No. 15-1034

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IN THE

Supreme Court of the United States

SOARING EAGLE CASINO AND RESORT, an enterprise of the Saginaw Chippewa Indian Tribe of Michigan,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR NATIONAL CONGRESS OF AMERICAN INDIANS AND NATIONAL INDIAN GAMING ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

JOHN DOSSETT
GENERAL COUNSEL
NATIONAL CONGRESS OF AMERICAN INDIANS
1516 P Street, NW
Washington, DC 20005
(202) 466-7767

SETH P. WAXMAN
DANIELLE SPINELLI
Counsel of Record
ROBBIE MANHAS
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
danielle.spinelli@wilmerhale.com

ALAN SCHOENFELD
WILMER CUTLER PICKERING HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 230-8000

QUESTIONS PRESENTED

For more than sixty years, the National Labor Relations Board correctly declined to exercise jurisdiction over tribal operations on tribal lands. But in recent years, the Board has belatedly asserted the extraordinary power to regulate the on-reservation activities of sovereign Indian tribes, precipitating a three-way circuit split in the process. Nothing in the text of the National Labor Relations Act changed in that interval; it contains no language granting the Board authority over Indian tribes. Nor has the language of various Indian treaties, like those between the Saginaw Chippewa Indian Tribe and the United States, changed; they continue to recognize the Tribe's authority to exclude nonmembers. And despite the Board's complete lack of expertise in Indian law, the Board now dictates that some tribal operations are subject to the NLRA and others are not based on its evaluation of the centrality of certain functions to tribal sovereignty and subtle differences in treaty language.

This case presents two questions, both of which have divided the courts of appeals:

(1) Does the National Labor Relations Act abrogate the inherent sovereignty of Indian tribes and thus apply to tribal operations on Indian lands?

(2) Does the National Labor Relations Act abrogate the treaty-protected rights of Indian tribes to make their own laws and establish the rules under which they permit outsiders to enter Indian lands?

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INTEREST OF AMICI CURIAE[1]

The National Congress of American Indians (NCAI), founded in 1944, is the Nation's oldest and largest association of Indian Tribes, representing 252 tribal governments and many individual tribal members from every region of the country. NCAI serves as a forum for consensus-based policy development among its member Tribes. Its mission is to inform the public and the federal government about tribal self-government, treaty rights, and a broad range of federal policy issues affecting Tribes.

The National Indian Gaming Association (NIGA) is a non-profit trade association composed of 184 Tribes and other non-voting associate tribal members. Its mission is to advance the lives of Indian people—economically, socially, and politically. NIGA operates as a clearing house of educational, legislative, and public-policy resources on Indian gaming issues and tribal community development. These resources are made available to Tribes, policymakers, and the public.

SUMMARY OF ARGUMENT

Congress and this Court have long recognized federal Indian law's "'overriding goal' of encouraging tribal self-sufficiency and economic development." *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987). Congress has repeatedly reaffirmed its commitment to tribal self-determination. And, as this

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[1] No counsel for a party authored this brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief are on file with the Clerk of the Court.

Court has repeatedly acknowledged, that goal is "not within reach if the Tribes cannot raise revenues and provide employment for their members." *Id.* at 218-219.

Raising revenues, however, is difficult for Indian Tribes. Tribal member incomes are generally too low for income taxes, property taxes are not permitted on trust land, and the imposition of both tribal and state sales and excise taxes on non-Indian businesses would discourage economic growth. For decades, therefore, Tribes have operated an array of enterprises—stores, hotels, gas stations, gaming facilities, and more—to raise funds where taxes cannot.

These enterprises support the infrastructure necessary for tribal self-government. For the Tribes that operate them, they serve as the central and often only source of self-generated revenue. Yet the court of appeals here—constrained by an earlier panel decision—held that the Saginaw Chippewa Indian Tribe's interest in applying tribal law to employees of its tribal gaming enterprise was at the "periphery" of tribal sovereignty. *See* Pet. App. 24-26.

That mischaracterization relies on a formless and often-repudiated distinction between commercial and governmental enterprises. It upends the proper relationship among Congress, Indian Tribes, and the courts; denigrates tribal sovereignty; and jeopardizes the funding of basic governmental services on tribal land. And the Sixth Circuit's ultimate conclusion that the National Labor Relations Board has the authority to regulate employees at a government-operated, on-reservation tribal enterprise deepens a significant circuit split, feeding growing uncertainty about labor relations on tribal lands.

