No. _____

In The
Supreme Court of the United States

CASINO PAUMA, an enterprise of the Pauma Band of Luiseno Mission Indians of the Pauma and Yuima Reservation, a federally-recognized Indian Tribe,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

CHERYL A. WILLIAMS
KEVIN M. COCHRANE
(*Counsel of Record*)
WILLIAMS & COCHRANE, LLP
28581 Old Town Front Street
Temecula, CA 92590
kmc@williamscochrane.com
T/F: (619) 793-4809
Attorneys for Petitioner Casino Pauma, an enterprise of the Pauma Band

QUESTIONS PRESENTED

For over seventy years, the National Labor Relations Act, 29 U.S.C. § 151 *et seq*., was interpreted as *not* applying to Indian tribes according to administrative regulation and decisions. During this time, Congress enacted the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq*., thereby authorizing the State of California and the owner of the Petitioner – the Pauma Band of Mission Indians – to execute a compact that incorporates the core protections of the NLRA but directs any resultant unfair labor practice charges into an "exclusive" and "binding" arbitration process.

Despite this IGRA-based arbitral "substitute," the National Labor Relations Board exerted jurisdiction over the unfair labor practice charges below using a new interpretation of the NLRA that presumes the statute is generally applicable, narrowly construes the exceptions, and equates silence as to Indian tribes with Congressional assent. It then rewrote the rule in *Republic Aviation Corporation v. NLRB*, 324 U.S. 793 (1945), that allows employees to discuss unionization with other employees in "non-work" areas of a workplace to permit employees to solicit customers in any "guest" areas *inside* the facility – like restrooms and restaurants. Writing for the Ninth Circuit, Judge Berzon affirmed in full, deferring to the Board's latest interpretation of the NLRA under *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), despite Casino Pauma offering an admittedly reasonable counter-interpretation.

The questions presented are:

1. Should this Court reconsider *Chevron*?

QUESTIONS PRESENTED – Continued

2. Does the National Labor Relations Act apply to Indian tribes?

3. Does the employee-to-employee solicitation rule in *Republic Aviation* empower employees to solicit customers in business "guest areas" like restrooms and restaurants?

PARTIES TO THE PROCEEDING

Petitioner Casino Pauma, an enterprise of the Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation, a federally-recognized Indian tribe, was the Petitioner and Cross-Respondent in the Ninth Circuit. Respondent National Labor Relations Board was the Respondent and Cross-Petitioner in the Ninth Circuit. Unite Here International Union, the original and absent charging party before the National Labor Relations Board, was an Intervenor in the Ninth Circuit.

CORPORATE DISCLOSURE STATEMENT

Petitioner Casino Pauma is a governmental enterprise of the Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation, a federally-recognized Indian tribe. As such, it has neither a parent corporation nor any public stockholders.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

PETITION FOR WRIT OF CERTIORARI

Casino Pauma, an enterprise of the Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation ("Pauma" or "Tribe"), a federally-recognized Indian tribe, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's opinion is published at 888 F.3d 1066 and reproduced at Petition Appendix ("App.") 1-37. The subsequent order by the Ninth Circuit denying rehearing *en banc* is unpublished and reproduced at App. 113-114. The underlying National Labor Relations Board ("NLRB" or "Board") order is published at 363 NLRB No. 60 and reproduced at App. 38-87. The jurisdictional section of the aforementioned order adopts the analysis of a prior Board order, which is in turn published at 362 NLRB No. 52 and reproduced at App. 88-112.

