthem Blue Cross & Blue Shield*, 600 F.3d 1275, 1284 (10th Cir. 2010) (*San Juan* held that "Congressional silence exempted Indian tribes from the [NLRA]"). In addition, the Tenth Circuit found inapplicable *Tuscarora*'s statement that "a general statute … applying to all persons" applies to Indian tribes. It reasoned that *Tuscarora* did not involve the exercise of sovereign tribal authority, and that because the NLRA excludes thousands of public employers, it therefore is not a generally applicable law. 276 F.3d at 1198-99.

The Sixth Circuit here, however, insisted the Tenth Circuit's approach "cannot be the rule," App. 21a, thereby "creat[ing] a needless circuit split." *Id.* at 52a (McKeague, J., dissenting). *See also Soaring Eagle*, 791 F.3d at 673, 675 (expressly agreeing with the Tenth Circuit's decision in *San Juan* and its "reject[ion] [of] the *Coeur d'Alene* framework," but holding that it was bound to follow circuit precedent).

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subpoenas against a tribal entity. *See NLRB* v. *Chapa De Indian Health Program*, 316 F.3d 995 (9th Cir. 2003).

The NLRB, too, recognizes that its approach is the subject of a conflict in the circuits. In its initial decision asserting jurisdiction to invalidate tribal governments' labor relations laws, a divided Board acknowledged that "the Tenth Circuit's interpretation of *Tuscarora* stands in contrast to that of the other courts of appeals" and that of the Board. *San Manuel*, 341 NLRB at 1060 n.16. That disagreement, moreover, is intentional as the Tenth Circuit "addressed (and definitively rejected) the NLRB's new approach." App. 40a-41a (McKeague, J., dissenting).

The D.C. Circuit, like the Sixth Circuit, has agreed that the Board has jurisdiction in the circumstances presented here, but these two circuits disagree on the proper analysis to employ. Unlike the Sixth Circuit, the Ninth Circuit (*see supra* note 3), and the Board, the D.C. Circuit declined to follow the *Tuscarora-Coeur d'Alene* framework. Instead, the D.C. Circuit decided that when interpreting a federal statute that is not explicit about its application to Indian tribes, courts should determine whether applying the statute would materially constrain or "impinge on" tribal sovereignty, *San Manuel*, 475 F.3d at 1317, asking whether the tribal activity is governmental "enough." If a court's answer is yes, then the statute does not apply. *Id.* at 1315.

The D.C. Circuit's approach embraces yet a third framework for deciding whether, or to what extent, the NLRA will apply to Indian tribes. And its conclusion rests on the counter-intuitive notion that tribal sovereignty is not materially impaired when the NLRB displaces tribal labor relations laws regulating tribal casino employees on tribal trust land, even though no other public employer is so

burdened, and even though IGRA mandates that those same tribal casinos must operate under state-tribal intergovernmental compacts and must devote their net revenues exclusively to the provision of essential tribal government functions. *Id.* at 1315, 1318.

In sum, the courts of appeals are deeply fractured over the proper approach to interpreting the NLRA's application to Indian tribes. Moreover, they disagree sharply about whether Board jurisdiction in this area interferes significantly with tribal sovereignty. Only this Court's intervention can unify the circuits' approach to statutory interpretation and ensure that the NLRA will be correctly and consistently applied nationwide.

B. The Decision Below Contravenes This Court's Precedent.

The NLRB insists "[t]he Supreme Court has not addressed or decided whether comprehensive federal laws like the NLRA apply to on-reservation tribal enterprises absent express language specifying application to Indian tribes." NLRB Resp. 2. In contrast, the D.C. Circuit maintains that this statutory-interpretation question involves two "conflicting Supreme Court canons of interpretation," *San Manuel*, 475 F.3d at 1310: *first*, the statement in *Tuscarora* that "a general statute in terms applying to all persons includes Indians and their property interests" (362 U.S. at 116); and *second*, numerous cases holding that tribal sovereignty is not abrogated unless Congress clearly manifests its intent to do so, most recently *Bay Mills*, 134 S. Ct. at 2037. The Sixth Circuit parts company with both. It takes the position that under *Tuscarora*, the process of statutory

interpretation must begin with the *presumption* that a given law applies to tribes as governments, App. 6a, and this presumption is overcome only by some contrary indication in the language, context, and history of the act. *Id.*