Moreover, the decision is contrary to the history and purposes of the National Labor Relations Act. The Act was passed at a time when federal Indian policy decisively shifted to recognizing and dealing with Tribes as governments. Settled canons of Indian law require construing congressional silence in favor of Tribes. Where, as here, the extension of an act of Congress that is silent on the subject of Tribes would be inconsistent with the history and purposes of the act from the special perspective of federal Indian law, such an act does not apply to Tribes.

At bottom, the Board's exercise of jurisdiction subjects Indian Tribes—alone among sovereigns recognized in our system of government—to the potentially crippling threat of employee strikes, thereby jeopardizing necessary funding for government operations. Congress never intended that result; indeed, the entire history of federal Indian law and policy is to the contrary. The petition should be granted to correct this egregious departure from settled law and resolve the conflict among the circuits on this critical issue.

ARGUMENT

I. THE NLRB HAS NO AUTHORITY TO REGULATE LABOR RELATIONS AT A TRIBAL GOVERNMENT ENTERPRISE THAT IT DEEMS "COMMERCIAL" IN CHARACTER

The Sixth Circuit—like the Board and the D.C. Circuit before it—has predicated the extension of the NLRA to tribal government enterprises on a faulty distinction between "commercial" and "governmental" undertakings. *See NLRB* v. *Little River Band of Ottawa Indians Tribal Gov't*, 788 F.3d 537, 553 (6th Cir. 2015), *petition for cert. filed*, No. 15-1024 ("The right to conduct commercial enterprises free of federal regulation is not an aspect of tribal self-government."); *see al-*

so San Manuel Indian Bingo & Casino v. *NLRB*, 475 F.3d 1306, 1315 (D.C. Cir. 2007) ("[I]mpairment of tribal sovereignty is negligible ... , as the Tribe's activity was primarily commercial[.]").

This Court has repeatedly repudiated such distinctions as "unsound in principle and unworkable in practice." *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546-547 (1985); *see also New York* v. *United States*, 326 U.S. 572, 580 (1946) ("[W]hat is 'normally' conducted by private enterprise in contradiction to the 'usual' governmental functions is too shifting a basis for determining constitutional power and too entangled in expediency to serve as a dependable legal criterion. ... [T]he problem cannot be hidden by an attempt to separate manifestations of indivisible governmental powers."). And Congress, with the Tribes specifically in mind, has also recognized the analytic bankruptcy of a commercial-governmental divide. 29 U.S.C. § 1002(32) (tribal "commercial activities" can be "an essential government function"). Like any "distinction between ... governmental and proprietary functions," the Sixth's Circuit's standard invites "'the inevitable chaos [of] courts try[ing] to apply a rule of law that is inherently unsound.'" *Owen* v. *City of Indep., Mo.*, 445 U.S. 622, 647 n.26 (1980).

A. Indian Tribes Are Entitled To Deference In Denominating Their Enterprises Governmental

The Sixth and D.C. Circuits differ in their formulations of the commercial-governmental imponderable. *Compare Little River*, 788 F.3d at 542 (question is whether "the law 'touches exclusive rights of self-government in purely intramural matters'"), *with San Manuel*, 475 F.3d at 1313 (question is whether the law

affects "the traditional acts governments perform" or "collateral activities that, though perhaps in some way related to the foregoing, lie outside their scope"). Regardless of the exact standard, however, whether a tribal enterprise falls under the ambit of the NLRA now depends on an ad hoc, rudderless inquiry.

This line-drawing problem is particularly acute for Indian Tribes, for whom so many commercial enterprises underlie or intersect with the operation of government. *See Breakthrough Mgmt. Grp.* v. *Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1183 (10th Cir. 2010) ("'[T]ribal governments directly control or participate in commercial activities more frequently than other types of governments[.]'"). As the IRS has explained: "Tribes generally do not have tax revenues adequate to support government operations .... Excess revenues from tribal business operations are a critical source of funding for tribal governmental programs." IRS, Advisory Comm. on Tax Exempt & Gov't Entities, *Survey and Review of Existing Information and Guidance for Indian Tribal Governments* 10 (2005).

