

No. 15-1024

IN THE
Supreme Court of the United States

LITTLE RIVER BAND OF OTTAWA INDIANS TRIBAL
GOVERNMENT,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

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

REPLY BRIEF OF PETITIONER

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INTRODUCTION

This petition cleanly presents a statutory question central to the economic health and political vitality of tribes throughout the country: Whether tribes, like all other public employers, may enact laws regulating labor relations with their employees, or whether Congress abrogated that sovereign power more than 80 years ago in the National Labor Relations Act, which applies only to private-sector employment and says not one word about tribal prerogatives.

The government does not deny the importance of this question. It concedes that courts of appeals have adopted “different analytical approaches” to its resolution. Opp. 13. And while it contends this acknowledged conflict is not “square,” *id.*, lower courts consistently have viewed this choice of approach as dispositive of the cases before them.

Further, the government declines to defend the specific “analytical approach” adopted by the Board and applied by the Sixth Circuit. The government’s alternative approach, however, shares the key flaws of the old. It fails to account for the NLRA’s full text and context. It ignores that Indian “sovereign power . . . remains intact” unless Congress clearly conveys a contrary intent, *e.g.*, *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987). It does not come to grips with the reality that Petitioner’s sovereign interests were injured when the Board ordered the Tribe to stop enforcing tribal laws governing its employees’ conduct on tribal trust lands. And it rejects Congress’s determination in the NLRA that public employers should be excluded from coverage, and in the Indian Gaming Regulatory Act that tribal gaming is *per se* governmental.

The decision below, in short, is clearly incorrect and highly consequential. The Court should review that holding, and reverse.

ARGUMENT

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

The petition demonstrated (pp. 16-19) that the Board’s position, affirmed below, conflicts with the rule that a tribe’s sovereign powers may be displaced only by a “clear expression” of Congressional intent. *E.g.*, *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2031-32 (2014); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149 n.14 (1982). The government does not attempt to square its position (or the Board’s) with these precedents. That conflict alone warrants the Court’s review.

The petition also identified (pp. 13-16) an outcome-determinative conflict among the courts of appeals on the question presented. Here too, the government largely cedes the field. It admits the Sixth and Tenth Circuits follow “different analytical approaches” in deciding whether the NLRA displaces tribal authority. Opp. 13. And it tacitly recognizes that the Tenth Circuit would reach a different result if it “were to take the same approach” in this very case. Opp. 14. The government nonetheless claims this conflict is insufficiently “square” because the Tenth Circuit’s decision in *NLRB v. Pueblo of San Juan*, 276 F.3d 1186 (10th Cir. 2002) (en banc), involved an enterprise owned by private entities, whereas the Sixth Circuit cases featured enterprises owned by tribes. See Opp. 13-14. Thus, the government incorrectly claims that *San Juan* did not address “the question

at issue here: whether the NLRA applies to a tribe *acting in its capacity as an employer* in the commercial sphere.” Opp. 15 (emphasis added).¹

In fact, both the Sixth and Tenth Circuits addressed a tribe’s authority *as a sovereign* to enact and enforce labor laws. Here, Petitioner enacted a comprehensive statutory scheme to address “Labor Organizations and Collective Bargaining” across its public sector. App. 158a-159a. Responding to a union complaint, App. 5a, the Board ordered the tribe to “cease and desist” *applying its laws*. App. 80a-81a. In *San Juan*, the Tenth Circuit addressed the same core issue. There, “an Indian tribe ha[d] exercised its authority as a sovereign . . . by enacting a labor regulation,” 276 F.3d at 1199. The “central question” was “whether the [tribe] continues to exercise the same authority to enact [labor laws of its choosing] as do states and territories,” or whether Congress instead “intended to strip Indian tribal governments of this authority as a sovereign.” *Id.* at 1191.