All these views disregard this Court's oft-stated rule that any ambiguity in a federal statute must not be construed to infringe upon sovereign tribal interests absent a "clear expression" of Congressional intent. *Bay Mills*, 134 U.S. at 2031-32 (describing this rule as an "enduring principle of Indian law"). *Bay Mills* illustrates that this rule even applies to statutes like IGRA that directly address Indian tribes and Indian interests. The same rule applies to general legislation that does not expressly address Indian tribes. *See, e.g.*, *Iowa Mut. Ins. Co.* v. *LaPlante*, 480 U.S. 9, 18 (1987) ("the proper inference from silence … is that the sovereign power … remains intact") (interpreting federal diversity statute); *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 149 n.14 (1982) ("the proper inference from silence ... is that the sovereign power ... remains intact") (interpreting various federal energy enactments). Thus the Tenth Circuit correctly explained that its interpretation of the NLRA's language must be informed by this Court's numerous cases mandating that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *San Juan*, 276 F.3d at 1191 (quoting *Montana* v. *Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985)). Guided by that line of authority, the Tenth Circuit rightly concluded that Congress had not intended in the NLRA to infringe Indian tribes' sovereign interests in enacting and enforcing labor relations laws. *Id.* at 1200.

Significantly, this Court's cases have made clear that tribal sovereignty interests are at their zenith in two circumstances directly relevant here. First, a tribe retains "the power to manage the use of *its territory and resources* by both members and nonmembers" and "to undertake and regulate economic activity *within the reservation*." *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983) (emphases added). Second, this Court has recognized the tribes' "power to make their own substantive law," *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 55-56 (1978), which includes the authority to "regulate, through taxation, licensing, or other means, the activities of nonmembers who enter into consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana* v. *United States*, 450 U.S. 544, 557, 565-66 (1981). Individual employees have entered into "consensual" commercial relationships (*i.e.*, employment contracts) with the Band that occur on tribal lands and that directly relate to the Band's regulation of the employment relationship. The Sixth Circuit and the Board failed to recognize the significance of these circumstances and this precedent in interpreting the NLRA's application to tribes, and similarly failed to acknowledge the significant harm that expansion of NLRB authority would inflict on important sovereign interests.[4]

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[4] This case concerns only the legislative jurisdiction of the tribes, in contrast to *Dollar General Corp.* v. *Mississippi Band of Choctaw Indians*, which concerns the authority of tribal courts to "adjudicate civil tort claims against nonmembers." 83 U.S.L.W. 3006 (June 12, 2014) (No. 13-1496).

In sum, the division among the courts of appeals over the NLRB's jurisdiction is reflected not only in their differing readings of the statutory text, but also in their reliance on different precedents of this Court. The Court should grant the petition to ensure that the NLRA is interpreted uniformly and in a manner consistent with this Court's precedents.

II. THE SIXTH CIRCUIT'S DECISION IS INCORRECT.

Another critical error underlies the *Little River* decision: The court failed to ground its analysis in the text and context of the NLRA. *See*, *e.g.*, *Bay Mills*, 134 S. Ct. at 2034. *See also FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (courts and agencies must "interpret the statute 'as a symmetrical and coherent regulatory scheme,'" and attempt to fit "all parts into an harmonious whole").

Here, examination of the Act's text and context demonstrates that Congress removed *all* public employers—*including* tribes—from the Board's control. Moreover, a contrary interpretation infringes tribal sovereignty in direct contravention of this Court's precedents recognizing tribal authority to regulate the voluntary commercial conduct of members and non-members on reservation lands, a category that surely includes public employment with the Band. As this Court has held, that authority cannot be displaced unless Congress clearly expresses its intention to do so. No such expression is present in the NLRA.

A. The NLRA's Public-Employer Exclusion Encompasses Indian Tribes.

1. From enactment, the NLRA has drawn a fundamental distinction between private-sector and

public-sector employers. "[C]ongressional attention" in the NLRA was exclusively "focused on employment in private industry." *Catholic Bishop*, 440 U.S. at 504. In contrast, Congress removed *public* employers from the Board's jurisdiction:

> The term 'employer' *includes* any person acting as an agent of an employer, directly or indirectly, but *shall not include* 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) (emphases added).