Tribal gaming is but one example. Also at issue are tribal hospitals, colleges, economic-development corporations, and countless other enterprises, both for-profit and not-for-profit. *See, e.g.*, *Quantum Entm't, Ltd.* v. *DOI*, 848 F. Supp. 2d 30, 34 (D.D.C. 2012) (gas station), *aff'd*, 714 F.3d 1338 (D.C. Cir. 2013); *Fort Apache Timber Co.*, 226 N.L.R.B. 503, 503 (1976) (timber company). Even if the courts of appeals agreed on a commercial-governmental standard by which to assess the susceptibility of such enterprises to NLRB jurisdiction, each enterprise presents unique factual and legal considerations that defeat any hope of consistent application. *Compare San Manuel*, 475 F.3d at 1314-1318 (tribal casino subject to Board jurisdiction even though, under

IGRA, Tribe engaged in casino-related "governmental act[s]" and "application of the NLRA" would "impinge ... on these governmental activities"), *with Yukon-Kuskokwim Health Corp.*, 341 N.L.R.B. 1075, 1076-1077 (2004) (no jurisdiction because tribal hospital "fulfilled ... a unique governmental function" by "provid[ing] free health care to Indians ... under the Indian Health Improvement Act"), *on remand from Yukon-Kuskokwim Health Corp.* v. *NLRB*, 234 F.3d 714, 718 (D.C. Cir. 2000) (Board, in asserting jurisdiction, did not adequately address whether Indian Self Determination Act exempts hospital from NLRA).

The inherent uncertainty resulting from ad hoc application of such an unstable governmental-commercial distinction can devastate a Tribe's ability to plan the operation of government. Two aspects of the Sixth Circuit's rule exacerbate this problem.

First, in authorizing the Board to exercise its jurisdiction over, and make labor-law determinations regarding, tribal enterprises, the Sixth Circuit ceded the parsing of the governmental-commercial divide to an agency that has no "expertise [or] delegated authority ... relate[d] to federal Indian law." *San Manuel*, 475 F.3d at 1312. As discussed below, the governmental-commercial distinction has troubled courts for generations, and its application to Indian Tribes has proven particularly complicated. Whatever the Board's expertise in labor law, it is ill-suited to determine whether and under what circumstances a Tribe is acting "governmentally" or "commercially." As at least one Board member has recognized, the Board is susceptible to the vagaries of "competing policy interests," which may result in unpredictable determinations in an area where tribal governments need certainty. *See San Manuel Indian Bingo & Casino*, 341 N.L.R.B. 1055, 1065 (2004)

(Member Schaumber, dissenting) ("Providence ... breeds policy, for the Board today reverses course because, in the words of the majority, ... 'tribal businesses have grown and prospered ... .' In response to this new 'prosperity,' the majority undertakes a rebalancing of competing policy interests and finds that the Act extends to on-reservation tribal enterprises.'").

Second, even posing the question whether a tribal enterprise is governmental or commercial is an affront to tribal sovereignty. This Court has explained that the very process of parsing the distinction between traditional and non-traditional government functions "disserves principles of democratic self-governance." *Garcia*, 469 U.S. at 547. Self-governing sovereigns, "within the realm of authority left open to them ... , must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else—including the judiciary—deems state involvement to be." *Id.* at 546.

For example, sovereign activities—be they "governmental" or "commercial"—are entitled to the immunity that attaches to a sovereign because of its status as a government. *See Reeves, Inc.* v. *Stake*, 447 U.S. 429, 442 n.16 (1980) ("'[A] State's project is as much a legitimate governmental activity whether it is traditional, or akin to private enterprise, or conducted for profit.'"). This Court has specifically rejected the argument that state sovereign immunity is "any less robust" with respect to conduct "that is undertaken for profit, that is traditionally performed by private citizens and corporations, and that otherwise resembles the behavior of 'market participants.'" *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 684 (1999).

It is no more appropriate to apply a commercial-governmental distinction in the current context. *See, e.g.*, *Michigan* v. *Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2037 (2014) ("'We decline to draw [any] distinction' that would 'confine [immunity] to reservations or to noncommercial activities.'"); *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 510 (1991) (tribal sovereign immunity not set aside in connection with conduct of business). No governments other than Indian Tribes are subjected to the NLRA for any of their activities. *See NLRB* v. *Natural Gas Util. Dist.*, 402 U.S. 600, 604-605 (1971) (Board's test for whether political subdivision of State is an "employer" under NLRA depends on how the entity was created and who administers it, not the nature of its activities). And as detailed below, Congress adopted the NLRA's governmental exclusion even though it had before it arguments that such an exclusion would give States and localities an unfair advantage over private entities unless it were limited just as the Board would now limit it for Tribes—to governments functioning "purely [as] governmental agencies." *See* 1 NLRB, *Legislative History of the National Labor Relations Act 1935*, at 325 (1949) (letter from J.W. Cowper (Mar. 13, 1934)) (*NLRA History*).