JURISDICTION

The Ninth Circuit issued its opinion on April 26, 2018 and subsequently entered judgment in connection with denying rehearing *en banc* on August 7, 2018. On September 28, 2018, The Chief Justice granted Casino Pauma a sixty-day extension of time in which to file a petition for writ of certiorari, consequently

extending the deadline to January 4, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 10(a) of the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. § 151 *et seq*., provides in relevant part, "[t]he Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce." 29 U.S.C. § 160(a). For purposes of interpreting this language and the referenced Section 8, the definitions set forth in the preceding Sections 2(1), 2(2), and 2(6) provide, respectively:

> (1) The term 'person' includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in cases under title 11 of the United States Code, or receivers.
>
> (2) 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, or any person subject to the Railway Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.
>
> * * *

> (6) The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

29 U.S.C. §§ 152(1), (2) & (6).

INTRODUCTION

At its heart, this Petition shows both the dangers and devolution of the deference rule in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984) – one that helped protect administrative functionality in 1984 but has become a vehicle for the wholesale abdication of the judicial function in 2018. In the decision below, the Ninth Circuit applied *Chevron* in a manner that conflicts with three separate opinions from this Court last term, thereby cementing what has become one of the worst imaginable circuit splits on the question of whether the NLRA applies to Indian tribes and vitiates tribal labor laws. For more than seventy years, this was not a question at all, as the NLRB believed Indian tribes were both explicitly and implicitly excluded from the Act. *See Fort Apache Timber Co.*, 226 N.L.R.B. 503, 506

& n.22 (1976). Yet, insert Indian casinos into the picture and the NLRB flipped the law on its head so it could similarly flip its own precedent on its head. This process began with a superficial brand of statutory interpretation in which the NLRB simply presumed that the Act was generally applicable and the exemptions therein should be narrowly construed. With that, the statutory interpretation then shifted gears from at least feigning to consider the language of the statute to applying perceived constructs of federal Indian law – a shift that enabled the NLRB to conclude that the absence of any mention of Indian tribes in either the text or legislative history of this "generally applicable" Act means that a tribe bears the burden of proving *exclusion* rather than the Board having to show a clear intent on the part of Congress to *include* tribes thereunder. *But see Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790 (2014) (stating "courts will not lightly assume that Congress in fact intends to undermine Indian self-government").

Despite the obvious flaw with asking a party to prove a negative, the Ninth Circuit dodged having to address this issue head-on by simply concluding in large part that silence is not only proof of ambiguity but also the reasonableness of the NLRB's position. Yet, in so doing, the Ninth Circuit afforded *Chevron* deference to an agency without first determining whether the *actual* language and context of the statute made such deference appropriate. *See Wisconsin Cent. Ltd. v. United States*, 585 U.S. ___, 138 S. Ct. 2067, 2070-71 (2018). Further, the Ninth Circuit also deferred despite

the fact that NLRB admittedly construed the exceptions in the Act narrowly so it could hold that the statute is generally applicable. *See Encino Motorcars, LLC v. Navarro*, 584 U.S. ___, 138 S. Ct. 1134, 1142 (2018). And moreover, the Ninth Circuit also deferred yet again to an agency that was seeking to expand its own jurisdiction under one federal statute it does administer in order to destroy rights – including arbitration rights – created under a second federal statute that it does not. *See Epic Sys. Corp. v. Lewis*, 584 U.S. ___, 138 S. Ct. 1612, 1629 (2018). The end result of all of this is that the Ninth Circuit deepened an already muddled circuit split as to whether the NLRA applies to Indian tribes and supplants tribal labor laws that arose long before the Board cast aside seventy years of precedent and practice – with the Ninth Circuit saying yes, the Tenth Circuit saying no, and the Sixth Circuit straddling the fence by saying yes even though a supermajority of the six deciding judges in two near-simultaneous cases believe this decision violates Supreme Court precedent. Quite simply, the federal circuits have "made a mess of th[is] [important] issue" and could not be more "in conflict," which means this Petition presents this Court with the perfect opportunity to perform one of its "primary functions" by reconciling the conflict while also providing some much needed guidance on statutory interpretation both in and outside of the NLRA. *Gee v. Planned Parenthood of Gulf Coast, Inc.*, 586 U.S. ___, 139 S. Ct. 408 (2018) (Thomas, J., dissenting from denial of certiorari).