This public-employer exclusion uses the term "include," followed by a list of excluded public employers. "'[I]ncludes' imports a general class, some of whose particular instances are those specified in the definition," *Helvering* v. *Morgan's, Inc.*, 293 U.S. 121, 125 n.1 (1934). The NLRB has *never* read the public-employer exclusion as an exhaustive list of exempted entities. For example, since 1936 the Board has construed "[t]he term *State* as used in [§ 152(2) to] include the District of Columbia and all States, Territories, and possessions of the United States." 29 C.F.R. § 102.7; *see also* 1 Fed. Reg. 207, 208 (Apr. 18, 1936). Courts, too, have long held that government entities not listed in the public-employer exclusion are nonetheless shielded by that exclusion from NLRB jurisdiction. *See*, *e.g.*, *Chaparro-Febus* v. *Int'l Longshoremen Ass'n*, 983 F.2d 325, 329-30 (1st Cir. 1992) (commercial instrumentality of Puerto Rico is exempt); *V.I. Port Auth.* v. *S.I.U. de P.R.*, 354 F. Supp. 312, 313 (D. V.I. 1973), *aff'd on other grounds*, 494 F.2d 452, 453 n.2 (3d Cir. 1974) (commercial instrumentality of the Virgin Islands government exempt); *Brown* v. *Port Auth. Police Superior Officers*

Ass'n, 661 A.2d 312, 315-16 (N.J. Super. Ct. App. Div. 1995) (Port Authority of New York and New Jersey exempt because created by interstate compact).

The Board's 1976 *Fort Apache* decision—holding that tribal employers are excluded from the Act under the public-employer exclusion—fit naturally with the Board's then-prevailing view that *all* sovereigns are excluded from the reach of the NLRA. There, the Board resolved a question "of first impression … whether an Indian tribal governing council *qua* government, acting to direct the utilization of tribal resources through a tribal commercial enterprise on the tribe's own reservation, is an 'employer' within the meaning of the [NLRA]." *Fort Apache Timber Co.*, 226 NLRB at 504. The Board held that the NLRA did not apply because "it is clear beyond peradventure that a tribal council such as the one involved herein … is a government both in the usual meaning of the word, and as interpreted and applied by Congress, the Executive, and the Courts." *Id.* at 506 (footnote omitted). Indeed, the Board observed that "it would be possible to conclude the [tribal government] is the equivalent of a State, or an integral part of the government of the United States as a whole,[5] and as such specifically" exempted by the language of the public-employer exclusion. *Id.* (footnote omitted). The Board's

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[5] In 1935, when the NLRA was enacted, this Court was still "treat[ing] Indian immunities as derivative from the Federal Government's immunity" and, thus, Indian tribes as "federal instrumentalities for purposes of state taxation." *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 183 n.8 (1980) (Rehnquist, J., concurring in part and dissenting in part). *See also, e.g.*, *McClanahan* v. *State Tax Comm'n*, 411 U.S. 164, 169 (1973) (collecting cases).

ultimate conclusion was that the tribe's governmental nature made it "implicitly exempt" from the NLRA's "employer" definition. *Id.*; *see also S. Indian Health Council, Inc.*, 290 NLRB 436 (1988) (applying *Fort Apache* rule to health-care clinic). That conclusion was correct.

2. Further textual support for the Band's interpretation of the Act is found in Congress's 1947 amendment of the NLRA in the Labor-Management Relations Act ("LMRA"), ch. 120, 61 Stat. 136 (1947). One central purpose of the amendments—embodied in section 301 of the Act, *id.* at 156-57 (codified at 29 U.S.C. § 185)—was to create causes of action that would allow private-sector employers, employees, and labor organizations to enforce specific obligations arising under the NLRA, including obligations created through collective-bargaining agreements. *See Textile Workers Union of Am.* v. *Lincoln Mills of Ala.*, 353 U.S. 448, 453-55 (1957).

The LMRA did not, however, waive any sovereign's immunity from suit. Accordingly, under section 301 private parties cannot enforce, *inter alia*, collectively bargained obligations against any *public* employer. Like other public employers, Indian tribes "possess[] the common-law immunity from suit traditionally enjoyed by sovereign powers," *Santa Clara Pueblo*, 436 U.S. at 58; that immunity can be waived by statute, but only through an "unequivocal[]" expression of congressional intent. *Bay Mills*, 134 S. Ct. at 2031. Congress's failure to include a sovereign immunity waiver in the LMRA provides further evidence that Congress did not intend the NLRA to cover any public employers. Congress cannot have intended to subject tribal employers, alone among sovereigns, to the NLRA's private-sector regime

without waiving their immunity from the key enforcement mechanism of that regime. Far more likely is that Congress did not include any waiver of sovereign immunity because it understood that the NLRA did not apply to public employers, *including* Indian tribes, in the first place.