Tribal governments have at least as urgent a need for uninterrupted funding as their national, state, and local counterparts. And they have just as much of a sovereign prerogative to determine for themselves whether and how to balance that need against the potential desirability of according some categories of public employees the right to strike in some circumstances. Yet the Sixth Circuit's decision imposes upon Tribes—alone among all governments—both direct regulation by the Board and exposure to strikes through which

employees pursuing private economic interests can threaten to cripple public operations that are critical to the well-being of Tribes and their members. That very direct and serious encroachment on tribal sovereignty cannot be allowed.

B. Tribal Gaming Is An Essential Tribal Government Enterprise

These concerns apply across the breadth of enterprises that Tribes operate to fund their critical government functions. They have special purchase here, however, because they arise in a case involving tribal gaming enterprises, which "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).

In enacting the Indian Gaming Regulatory Act (IGRA), a comprehensive legislative scheme governing tribal gaming, Congress required that "net revenues from any tribal gaming" be used exclusively for public purposes. 25 U.S.C. § 2710(b)(2)(B) (including "fund[ing] tribal government operations or programs" and "fund[ing] operations of local government agencies"). The point of IGRA is "to provide 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." *Id.* § 2702(1); *see also id.* § 2701(4) (such a purpose is "a principal goal of Federal Indian policy"); *cf. California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 216, 222 (1987) (state regulation of tribal gaming "would impermissibly infringe on tribal government" because gaming furthers "the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development").

Thus, as the United States has recognized, "[t]ribal gaming under IGRA is not just ordinary commercial activity." U.S. Br. 29 n.7, *Bay Mills*, 134 S. Ct. 2024; *see also* Jan. 15, 2009 Letter from E.R. Blackwell, *Saginaw Chippewa Indian Tribe of Michigan* v. *Becker*, No. 11-cv-14652 (E.D. Mich. Nov. 21, 2011), ECF No. 21-2 (DOI explaining that Board may not treat tribal employer's acts as "merely those of a private employer"). Rather, "tribal gaming [is] *governmental* gaming, the purpose of which is to raise tribal revenues for member services." S. Rep. No. 100-446, at 12 (1988) (emphasis added).

Indeed, for Tribes that have them, tribal enterprises such as casinos typically provide a very large percentage of government funds. *See, e.g.*, Pet. App. 5. The revenues pay for utilities, including water, sewer, telecommunications, and energy; health care; natural-resource management; elder-care programs; social services; court systems; law enforcement; schools; and adult education. *See id.*; *see also, e.g.*, *Grand Traverse Band* v. *United States Att'y*, 198 F. Supp. 2d 920, 926 (W.D. Mich. 2002). And tribal gaming in particular has a marked positive effect on tribal socioeconomic conditions and governmental services. Cornell, *The Political Economy of American Indian Gaming*, 4 Ann. Rev. L. & Soc. Sci. 63, 70-76 (2008) (summarizing evidence); *see also Breakthrough*, 629 F.3d at 1192 ("The allocation of revenue from the Casino clearly benefits the Tribe[.]"); *Allen* v. *Gold Country Casino*, 464 F.3d 1044, 1046-1047 (9th Cir. 2006) ("With the Tribe owning and operating the Casino, there is no question that ... advantages inure to the benefit of the Tribe."); *Grand Traverse*, 198 F. Supp. 2d at 926 ("[The tribal] casino ... employs approximately [250] tribal members. Revenues ... also fund approximately 270 additional tribal

government positions, which administer a variety of governmental programs .... The casino also provides some of the best employment opportunities in the region, and all of its employees are eligible for health insurance benefits, disability benefits and 401(k) benefit plans." (citations omitted)).

Saginaw Chippewa Tribe's gaming operation provides just such benefits. "The operation of the Casino allows the Tribe to provide many services previously not available to its members because it lacks access to exploitable natural resources and has an insufficient tax base." Pet. App. 5. "The revenues from the Casino constitute almost 90% of the Tribe's income, providing the vast majority of funding necessary to run the Tribe's 37 departments and 159 programs." *Id.* And the casino's corporate structure mirrors this purpose: "[T]he Tribe created Soaring Eagle Gaming as a Governmental entity to operate and manage the casino, as established by Charter[.]" *Id.* 80. "The tribal council hires all management-level employees" and exercises oversight over the operation, with "[t]he casino department managers and directors regularly report[ing] to [it]." *Id.*

A tribal enterprise of this sort is governmental. It falls squarely within tribal sovereign authority "to raise revenues to pay for the costs of government." *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 144 (1982); *see also New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983) ("[T]ribes have power ... to undertake and regulate economic activity within the reservation[.]"). Because "[r]aising revenue and redistributing it for the welfare of a sovereign nation is manifestly a governmental purpose," *Cohen* v. *Little Six, Inc.*, 543 N.W.2d 376, 379 (Minn. Ct. App. 1996), *aff'd*, 561 N.W.2d 889 (Minn. 1997), the NLRA should not apply.