STATEMENT OF THE CASE

A. National Labor Relations Act (1935)

Congress enacted the NLRA via Public Law 74-198 on July 5, 1935 to provide certain ground rules in collective bargaining with the aim of reducing "industrial strife or unrest" between the classes of defined "employers" and "employees" that fell within the ambit of the Act. 29 U.S.C. § 151. "An essential part of that system is the provision for the prevention of unfair labor practices by the employer" in Section 8 that explains, amongst other things, that "[i]t shall be an unfair labor practice for an employer – (1) [t]o interfere with, restrain, or coerce employees in the exercise of the[i]r [collective bargaining] rights guaranteed in [the foregoing] section 7." *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 799 (1945); 29 U.S.C. § 158. If an employee believes that such interference has occurred, he or she may file a charge with the NLRB, which "is empowered," as thereinafter provided in the Act, "to prevent any *person* from engaging in any unfair labor practice . . . affecting *commerce*." 29 U.S.C. § 160(a). As originally defined by the Act, the term "person" "includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers." 29 U.S.C. § 152(2) (1935). As for the term "commerce," the definition focuses upon the Interstate and Foreign prongs of the Commerce Clause, explaining that it covers certain commercial activities "among the several states, or between the District of Columbia or any Territory of the United States and any State or other Territory, or

between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country." 29 U.S.C. § 152(6). Even if these definitions of "person" and "commerce" are met in a given situation, a charge alleging an unfair labor practice under Section 8 must still be brought against an eligible "employer," a term that "shall not include," *inter alia*, "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).

B. Interpretive Regulation (1936)

To carry out the provisions of the Act, Section 6(a) of the NLRA, as originally written, empowered the Board "to make, amend, and rescind . . . rules and regulations," which "shall be effective upon publication in the manner which the Board shall prescribe." 29 U.S.C. § 156(a) (1935). Pursuant to this grant of authority, the Board published its initial General Rules and Regulations in the Federal Register less than a year after the enactment of the Act. 32 Fed. Reg. 277 (Apr. 28, 1936). The definition section therein explained the term "State" – like that used in the governmental exemption for "employer" in Section 2(2), *supra* – shall include "all States, Territories, and possessions of the United States and the District of Columbia." *Id.* Though the syntax of this provision has changed over time (such that District of Columbia is now at the beginning of the

sentence), this interpretive definition of the term "State" still remains in effect today in its own unique section of the Code of Federal Regulations. *See* 29 C.F.R. § 102.1 (2018).

C. Interpretive Decision (1976)

The applicability of the NLRA to Indian tribes was not in question until forty years later when one of the Regional Directors for the agency attempted to direct an election amongst certain employees of a logging company owned by the White Mountain Apache Tribe, the language of the foregoing regulation notwithstanding. *See Fort Apache*, 226 N.L.R.B. at 504. This administrative action forced the NLRB to formally consider for the first time in the adjudicatory context the issue of whether a "tribal commercial enterprise on the tribe's own reservation[] is an 'employer' within the meaning of the Act." *Id.* The discussion of this issue began with the NLRB noting that "the principles governing resolution of the Indian sovereignty question are not new," a central one being that "Indian tribal governments, at least on reservation lands, are generally free from . . . in most instances Federal intervention, unless Congress has specifically provided to the contrary." *Id.* at 506. With the NLRA bereft of *any* language pertaining to Indian tribes, the Board turned its attention to pointing out all the indicia showing Indian tribes were meant to be excluded from the Act. For starters, the *sine qua non* of the Tribal Council overseeing the logging enterprise is that it is a government, one that could be found to be "the equivalent of a State,

or an integral part of the United States as a whole" for purposes of the express text of Section 2(2) if it were not "implicitly exempt as employers within the meaning of the Act." *Id.* With that said, the NLRB went one step further and actually found an express exemption under Section 2(2), citing a prior opinion of this Court entitled *NLRB v. Natural Gas Utility District*, 402 U.S. 600 (1971), that approved of the Board's definition for the term "political subdivision" to "conclude the Fort Apache Timber Company" was "exempt [thereunder] as a governmental entity recognized by the United States, to whose employees the Act was never intended to apply." *Id.* at n.22. Thus, the NLRB had rendered a decision on the applicability of the Act to Indian tribes with the aid of existing Supreme Court precedent – precedent other than *FPC v. Tuscarora Indian Nation*, 362 U.S. 99 (1960) – and without even having to consider its all-inclusive interpretive definition of "State" in the Code of Federal Regulations.