The Sixth and Tenth Circuits reached different conclusions on the same issue because they applied conflicting legal frameworks. The Tenth Circuit upheld tribal regulatory power by applying the rule that Congress must clearly express its intent to displace a tribe’s inherent sovereign powers. It has expressly

¹ The government mischaracterizes the Tenth Circuit’s statement that “the general applicability of federal labor law” was not at issue in *San Juan*. Opp. 14 (quoting 276 F.3d at 1191). The Tenth Circuit’s citation to the district court opinion shows the court was referring to whether “federal labor law is applicable to a *non-Indian employer* on Indian lands,” *NLRB v. Pueblo of San Juan*, 30 F. Supp. 2d 1348, 1351 (D.N.M. 1998) (emphasis added). That distinct general question is absent from this case.

summarized its holding by stating that “Congressional silence exempted Indian tribes from the National Labor Relations Act.” *Dobbs v. Anthem Blue Cross & Blue Shield*, 600 F.3d 1275, 1284 (10th Cir. 2010) (citing *San Juan*, 276 F.3d at 1199). In contrast, the Sixth Circuit’s framework “reject[s] the notion that ‘congressional silence should be taken as an expression of intent to exclude tribal enterprises.’” App. 17a (quoting *Donovan v. Coeur d’Alene Tribal Farm*, 751 F.2d 1113, 1115 (9th Cir. 1985)).² It thus concluded that the Board, not the Tribe, is authorized to determine labor laws governing the Tribe’s employees.

That outcome-determinative difference in approach is the kind of conflict this Court routinely resolves. See, e.g., *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1342 (2016) (granting petition “to reconcile the difference in approaches” among courts of appeals respecting criminal sentencing). “Cases are properly regarded as conflicting if it can be said with confidence that another circuit would decide the case differently because of the language in an opinion in a case having substantial factual similarity.” S. Shapiro et al., *Supreme Court Practice* 479 (10th ed. 2013).

² The government suggests (Opp. 15) this Court should await the Ninth Circuit’s decision in two recently docketed cases to resolve the question presented. These cases illustrate the recurring nature of the issue, but neither is a stronger vehicle than this case; nor could they resolve the current conflict among other circuits. The government’s half-hearted contention (Opp. 16-17) that Congress may resolve the conflict is similarly unpersuasive. The pending bills—which the Administration *opposes*, Opp. 17 n.3—are the latest in a series of such measures introduced over many years. See, e.g., Tribal Labor Relations Act, H.R. 4719, 107th Cong. (2002).

Without question, *Little River* would have come out differently in the Tenth Circuit. Indeed, the dissenting judge below and the dissenting panel in *Soaring Eagle Casino & Resort v. NLRB*, No. 15-1034 (U.S. Feb. 12, 2016) (petition pending), said they would have followed the Tenth Circuit’s approach, App. 43a-44a; *Soaring Eagle Casino & Resort v. NLRB*, 791 F.3d 648, 674-75 (6th Cir. 2015), and sustained the tribes’ authority to regulate reservation labor policy. App. 51a-52a; *Soaring Eagle*, 791 F.3d at 675.

Little River thus “create[d] a circuit split,” App. 34a, ripe for this Court to resolve.

II. THE DECISION BELOW IS INCORRECT AND POSES SERIOUS RISKS TO VITAL TRIBAL AND STATE INTERESTS.

The decisions reached by the Sixth Circuit and the Board are inconsistent with the key textual and contextual indicators of the statute’s intended meaning. Unless reviewed and reversed, they will eliminate tribal law-making authority and unsettle or invalidate numerous existing tribal labor laws, many of which were adopted in conjunction with Tribal-State compacts approved years ago by the Interior Department.

1. Petitioner explained (pp. 19-20) that when a statutory definition uses the word “include,” that definition “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) (emphasis added); see also A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 132 (2012) (“The verb *to include* introduces examples, not an exhaustive list.”). The NLRA uses “include” to describe the entities exempt from the statute’s definition of “employer.” Thus, the entities specifically

listed in that provision must be read as exemplars of a broader “general class.” *Helvering*, 293 U.S. at 125 n.1.

Indeed, since 1936, the Board has defined the term “State” to “include the District of Columbia” and all “Territories, and possessions of the United States,” 29 C.F.R. § 102.7, even though none is specifically mentioned in NLRA section 152(2). Lower courts, too, have construed the NLRA’s definition of “employer” to exempt unlisted entities like D.C. and Puerto Rico. Pet. 20-21. Tribes also fit comfortably within the public-employer exemption. NCAI Br. 14-15; see also CNIGA Br. 13 (noting Department of Interior’s position that NLRB lacks jurisdiction over Indian tribes). Indeed, until 2004, the Board agreed, deeming the point “clear beyond peradventure.” *Fort Apache Timber Co.*, 226 NLRB 503, 506 (1976).