II. EXTENDING THE NLRA TO TRIBAL GOVERNMENT ENTERPRISES CONFLICTS WITH THE ACT AND WITH FEDERAL INDIAN LAW MORE BROADLY

"For nearly two centuries now, [this Court] ha[s] recognized Indian tribes as 'distinct, independent political communities,' qualified to exercise many of the powers and prerogatives of self-government." *Plains Commerce Bank* v. *Long Family Land & Cattle Co.*, 554 U.S. 316, 327 (2008). It is true that all aspects of tribal self-government are "subject to the superior and plenary control of Congress." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 58 (1978). Absent clear congressional direction, however, this Court has "'consistently guarded the authority of Indian governments over their reservations.'" *United States* v. *Mazurie*, 419 U.S. 544, 558 (1975).

Respect for tribal self-government is reflected in two powerful canons of construction. First, "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana* v. *Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). Second, where Tribes are concerned, courts "tread lightly in the absence of clear indications of legislative intent.'" *Merrion*, 455 U.S. at 149. When the NLRA's history and purpose is viewed in light of these principles, it is clear that the Act should not be extended to tribal governments engaged in activities on tribal land.

A. Congress Framed The NLRA To Cover Ordinary Private-Sector Employers, Not Governments Of Any Sort

Congress has excluded governments, including "the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or

political subdivision thereof," from the NLRA's coverage. 29 U.S.C. § 152(2). That exclusion reflects Congress's unwillingness to subject either its own instrumentalities or other governments to labor regulation. In particular, it embodies an unwillingness to extend to the employees of any governmental employer a federal right to strike—a right that is otherwise "part and parcel of the system that the [NLRA] ha[s] recognized." *NLRB* v. *Insurance Agents' Int'l Union*, 361 U.S. 477, 488-489 (1960).

At the time the NLRA was enacted, "governmental employees did not usually enjoy the right to strike." *Natural Gas Util. Dist.*, 402 U.S. at 604 & n.3. Such strikes were barred at common law, *Virgin Islands Port Auth.* v. *SIU de P.R.*, 354 F. Supp. 312, 313 (D.V.I. 1973), *aff'd*, 494 F.2d 452 (3d Cir. 1974), and generally remain so today in the case of federal and most state employees, *see, e.g.*, 5 U.S.C. § 7116(b)(7). The legislative history of the Act includes a 1934 letter to the New York Times from Senator Walsh, Chairman of the Senate Committee on Education and Labor, emphasizing the importance of precluding public employees from striking. *NLRA History* 1117 (letter dated June 3, 1934). Similarly, in 1937, just three years after he signed the Act, President Roosevelt argued forcefully that strikes by public employees were inconsistent with effective government:

> [M]ilitant tactics have no place in the functions of any organization of Government employees .... [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. Such action, looking toward the paralysis of

> Government by those who have sworn to support it, is unthinkable and intolerable.

Norwalk Teachers' Ass'n v. *Board of Educ.*, 83 A.2d 482, 484 (Conn. 1951) (quoting Aug. 16, 1937 letter).

Congress clearly accepted, then, the proposition that public-employee strikes are "contrary to the notion of government," in part because governmental activity

> is usually undertaken by the government precisely because it is critically important to a large segment of the public, and the public is therefore especially vulnerable to "blackmail" strikes by workers in this field.

Virgin Islands, 354 F. Supp. at 313. Congress therefore declined to enact a federal law imposing either collective-bargaining or related rights, including the right to strike, on other governments. Instead, it left those governments free to make these significant policy choices through their own laws.

The governmental exclusion has already been extended beyond the NLRA's express reference to the most commonly considered governments in the American system—the United States and "any State or political subdivision thereof." 29 U.S.C. § 152(2). Federal courts have interpreted the provision to reach Puerto Rico and the Virgin Islands. *See Chaparro-Febus* v. *International Longshoremen Ass'n*, 983 F.2d 325, 329-330 (1st Cir. 1992); *Virgin Islands*, 354 F. Supp. at 313; *cf. San Manuel*, 341 N.L.R.B. at 1070 (Member Schaumber, dissenting); *see also* 29 C.F.R. § 102.7 (current Board regulation defining "State" to include the District of Columbia and all U.S. territories and possessions, promulgated Apr. 18, 1936, *see* 1 Fed. Reg. 207, 208). And until 2004, the Board had likewise recognized