D. Indian Gaming Regulatory Act (1988)

The administrative decision in *Fort Apache* was still the controlling opinion on the applicability of the NLRA to Indian tribes some twelve years later when Congress enacted the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq*., to specify the laws that may apply to the various forms of gaming a tribe could then or one day conduct on its reservation. In crafting IGRA, Congress was not only forward looking but also sought to coalesce the new regulatory scheme with existing laws, which it did in two ways. The first

was to provide Indian tribes with an exemption from the prohibition on possessing gambling devices set forth in the Johnson Act, 15 U.S.C. § 1171 *et seq*., so long as they operated such devices in conformance with the provisos of IGRA. *See* 25 U.S.C. § 2710(d)(6). The second was to use its plenary power over Indian affairs to modify the Constitution-based rule that states generally lack civil jurisdiction over the reservation activities of Indian tribes by allowing states to negotiate intergovernmental "compacts" with tribes located within their geographic borders for the external laws that would govern the operation of any Las Vegas-style casino gaming. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); 25 U.S.C. § 2710(d)(3). Notably, what Congress did not change was the historically-stable state of federal labor law vis-à-vis tribally-run commercial enterprises on the reservations. Rather than amend the NLRA or insert a provision into IGRA to extend some degree of the collective bargaining rules in the Act to any incipient or forthcoming tribal gaming facilities, Congress instead left labor laws as one of many subjects that tribes and states could discuss during compact negotiations. *See* 25 U.S.C. § 2710(d)(3)(C). Federal courts like the Ninth Circuit were quick to verify as much, as they have long interpreted the seven permissible subjects of compact negotiations under IGRA as encompassing labor relations. *See In re Indian Gaming Related Cases*, 331 F.3d 1094, 1115 (9th Cir. 2003) ("*Coyote Valley II*").

E. Compact's "Exclusive" and "Binding" Arbitration Process for Unfair Labor Practice Charges (1999-2001)

Tribal casino gaming in California surfaced ten years after the enactment of IGRA, when the people of the State approved a ballot initiative that would require the Governor to execute a form statutory compact with any interested tribe as a ministerial act within thirty days of receiving a request. *See Hotel Employees & Rest. Employees Int'l Union v. Davis*, 21 Cal. 4th 585 (1999) ("*HERE*") (citing Cal. Gov't Code § 98000 *et seq.*). Though this compact included "provisions addressing employee work-related injuries, disabilities, and unemployment," what it did not contain were provisions "concerning collective bargaining rights of casino employees" (*see Coyote Valley II*, 331 F.3d at 1102), and the absence of such led the Hotel Employees and Restaurant Employees International Union – a predecessor of the Intervenor Unite Here International Union – to file a petition for writ of mandate directly with the Supreme Court of California to invalidate the statutory compact. *See HERE*, 21 Cal. 4th at 589. The Union was successful in its pursuit and ultimately secured a seat at the bargaining table in subsequent negotiations between the State of California and Indian tribes to devise a replacement model compact. *See Coyote Valley II*, 331 F.3d at 1106. The outcome of many months of face-to-face negotiations between the Union and California tribes was the creation of the longed-for collective bargaining laws, which comprise a part of the compact known alternatively as

either "Addendum B" or the "Tribal Labor Relations Ordinance." App. 120-135. This portion of the compact incorporates the rights of employees and unfair labor practices of employers/labor unions in Sections 7 and 8 of the NLRA, respectively, with only minor textual deviations, and directs any resultant unfair labor practice charges into an "exclusive" and "binding" multi-level arbitration process. App. 125-126, 133-135.