3. Congress's decision to limit the NLRA to private-sector employers also squares with, and reflects, enduring common-law principles. The common law generally prohibits public-employee strikes against the government. *United Fed'n of Postal Clerks* v. *Blount*, 325 F. Supp. 879, 882 (D.D.C.), *aff'd*, 404 U.S. 802 (1971); *see also United States* v. *United Mine Workers of Am.*, 330 U.S. 258, 270 (1947) (holding Norris-LaGuardia Act's proscription on injunctions against strikes inapplicable to federal government). Because courts do not lightly presume that Congress has silently derogated from the common law, *Norfolk Redev. & Hous. Auth.* v. *Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 35 (1983), that fact alone strongly supports the Band's position.

Moreover, this Court has expressly recognized that the public-employer exclusion embraces the common-law rule that "governmental employees did not usually enjoy the right to strike." *NLRB* v. *Nat. Gas Util. Dist.*, 402 U.S. 600, 604 (1971); *see also Davenport* v. *Wash. Educ. Ass'n*, 551 U.S. 177, 181 (2007) (NLRA "leaves States free to regulate their labor relationships with their public employees"). And yet the Board's rule, approved in *Little River*, exposes a tribal government to public-employee strikes—a conclusion directly contrary to the common law and this Court's starting presumption against the displacement of that law.

4. Were there any ambiguity whether the NLRA grants the Board jurisdiction over tribal governments, that doubt would have to be resolved in favor of the tribes.[6] This Court has repeatedly declared that "doubtful expressions of legislative intent must be resolved in favor of the Indians," *South Carolina* v. *Catawba Indian Tribe*, 476 U.S. 498, 506 (1986); *see also supra* at 2-3, particularly where sovereign tribal interests are at stake. *Bracker*, 448 U.S. at 143-44. Thus, even if the NLRA were "silent" about its application to tribal government employers, the Band should have prevailed. "[T]he proper inference from silence … is that the [Tribe's] sovereign power … remains intact." *Merrion*, 455 U.S. at 149 n.14.

B. NLRB Jurisdiction Significantly Infringes Important Tribal Sovereign Interests.

Beyond misreading the NLRA and this Court's controlling precedent on the interaction between federal law and Indian tribes' sovereign powers, both the Board and the Sixth Circuit erred in concluding that NLRB jurisdiction would not infringe important tribal sovereign interests. The Sixth Circuit based this determination on its conclusion that the Band's gaming operations constitute "commercial" conduct. That conclusion cannot be squared with IGRA or this

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[6] No court of appeals has granted the Board *Chevron* deference in its assessment of whether tribal sovereign interests are at stake. Even if *Chevron* were applicable, the rule of construction holding that tribal sovereignty cannot be significantly infringed without a clear expression from Congress would control at the first step of the analysis. *Cf. Solid Waste Agency of N. Cook Cty.* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001).

Court's precedents concerning the governmental nature of Indian gaming.

Congress considers a tribe's IGRA gaming operations to be *sovereign* activity. It requires tribes to "ente[r] into a Tribal-State compact governing the conduct of gaming activities" to conduct class III gaming activities such as casino games and slot machines. 25 U.S.C. § 2710(d)(3)(A). Compacts are governmental agreements by nature, *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 105 (1938); and IGRA compacts address core sovereign concerns like "the allocation of criminal and civil jurisdiction between the State and the Indian tribe," "taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities," and the proper "remedies for breach of contract," 25 U.S.C. § 2710(d)(3)(C). Further, net revenues generated from IGRA gaming may be spent only for public purposes, *see id.* § 2710(b)(2)(B), (d)(1)(A)(ii).

This Court, too, has recognized the sovereign nature of tribal gaming activities. In *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 218-19 (1987), the Court explained that gaming operations "at present provide the sole source of revenues for the operation of the tribal governments and the provision of tribal services." When the United States argued to this Court in *Bay Mills* that "tribal gaming under IGRA is not just ordinary commercial activity," U.S. Br. 29 n.7, No. 12-515, Justice Sotomayor agreed, stating "tribal gaming operations cannot be understood as mere profit-making ventures that are wholly separate from the Tribes' core governmental functions." *Bay Mills*, 134 S. Ct. at 2043 (Sotomayor, J., concurring). The Board and the

court of appeals erred in adopting a contrary conclusion.