that it was "clear beyond peradventure that a tribal council ... is a government both in the usual meaning of the word, and as interpreted and applied by Congress, the Executive, and the Courts." *Fort Apache*, 226 N.L.R.B. at 506 (footnote omitted). It thus considered tribal enterprises exempt from the Act, at least when they operated on tribal land. *Id.*; *see Sac & Fox Indus.*, 307 N.L.R.B. 241, 243-244 (1992) (distinguishing off-reservation activities). The only federal court that had addressed the question before 2004 agreed. *Roberson* v. *Confederated Tribes*, 103 L.R.R.M. 2749, 1980 WL 18759, at *2 (D. Or. Feb. 4, 1980).

Not until its 2004 decision in *San Manuel* did the Board assert that the NLRA extends to federally-recognized tribal governments. It has since maintained that position, in this case and others. The Board's new construction of the Act is implausible, especially when the Act's adoption in 1935 is considered in conjunction with the immediately preceding and succeeding enactment of the Indian Reorganization Act (IRA) in 1934 and the Oklahoma Indian Welfare Act (OIWA) in 1936.

As discussed below, the adoption of the IRA and related statutes was driven by the desperate state of tribal affairs at that time, reflected a sharp turning point in federal Indian policy, and embodied a renewed commitment by the United States to deal with Tribes on a government-to-government basis. In light of that historical context, that Congress did not mention Tribes specifically in the NLRA cannot support treating them—alone among American governments—as "employers" within the meaning of the Act. *See Monessen Sw. Ry.* v. *Morgan*, 486 U.S. 330, 337 (1988) (emphasizing importance of considering "Congress' silence ... in the appropriate historical context"); *El Paso Natural Gas Co.* v *Neztsosie*, 526 U.S. 473, 487 (1999) (con-

cluding Tribes should be treated like States under Price-Anderson Act because Act's silence on issue was probably inadvertent); *NLRB* v. *Pueblo of San Juan*, 276 F.3d 1186, 1196 (10th Cir. 2002) (en banc) ("Silence is not sufficient to establish congressional intent to strip Indian tribes of their retained inherent authority to govern their own territory.").

B. Between 1934 And 1936, Congress Would Have Thought Of The Tribes As Governments In The Process Of Reconstruction, Not As Private-Sector Employers

The United States originally conducted its legal relations with Tribes through treaties. *See, e.g.*, *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 542-548 (1832); *Cohen's Handbook of Federal Indian Law* § 1.03[1], at 23-30 (Newton et al. eds., 2012) (*Cohen*). Eventually, however, it "began to consider the Indians less as foreign nations and more as a part of our country." *Organized Vill. of Kake* v. *Egan*, 369 U.S. 60, 72 (1962). The federal government adopted a strict assimilationist policy, "substitut[ing] federal power for the Indians' own institutions by imposing changes in every aspect of native life." S. Rep. No. 101-216, at 3 (1989). That policy "proved to be a disastrous failure." *Hagen* v. *Utah*, 510 U.S. 399, 425 (1994) (Blackmun, J., dissenting). And in the wake of that failure, federal policy began to shift back toward respect for Tribes as separate sovereigns and the promotion of tribal self-government and community-based economic development. *Cohen* § 1.05, at 79-81.

A critical turning point was the 1928 Meriam Report, which described the deplorable conditions created by assimilation policy and quickly became a "primary catalyst for change." *Cohen* § 1.05, at 80. It detailed

how "[a]n overwhelming majority of the Indians [were] poor" and "living below any reasonable standard of health and decency." *The Problem of Indian Administration* 3, 433-434 (Meriam et al. eds., 1928).

After the 1932 election, Congress concluded that "[t]he overly paternalistic approach of prior years had proved both exploitative and destructive of Indian interests." *Morton* v. *Mancari*, 417 U.S. 535, 553 (1974). Proper fulfillment of the Nation's trust obligations required a complete shift in approach, "turning over to the Indians a greater control of their own destinies." *Id.* This led to the "sweeping" statutory changes embodied in the IRA, 25 U.S.C. §§ 461 *et seq.*, the "overriding purpose" of which was "to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically," *Morton*, 417 U.S. at 542.