The insistence by the State of California that the compact contain theretofore inapplicable collective bargaining laws did not sit well with many negotiating tribes, some of whom elected to file "bad faith" suits rather than execute the ultimate compacts. *See Coyote Valley II*, 331 F.3d 1094. At this point, the Union went on the defense and attempted to intervene in the ensuing consolidated federal lawsuit so it could uphold the NLRA-based collective bargaining rules that it had invalidated a prior compact to obtain. *See In re Indian Gaming Related Cases*, No. 98-1806 (N.D. Cal. 2001) ("*Coyote Valley I*"). In a series of court filings, the same legal counsel that represented the Union throughout the case below acknowledged the Tribal Labor Relations Ordinance of the compact was a "substitute" for the inapplicable NLRA – not just any substitute, but one that would remain in full force even if the Board would one day try and exert jurisdiction over Indian tribes for whatever political reason. App. 151-158. The submissions by the Union were clear on these points, with a section of one brief in particular proclaiming "The Compact Provisions Would not be Preempted if the NLRA Were Held to Apply to Indian Casinos" to

matter-of-factly explain the lack of import any future change in federal labor law would have for California gaming tribes:

> The ultimate outcome of the question whether there is NLRB jurisdiction over the Indian casinos will not be known for years, but in the end it really doesn't matter with respect to the Compact, because its provisions are entirely proper and enforceable under the NLRA.

App. 152-153.

F. Administrative Proceeding Below (2014-15)

The initial communications by the Union to Pauma respected the compact's arbitration process, with a June 12, 2012 letter concerning what was truly the first alleged unfair labor practice quoting the sections of the compact that detail the "exclusive" and "binding" arbitration process and then requesting that the State of California appoint an arbitrator or arbitration panel to handle "the second level of binding dispute resolution." App. 138-141. For whatever reason, the Union withdrew its request for arbitration after a representative for the State of California disclosed the identities of the three arbitrators on the presiding panel, electing instead to begin a "corporate campaign" against Pauma in which it filed nine different unfair labor practice charges with the NLRB over the span of little more than a year and a half. App. 142-144. The three charges that were consolidated for purposes of the case below largely concern whether casino employees have the

right to "distribute literature [to] and [engage in] solicitation" with *customers* "in 'guest areas,'" a term that the Union thought should include "the casino's shuttle buses" that transport patrons from metropolitan areas like Los Angeles to the remote Pauma reservation. App. 147-148.

The administrative law judge ("ALJ") assigned to the case proceeded to hear and resolve the charges, stating in its decision that Casino Pauma was barred by the doctrine of *res judicata* from contesting jurisdiction in light of a recent opinion by another ALJ tasked with hearing other Union charges who held jurisdiction over Casino Pauma, as an Indian casino, exists *ipso facto* on account of the Board's decision in *San Manuel Indian Bingo & Casino*, 341 N.L.R.B. 1055 (2004), *enforced*, 475 F.3d 1306 (D.C. Cir. 2007). App. 46-48. Though the 1976 decision in *Fort Apache* premised its declination of jurisdiction on the fact that the "principles governing . . . Indian sovereignty . . . [we]re not new," the NLRB opened its 2004 opinion in *San Manuel* by explaining that the Board had nevertheless "wrestled with the question of whether the Act apples to the employment practices of this Nation's Indian tribes" for the thirty years since, and the time had finally come "to adopt a new approach" to the issue. *San Manuel*, 341 N.L.R.B. at 1056. What this new approach did was twofold: it "narrowly construe[d]" the governmental exemption in Section 2(2) of the NLRA so Indian tribes could not benefit from it, and then declared that the Act was one of general applicability so that a tribe – according to a common law test arising out of

the *Tuscarora* opinion that is sixteen years *Fort Apache*'s senior – would have to affirmatively prove it was exempt from the completely silent statute on account of either treaty rights or the charge at issue touching upon a "purely intramural matter." *Id.* at 1058-59. As for the regulatory definition of State that the NLRB promulgated the year after the Act went into effect, that is nowhere to be found in the discussion in *San Manuel.*