More generally, this Court has repeatedly recognized that distinctions between "governmental" and "proprietary" activities are "untenable," *New York* v. *United States*, 326 U.S. 572, 583 (1946); *see also Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546-47 (1985), because "[t]here is not, and there cannot be, any unchanging line of demarcation between essential and non-essential governmental functions." *Helvering* v. *Gerhardt*, 304 U.S. 405, 427 (1938) (Black, J., concurring). *See also Bay Mills*, 134 S. Ct. at 2031, 2036-37 (rejecting a "commercial activities" exception to sovereign immunity). The Sixth Circuit's use of a governmental/commercial distinction to minimize the sovereignty interests at stake here is deeply misguided. And it permits the Board to engage in standardless balancing to determine when tribal government entities are subject to tribal public-sector labor relations law or are instead controlled by the Board.

In addition, the Sixth Circuit's distinction has no basis in modern practice. Today, state and local governments are heavily engaged in gaming activities of various forms. They run lotteries, race-tracks, and casinos; and like tribes, they use the revenues from those enterprises to fund governmental programs, including public schools. *See*, *e.g.*, Mich. Comp. Laws §§ 432.1 *et seq.* (governing state-run lottery); Stephanie Simon, *(State) House Rules in Kansas Casino*, Wall St. J., Feb. 4, 2010, http://www.wsj.com/articles/SB10001424052748703338504575041433293903748 (describing state-owned casino). These examples demonstrate that gaming enterprises are neither inherently "governmental" nor inherently "commercial." Their public or private character

depends on their ownership and management structures and the purposes underlying their creation.

Congress has stated that Indian gaming shall be under the auspices of two sovereigns—the states and the tribes—and shall raise revenues for strictly public purposes. Against that backdrop, the court of appeals committed a clear category error by characterizing IGRA gaming operations as non-governmental. And it only compounded that error by claiming that an NLRB order displacing tribal regulation of casino operations does not significantly interfere with tribal sovereign interests.

That conclusion is also incompatible with *Montana* v. *United States*, 450 U.S. 544 (1981). The Sixth Circuit recognized it was displacing a tribal public-sector labor relations law, yet it seemed to believe the Band's sovereign interest was diminished because "tribes lack the inherent power to govern the activities of non-members" on tribal lands. App. 28a. That is incorrect. *Montana* holds, to the contrary, that tribal governments "retain inherent sovereign power" to "regulate, through taxation, licensing, or other means, the activities of nonmembers who enter into consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." 450 U.S. at 565-66. *See also Plains Commerce Bank* v. *Long Family Land & Cattle Co.*, 554 U.S. 316, 332-33 (2008) (tribes possess legislative authority to regulate "nonmember conduct inside the reservation that implicates" commerce, such as "the sale of merchandise by a non-Indian to an Indian on the reservation").

This retained sovereign power encompasses a tribe's labor relations with tribal employees, whether at casinos or other facilities. By accepting

employment with tribal governments, they have "enter[ed] into consensual relationship[s] with the tribe or its members, through commercial dealing [and] contracts." *Montana*, 450 U.S. at 565. Unions that seek to organize the Band's employees similarly have opted to engage in activities on reservation lands that involve commerce with the tribe and have a clear and direct effect on the Band's "economic security" and "welfare," *id.* at 566, as IGRA's requirement that the Band use gaming revenues to provide essential government services makes doubly clear.

* * * *

In sum, the Sixth Circuit incorrectly interpreted the NLRA to include tribal governments as "employers." It also erred in holding that expanding the Board's jurisdiction to include tribal IGRA gaming employees would not infringe tribal sovereignty.

III. RESOLUTION OF THE QUESTION PRESENTED IS CRITICALLY IMPORTANT TO THE FAIR AND UNIFORM ADMINISTRATION OF FEDERAL LABOR LAW AND TO FEDERAL INDIAN POLICY.

The time is ripe for the Court to decide whether the NLRB has power to displace tribal labor relations laws that govern the conduct of employees and unions on tribal trust lands.