The government now insists, however, that the exemption applies only to “certain governments,” *i.e.*, those “specified.” Opp. 20. But the statutory text tells us otherwise by its use of “includes,” which “makes clear that the examples enumerated in the text are intended to be illustrative, not exhaustive.” *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2170 (2012). The government concedes, Opp. 21 n.5, that its newly minted position casts doubt on the long-settled status of public employers not expressly named in NLRA section 152(2), but insists its longstanding regulation “does not even purport to construe the statute,” Opp. 20-21, and that the Board has no established position on whether federal territories and possessions are “employers.” Opp. 21 n.5.³

³ The government suggests these federal territories might be treated as part of the “United States” under section 152(2), but fails to address evidence that when the NLRA was enacted,

That stance is belied by the Board’s regulations, which unsurprisingly say that “State[s],” presumably as defined in the Board’s own terms, see 29 C.F.R. § 102.7, are in fact “excluded from the definition of ‘employer’ under the National Labor Relations Act,” *id.* § 104.204(a).

The government also claims that *State Bank of India v. NLRB*, 808 F.2d 526 (7th Cir. 1986), supports the Board’s exercise of jurisdiction over *foreign* public employers. But this petition concerns the power of a tribe to regulate labor-related activities *on tribal trust lands*, whereas the State Bank’s activities took place far outside India. *Id.* at 530-31 (operations in New York, Chicago, and California). Further, despite its name, the State Bank was merely an “agent” of India’s central bank, relating to the central bank much as “American banks” relate to the “American Federal Reserve Bank.” *Id.* at 530. In other words, the Seventh Circuit viewed the State Bank as akin to Citibank—regulated by the government, but distinct from it. Under IGRA, a tribe’s gaming facility is a governmental entity, the product of a compact between governments, serving governmental purposes.

2. The NLRA’s structure strongly supports Petitioner’s position. See Pet. 22-23; NCAI Br. 18-19. Congress revised the NLRA in 1947 to authorize private enforcement of collective-bargaining agreements, and did not waive (or otherwise mention) tribal sovereign immunity. See 29 U.S.C. § 185. It is implausible that Congress meant to subject tribes to the NLRA but exempt them from the NLRA’s primary enforcement mechanism, and took both steps without affirmatively addressing tribal interests in any way.

tribes were widely viewed as instrumentalities of the federal government. Pet. 21 n.5; NCAI Br. 19-21.

The government responds by noting that “Congress can, and sometimes does, impose legal obligations on Indian tribes without” exposing them to private litigation. Opp. 22. True enough, but the government’s citation to the Indian Civil Rights Act illustrates our point. That statute *expressly* cabins tribal authority. The NLRA does not. In that context, Congress’s omission of any sovereign immunity waiver supplies compelling evidence that Congress did not intend the NLRA to strip tribes of power to make labor laws governing tribal employee conduct.

3. The government’s position that a tribe is *sometimes* an “employer,” depending on whether it is performing a “commercial” or “governmental” function, is wholly unsupported. Opp. 23. Nothing in the text of section 152(2) even arguably permits this construction, which flouts this Court’s warning that it is “untenable” to distinguish between the “proprietary” and “governmental” activities of sovereigns. *New York v. United States*, 326 U.S. 572, 583 (1946); see also Pet. 26 (collecting cases).⁴

The petition further showed that no such line could be meaningfully drawn with respect to gaming activities because States routinely operate lotteries, race-tracks, and casinos, equally with the aim of raising

⁴ The government misreads this Court’s statement that Congress “vest[ed] in the Board the fullest *jurisdictional* breadth constitutionally permissible under the Commerce Clause.” Opp. 2, 19. The Court indicated only that the Board generally has statutory authority to address activities that “affect commerce” in the constitutional sense. *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963) (per curiam). But it is undisputed that Congress exempted from the Board’s jurisdiction entities whose activities plainly affect commerce, *e.g.*, federal agencies, municipalities, and railroads. The question here is simply whether Congress likewise exempted tribes from the statute’s reach.

revenue for public purposes. Pet. 26. The government fails to acknowledge that States routinely perform the very function the Board deems “commercial” when conducted by tribes.⁵

Nor does the government have any meaningful response to our showing that Congress treats IGRA gaming as governmental in nature, by mandating that it be carried out pursuant to intergovernmental compacts and that gaming revenues must be dedicated to governmental purposes. See Pet. 25. The government gives a passing nod to the “special status” of IGRA gaming, but contends this “does not render the activities associated with operating a casino *non-commercial* in a sense that would render the NLRA inapplicable.” Opp. 25. The government does not explain what “noncommercial” “sense” it has in mind, and fails to tie its understanding to relevant statutory text.