The two other issues central to the resolution of the pending unfair labor charges received treatment similar to that of the jurisdictional question by the ALJ. As for the effect of the compact between Pauma and the State of California on the proceedings, the ALJ took the opposite stance of the Union in the *Coyote Valley* litigation by concluding that the very moment the NLRB issued *San Manuel* it thereby assumed "exclusive jurisdiction over Indian casinos" and thus the "doctrine of Federal preemption applied" to *any* antecedent laws that arose during the prior seventy years, like those in the compact – though it is not entirely clear from the decision whether the ALJ ever considered the arbitration provisions therein. App. 49-50. On the main solicitation issue, the ALJ began the discussion by citing this Court's opinion in *Republic Aviation* that concerned and condoned employees discussing unionization with one another "outside of working hours, although on company property." App. 68; *Republic Aviation*, 324 U.S. at 803 n.10. However, the ensuing discussion rests on the implicit assumption that *Republic Aviation* only concerned itself with

the identity of the speaker and not the audience. With this assumption in mind, the ALJ then concluded that "[i]t is by now well-settled that employees are allowed . . . to distribute union literature [*to anyone*] on their employer's premises during nonwork time in nonwork areas." App. 68-69. The import of this rule for a service facility like Casino Pauma, according to the ALJ, is that it can restrict customer solicitations in the core productive area of the business (*i.e.*, the gaming floor), but not in ancillary "guest areas" that may carry special privacy concerns like restrooms and restaurants. App. 69. This decision that again renounced thirty years of administrative precedent and rewrote seventy years of Supreme Court common law was then affirmed in full by both the NLRB and the Ninth Circuit. App. 37-38.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit Decision Affording *Chevron* Deference to the NLRB Cemented a Circuit Split in Which the Federal Circuits have Reached Every Conceivable Outcome on the Question of Whether the National Labor Relations Act Applies to Indian Tribes and Overrides Tribal Labor Laws

A. Ninth Circuit – NLRA Applies to Invalidate Tribal Labor Laws

With the Ninth Circuit affording *Chevron* deference to the NLRB's interpretation, the federal circuits

have now reached every possible conclusion on the question of whether the Act applies to Indian tribes and preempts tribal labor laws, using every possible route to get there. The basis for the Ninth Circuit's decision is an abbreviated form of statutory interpretation that, under its brand of *Chevron*, looks at the language of the statute just enough to discern whether the interpretation offered by the agency is a "reasonably defensible" one that should be upheld. App. 11. If this abbreviated form of statutory interpretation seems even more abbreviated than normal under *Chevron*, that is due to the fact that the Ninth Circuit began its discussion by simply concluding that the "NLRA is ambiguous as to its application to tribal employers" and then devoted its entire analysis to the second step of the traditional two-part test that considers the propriety of the agency's interpretation. App. 11. Beginning with this deferential mindset, the Ninth Circuit glossed over the supposedly "zigzagging" precedential history pre-*San Manuel* before describing the interpretive ground rules the NLRB laid out therein – that the Act is generally applicable and "section 152(2)'s exemptions 'are to be narrowly construed,' and should not be read to exempt an unmentioned type of governmental entity." App. 12-13 (citing *San Manuel*, 341 N.L.R.B. at 1058). With these rules in place, the Ninth Circuit then discusses how the NLRB zeroed in on the particular definition of "employer" in Section 152(2) – not "person" in Section 152(1) or "commerce" in Section 152(6) – and found that Indian tribes do not fit within the entities listed in that governmental exemption. App. 14.