First, the circuit split will necessarily lead to arbitrary disparities in the treatment of tribes if permitted to persist. There are 73 Indian tribes within the Tenth Circuit, operating 157 casinos pursuant to compacts with Colorado, Kansas, New Mexico, Oklahoma, and Wyoming. There are 12

Indian tribes within the Sixth Circuit, operating 19 casinos pursuant to compacts with Michigan. The Ninth Circuit (which given *Chapa*, 316 F.3d 995, likely will follow the same path as the Sixth Circuit), includes another 424 tribes and 149 casinos operating pursuant to compacts with Arizona, California, Idaho, Montana, Nevada, Oregon, and Washington.

Tribes within the Tenth Circuit retain inherent sovereign authority to enact labor relations laws for gaming and other facilities that are consistent with their own laws and the terms of IGRA compact agreements with surrounding states. The tribes of the Sixth and (likely) the Ninth Circuits, in contrast, will suffer damage to their sovereign and financial interests as a result of the Board's decision to impose the NLRA's ill-fitting private-employment rules on their gaming operations (and other facilities—such as hospitals or charter schools—that the Board may deem insufficiently governmental to permit tribal regulation). It is fundamentally unfair to allow these significant disparities to persist.

Second, the arbitrary outcomes produced by the circuit split are amplified because the legal regime embraced by the Board and the Sixth Circuit will breed still further uncertainty and arbitrariness where it applies. In place of the bright-line distinction between private employers (covered) and public employers (not covered) established by the NLRA's "employer" definition, the Board has asserted authority to draw new lines on a case-by-case basis, leaving some tribal institutions governed by tribal law and others by the NLRA and Board regulation. *See San Manuel*, 341 NLRB at 1062 (Board will "examine the specific facts in each case to determine whether the assertion of jurisdiction over Indian

tribes will effectuate the purposes of the [NLRA]"). Tribal government employers will thus face deep uncertainty about what kind of government activities and which groups of tribal employees will be deemed "too commercial" to be governed by tribal law.[7]

Third, treating Indian tribes as private employers undermines vital policy choices embodied in federal statutes.

a. *The NLRA.* Although the NLRA leaves regulation of public-employee labor relations to sovereign governments, under the decision below tribes are treated differently from all other sovereigns, undermining tribal authority to establish and enforce locally applicable conduct rules.

Virtually all sovereigns forbid public-employee strikes. Under federal law, it is an unfair labor practice for any federal-employee union to call for, or even "condone," a strike, 5 U.S.C. § 7116(b)(7), and a *crime* for a federal employee to engage in a strike, 18 U.S.C. § 1918(3). Many states and municipalities have similar anti-strike prohibitions. In Michigan, too, "[a] public employee shall not strike," Mich. Comp. Laws § 423.202. The Band enacted a similar prohibition. App. 159a. Yet on Michigan reservations, under *Little River*, public employees *may* strike, because the Board has decided to overrule the Band's

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[7] To take but one example, in *Yukon Kuskokwim Health Corp.*, 341 NLRB 1075 (2004), the Board determined after years of litigation that a fee-free health clinic operated by an Alaska Native multi-tribal consortium was an "employer" covered by the NLRA, but declined jurisdiction on discretionary grounds. The result was hardly predictable, considering the Board's first instinct was to *assert* jurisdiction. *See id.* at 1075 n.1 (citing 328 NLRB 761 (1999)).

judgment that it too cannot risk a work stoppage at its government-owned facilities. This makes no sense.

Also incongruous is the Board's decision that the Band's law contravenes the NLRA by placing "restrictions on the duty to bargain over mandatory subjects," including "subjects in conflict with tribal law." App. 55a, 78a. Unless reversed, the Band and other tribes within the Sixth Circuit will be forced, for example, to bargain over "drug and alcohol testing policies," *id.*, notwithstanding the serious public health concerns that tribes have confronted in this area. All other public employers are free to exclude such subjects from bargaining based on their assessment of the public interest.

In these ways, the decision below undermines Congress's determination that public employers are excluded from NLRB regulation and should be free to establish their own labor relations regimes.

b. *The IRA and IGRA.* Treating tribal governments that operate casinos as if they were private employers undermines the twin pillars of Congress's efforts to affirm the sovereignty and to support the self-sufficiency of tribal governments: the IRA and IGRA. The IRA (adopted contemporaneously with the NLRA) encourages tribes to "revitalize their self-government through the adoption of constitutions and bylaws and through the creation of chartered corporations, with power to conduct the business and economic affairs of the tribe." *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 151 (1973). And IGRA "provide[s] a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1).