Importantly, the IRA aimed to promote self-determination by Indian communities through both renewed political recognition and economic development undertaken directly by Tribes as Tribes. *See Iowa Mut. Ins.* v. *LaPlante*, 480 U.S. 9, 14 n.5 (1987); *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 151-152 (1973). It therefore encouraged Tribes both to "reorganize"—to "revitalize their self-government," *Jones*, 411 U.S. at 151, through the adoption of tribal constitutions, 25 U.S.C. § 476—and to invigorate their economies through the creation of federally-chartered tribal corporations, *id.* § 477. All changes emphasized "the expression of retained tribal sovereignty." *Duro* v. *Reina*, 495 U.S. 676, 690-692 (1990). "Instead of forcing the assimilation of individual Indians, the IRA was intended to enable the tribe to interact with and adapt to modern society as a governmental unit." *Cohen* § 1.05, at 81. And in 1936—after the NLRA had been

passed—Congress enacted the OIWA, extending most provisions of the IRA to the Oklahoma Tribes. *See* 25 U.S.C. §§ 501 *et seq.*

Thus, Congress fundamentally changed federal policy in an effort to achieve two distinct but inseparable objectives: tribal political self-governance and tribal economic self-sufficiency. By promoting both, Congress sought to "'rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.'" *Jones*, 411 U.S. at 152 (quoting H.R. Rep. No. 73-1804, at 6 (1934)). Renewed support for tribal governments was directly linked to the policy of promoting economic development through which a Tribe could "generate substantial revenues for the education and the social and economic welfare of its people." *Id.* at 151.

As discussed above, the NLRA established a new national regime of collective bargaining, "focused on employment in private industry and on industrial recovery." *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 504 (1979). Against the backdrop of contemporaneous developments in federal Indian law, Congress could not have intended to include Tribes within that new regime.

First, given the economic devastation visited on Tribes by the federal policies of the previous decades, the most reasonable explanation for the lack of any specific mention of Tribes in the NLRA's text and legislative history is that reached by the D.C. Circuit: "[T]he NLRA was enacted by a Congress that in all likelihood never contemplated the statute's potential application to tribal employers." *San Manuel*, 475 F.3d at 1310.

That conclusion is underscored by Congress's failure to include any abrogation of tribal sovereign im-

munity for actions to enforce collective-bargaining agreements under Sections 301 or 303 of the Act. *See Roberson*, 1980 WL 18759, at *1 (finding no abrogation). Abrogation "cannot be implied but must be unequivocally expressed." *Martinez*, 436 U.S. at 58. It would have been surpassingly odd for Congress to include tribal government enterprises within the Act's coverage through the definition of "employer," but then to provide employees and labor organizations no authority to sue Tribes to enforce the Act. In the absence of an abrogation provision, the only logical conclusion is that Congress never contemplated application of the Act to tribal enterprises in the first place.

Second, if the question had been raised when the Act was being drafted in the 1930s, Tribes would likely have been considered "instrumentalities" of the federal government, and thus derivatively covered by the Act's express exemption of the United States itself.

That interpretation accords with a regulation promulgated in 1936 to prescribe procedures under the new Act. There, the Board itself defined the term "State" to include governments not expressly mentioned in Section 2(2): "the District of Columbia and all ... Territories, and possessions of the United States." 29 C.F.R. § 102.7; *see also* 1 Fed. Reg. 207, 208. The Tribes would have fallen under that provision because the period of 1914 through 1938—during which the Act was passed—witnessed "the reign of the treatment of Indian reservations as federal instrumentalities." *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 184 n.8 (1980) (Rehnquist, J., concurring in part, dissenting in part). Thus, in 1937, when the Solicitor of the Department of the Interior was asked to opine whether Tribes were required to

pay unemployment insurance and Social Security taxes when they handled funds under IRA, he reasoned:

> It is my opinion that the Indian tribes, even if employers, are not subject to either tax for two reasons; first, that it is highly doubtful whether a general tax law of this kind would be held to apply to an Indian tribe unless the statute so indicated, and secondly, and principally[,] because an Indian tribe, particularly when operating under a trust agreement, can be considered an instrumentality of the United States and, therefore, that employment by a tribe *is* within the exceptions to the kind of employment upon which taxes are laid.

1 Op. Solic. Dep't Indian Affairs 767, 768 (D.O.I. June 30, 1937); *see also* 1 Op. Solic. Dep't Indian Affairs 484, 491 (D.O.I. Dec. 13, 1934) (interpreting the 1934 IRA) ("The tribe is, therefore, so far as its original absolute sovereignty has been limited, an instrumentality and agency of the Federal Government.").