This is because there is no connection. The Board is engaged in free-form policymaking. And as the brief of *amici* State of Colorado and the Ute Mountain Ute Tribe explains (pp. 21-22), the Board’s frolic is harmful to tribes. They do not know which of their activities the Board would deem “commercial,” or how many bargaining units the Board would recognize within any “commercial” part of their government, and therefore cannot make efficient or predictable labor policy choices. Under *Little River*, any policy they

⁵ The government cites ERISA’s express direction to the IRS to distinguish between tribal governmental and commercial functions under that statute to support its argument that such lines may be drawn. Opp. 24 (citing 29 U.S.C. § 1002(32)). But the salient point is that in 1935, Congress did not draw such a distinction in the text of the public-employer exemption, § 152(2), and left no room for the Board to do so.

adopt is subject to Board revision, whenever the Board chooses.

4. Further, as explained in the petition (pp. 27-28, 31-34), this case does not merely concern “activities associated with operating a casino.” Opp. 25. The question is who may *enact and enforce laws* regulating those activities—the tribe or the Board. The government would never contend that Congress acts in a “commercial,” not sovereign, manner when it writes laws governing commercial activities. Congress exercises the same sovereign law-making function when it legislates on any proper subject.

The same is true of a tribe. Indeed, the government, unlike the Sixth Circuit, App. 28a, correctly recognizes that “Indian tribes have broad authority to regulate nonmembers’ activities on tribal land.” Opp. 29 (citing *Montana v. United States*, 450 U.S. 544, 565 (1981)). Petitioner exercised that authority by enacting laws concerning labor-related activities on tribal trust lands. Numerous tribes have enacted comparable laws, which are jeopardized by the Board’s claim of preclusive authority over labor-relations rules on tribal trust lands. See USET Br. 18; Ute Mt. Br. 18-19; CNIGA Br. 10-11. The government may not wish to describe its position as threatening tribal sovereignty, Opp. 26, but that is precisely what it is doing.

5. Finally, the petition showed, and the government does not dispute, that the Board’s position would nullify labor-relations provisions in dozens of existing IGRA compacts previously approved by the Secretary of the Interior. See 25 U.S.C. § 2710(d). In other contexts, the Administration lauds these compact provisions as “protect[ing] tribal self-governance while also ensuring that most casino workers retain important and effective labor rights.” Exec. Office of the President, *Statement of Administration Policy*:

H.R. 511—Tribal Labor Sovereignty Act of 2015 (Nov. 17, 2015). But here, Opp. 26 n.7, and elsewhere, see *Casino Pauma*, 363 NLRB No. 60 (2015), the government says these same provisions are unlawful. The Board’s approach thus threatens to unsettle existing intergovernmental accords and eliminate a power important even to States that have not previously exercised it—the “authority to negotiate on labor-relations issues” in connection with IGRA gaming compacts. See Michigan Br. 11.

The government contends that tribes must instead negotiate labor-relations matters under the Board’s supervision, and under threat of labor stoppages that could cripple their finances. The government dismisses this concern as “speculation,” and blithely offers a list of bargaining strategies it views as sufficient for tribes. Opp. 28 n.8.

But the government would never take its own medicine. It uses civil and criminal sanctions to deter and punish striking by federal employees, precisely because it views the prospect as intolerable. See 5 U.S.C. § 7116(b)(7); 18 U.S.C. § 1918(3). Petitioner assessed its governmental interests and, like the federal government (and many States), adopted a comprehensive legislative plan that bans strikes by tribal employees while creating mechanisms for regulating labor relations and resolving labor-related disputes. Pet. 6-7. Many tribes have enacted comparable programs. See USET Br. 6-10. At stake here is whether any tribe may lawfully follow that course. That question is too important to leave to the Board’s self-interested effort to expand its authority beyond statutory bounds.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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