Displacing tribal labor relations laws at tribal-chartered casinos undercuts both statutes. To forbid the Band from enforcing laws governing public-employee labor relations on tribal lands gravely infringes tribal authority, contrary to the IRA's purposes. And to justify that intrusion by mischaracterizing tribal government casinos as "commercial" is equally inconsistent with IGRA—the express objective of which was to enhance tribal sovereignty and the quality of self-government by creating the equivalent of tax collection to fill government coffers.[8]

The Board and the Sixth Circuit paid little heed to these congressional policies, and placed tribal governments at substantial risk. To provide but one concrete example, if—unlike most other public employees—tribal employees at the Little River Casino may lawfully strike, the Band stands to lose the revenue base that funds essential public services and must conduct collective bargaining under the tacit threat of a crippling public-employee strike. *See* Franklin D. Roosevelt, *Letter on the Resolution of Federation of Federal Employees Against Strikes in Federal Service* (Aug. 16, 1937) (stating that public-employee strikes are "unthinkable and intolerable" because they would result in "paralysis of Government").

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[8] As noted, the Band's casino supplies all funding for the Band's courts and prosecutors and roughly half of the Band's total budgetary needs. App. 153a-155a. The Band's circumstances are not unusual. *See, e.g.*, *Soaring Eagle*, 791 F.3d at 668 ("The Casino's revenue constitutes 90% of the Tribe's income …."); *Breakthrough Mgmt. Grp., Inc.* v. *Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1195 (10th Cir. 2010) ("[T]he Tribe depends heavily on the Casino for revenue to fund its governmental functions ….").

The ruling below also undermines significant *state* interests under IGRA. Class III gaming must be "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State." 29 U.S.C. § 2710(d)(1)(C). These inter-governmental compacts, which take effect upon approval by the Secretary of the Interior, *id.* § 2710(d)(3)(B), may address "any … subjects that are directly related to the operation of gaming activities," *id.* § 2710(d)(3)(C)(vii). States have utilized the compact process to obtain substantial financial and public policy benefits. *See*, *e.g.*, Tribal-State Compact Between the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians of Michigan and the State of Michigan §§ 15-16 (May 9, 2007) (payments to state and local governments); Indian Gaming Compact Between the State of New Mexico and the Mescalero Apache Tribe § 11 (Apr. 13, 2015); Tribal-State Compact Between the State of California and the Karuk Tribe § 5.0 (Nov. 12, 2014). Indeed, Michigan obtains millions of dollars per year from the Band's casino alone, and millions more from other Indian gaming operations.[9]

In addition, compacts may address and establish labor-management rules that differ from those the NLRA imposes on private employers. *See*, *e.g.*, Tribal-State Compact Between the State of California and the Karuk Tribe, *supra* § 12.10 (requiring Tribe to enact labor relations code); Tribal-State Compact Between the Mashpee Wampanoag Tribe and the Commonwealth of Massachusetts § 18.6 (Mar. 19,

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[9] *See* Mich. Gaming Control Bd., *Indian Gaming Section Annual Report to the Executive Director* 5 (2011), https://www.michigan.gov/documents/mgcb/Annual_Report_-_Indian_Gaming_2010_Final_proprietary_remove_353286_7.pdf.

2013) (same); N.Y. Exec. Law § 12(a) (authorizing governor to conclude IGRA compact, subject to tribe's agreement to enact labor relations provisions). Congress in IGRA established a regime that allows states to pursue their financial and policy interests, including their labor and employment law interests concerning Indian gaming, through intergovernmental compact negotiations.

The Board, however, takes the position that the NLRA displaces even compact provisions *agreed to* by states and tribes and approved by the Secretary of the Interior. *See Casino Pauma*, 363 NLRB No. 60 (2015) (affirming ALJ decision that compact provisions between California and a tribe are preempted by the NLRA). The Board's approach, embraced by the Sixth Circuit, directly threatens the states' role, as well as substantial negotiated state benefits contemplated by IGRA.

With the support of Congress, tribal governments are working to create the economic development opportunities essential to self-government and self-sufficiency. To the detriment of tribes within its jurisdiction, the Sixth Circuit has issued a decision that cannot be reconciled with Congress's duly enacted statutes and, indeed, undermines Congress's purposes and impairs achievement of its goals. That important and incorrect decision should be reviewed and reversed.

CONCLUSION

The petition should be granted.

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