Third, as discussed above, the whole thrust of Congress's Indian-specific enactments in 1934 and 1936 was to re-establish a federal policy of recognizing and dealing with Tribes as governments—subsidiary to and dependent on the United States, to be sure, but governments nonetheless. Therefore, if Congress had contemplated the special case of Tribes in the context of the NLRA, the only reasonable conclusion is that it would have included them within the list of governments expressly excluded from coverage. There is simply no basis for treating Tribes as covered while recognizing that the governments of other federal territories, "possessions," or enclaves are not. *See United States* v. *Lara*, 541 U.S. 193, 203-204 (2004) (Tribes di-

rectly compared to Hawaii before statehood, the Northern Mariana Islands, the Philippines, and Puerto Rico—each "a dependent sovereign that is not a State"); 29 C.F.R. § 102.7; *see also United States* v. *Wheeler*, 435 U.S. 313, 322-330 (1978) (Tribes are dependent—but separate—sovereigns).

Fourth, that some Tribes now conduct successful commercial activities along with their other functions does not detract from the conclusion that Congress would have viewed Tribes as governments in 1935. *See San Manuel*, 341 N.L.R.B. at 1065 (Member Schaumber, dissenting). In its 1934 and 1936 enactments, Congress specifically contemplated that Tribes would undertake economic activities to promote tribal development and self-sufficiency. *See, e.g., Cabazon*, 480 U.S. at 216 (noting Congress's "'overriding goal' of encouraging tribal self-sufficiency and economic development"). Indeed, if Congress had considered the effect that the right to strike would have on newly reorganizing tribal governments—one of the signal reasons for distinguishing between private and governmental employers under the Act—it would no doubt have had special concern about their vulnerability to disruption and the choking off of public funds.

C. The Further Development Of Federal Indian Law Since 1936 Strongly Supports Construing The NLRA Not To Reach The Tribes

Since 1936, the federal policies of tribal self-determination and economic self-sufficiency embodied in the IRA and the OIWA have only grown stronger. *See, e.g., McClanahan* v. *State Tax Comm'n*, 411 U.S. 164, 172 (1973).

Congress has repeatedly declared that "there is a government-to-government relationship between the

United States and each Indian tribe" and that "the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government." Indian Tribal Justice Act, 25 U.S.C. § 3601(1), (2). Contemporary federal statutes generally treat Tribes as governments. *See, e.g.*, Indian Tribal Government Tax Status Act of 1982, 26 U.S.C. § 7871; Clean Water Act, 33 U.S.C. § 1377; Clean Air Act, 42 U.S.C. § 7601(d). And through enactments such as the Indian Financing Act, 25 U.S.C. § 1451, and IGRA, 25 U.S.C. §§ 2701 *et seq.*, Congress has sought to facilitate, among other things, the development of tribal enterprises on tribal lands as a means of improving the economic circumstances and stability of tribal communities. *See, e.g.*, 25 C.F.R. §§ 101.1, 101.2(b)(1) (authorizing loans "[t]o eligible tribes ... to finance economic enterprises operated for profit, the operation of which will contribute to the improvement of the economy of a reservation and/or the members thereon"); 25 U.S.C. § 2702(1) (IGRA intended "to provide 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").

The executive and judicial branches have likewise strongly supported tribal self-government. Executive Orders expressly acknowledge the government-to-government relationship between the United States and Tribes and require federal agencies to "consult[] and collaborat[e]" with Tribes on matters affecting them. *See, e.g.*, Memorandum for the Heads of Executive Departments and Agencies: Government-to-Government Relationship with Tribal Governments, 74 Fed. Reg. 57,881, 57,881 (Nov. 5, 2009); Exec. Order No. 13084, 63 Fed. Reg. 27,655, 27,655 (May 14, 1998). And

this Court has consistently recognized the "traditional understanding of the tribes' status as 'domestic dependent nations'"—that each Tribe is "'a distinct political society, separated from others, capable of managing its own affairs and governing itself.'" *Lara*, 541 U.S. at 204-205.

Federal law and policy thus run directly counter to the Sixth Circuit's decision to treat Tribes like private-sector employers. For that reason, the Sixth Circuit's interpretation of the NLRA cannot be sustained.

CONCLUSION

The petition should be granted.

Respectfully submitted.

JOHN DOSSETT
GENERAL COUNSEL
NATIONAL CONGRESS OF
AMERICAN INDIANS
1516 P Street, NW
Washington, DC 20005
(202) 466-7767

SETH P. WAXMAN
DANIELLE SPINELLI
Counsel of Record
ROBBIE MANHAS
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
danielle.spinelli@wilmerhale.com

ALAN SCHOENFELD
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 230-8000

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