The silence in this particular definition when combined with the silence in the legislative history was largely enough for the NLRB to hold, from a strict textual perspective, that the Act should apply to Indian tribes according to the Ninth Circuit. App. 13. It, too, was apparently enough for the Ninth Circuit to hold both that the NLRA was ambiguous regarding its applicability to Indian tribes and that the Board's decision to assert jurisdiction over these entities was reasonably defensible; on these points, the opinion notes that its decision to defer to the NLRB's "interpretation of the statute's definition of 'employer' " *and* apply the entire Act to Indian tribes was due first and foremost to "[t]he absence of tribal governments from the 'employer' definition's list of exclusions" and "the NLRA's silence otherwise as to any exception for the statute's application for tribes." App. 14-15. As for the regulatory definition of the term "State" in the governmental exemption that the Board had ignored in its administrative decisions, the Ninth Circuit seemed to discuss this in the abstract, saying that "perhaps" in light of the definition "it would be reasonable to read the NLRA's exclusion of many public employers to extend to *all* public employers," or "perhaps it would be reasonable to view the NLRA's silence as to tribe's without import." App. 15. Yet, *Chevron* required a different outcome in the opinion of the Ninth Circuit. "Under these circumstances – in which both the Board and the parties present reasonable interpretations of an ambiguous provision in the NLRA – the court must defer to the Board's conclusion respecting the meaning of federal labor law." App. 16. After explaining federal

Indian law would not alter this result, the Ninth Circuit upheld the NLRB's assertion of jurisdiction and further concluded "that Casino Pauma's compact with California does not displace the application of the NLRA to its activities" – though, it too, gave no indication whether it even considered the arbitration provisions. App. 23-25.

B. Tenth Circuit – NLRA Does not Apply to Invalidate Tribal Labor Laws

One opinion that is conspicuously absent from the Ninth Circuit's discussion is the one the Tenth Circuit issued fourteen years earlier in which it interpreted the NLRA head-on and held that the seemingly-unambiguous Act could not displace tribal labor laws. *See NLRB v. Pueblo of San Juan*, 276 F.3d 1186 (10th Cir. 2002). *Pueblo of San Juan* dealt with an Indian tribe in New Mexico that had enacted a "right to work" ordinance that prevented any employers on the reservation – whether tribal or not – from inserting "union security clauses" into collective bargaining agreements or other labor contracts that required employees to do things like join a union or pay union dues as a condition of employment. *See Pueblo of San Juan*, 276 F.3d at 1189. Little more than eighteen months after the enactment of this tribal ordinance, the NLRB filed suit against the tribe in federal district court claiming the provisions "prohibiting compliance with union-security agreements . . . are invalid under the Supremacy Clause of the United States Constitution . . . due to preemption by the [NLRA]." *Id.* at 1189-90.

The case eventually wound its way up to the Tenth Circuit sitting *en banc*, which explained that the framing of the complaint as dealing with the issue of preemption left a number of issues the NLRB may have wanted to litigate to the side, such as the "general applicability of federal labor law" or "the [uncontested] supremacy of federal law" vis-à-vis tribal law. *Id.* at 1191. Rather, the "central question" up for discussion was "whether Congress in enacting . . . the NLRA . . . intended to strip Indian tribal governments of [their] authority as . . . sovereigns" to enact laws like the right-to-work ordinance that was under attack by the Board. *Id.* Much like the NLRB's opinion in *Fort Apache*, the discussion in *Pueblo of San Juan* began by talking about all those "not new" principles of federal Indian law, like Congress having plenary authority over Indian affairs and the consequent ability to divest tribes of their inherent sovereignty. *Id.* But, for the Tenth Circuit, this discussion of federal Indian law was just as readily one of statutory interpretation, as it analyzed the text of the NLRA to determine whether it evidenced a Congressional intent to apply to Indian tribes. *Id.* at 1196. Like the NLRB and the Ninth Circuit, the Tenth Circuit noted that "neither the history of the NLRA, nor its language, make any mention of Indian tribes." *Id.* at 1196. However, *unlike* the NLRB and the Ninth Circuit, the conclusion the Court drew from this silence was that it "is not sufficient to establish congressional intent to strip Indian tribes of their retained inherent authority to govern their own territory." *Id.* The supposed general applicability of the NLRA could not achieve this result either according to

the Tenth Circuit – in a marked about-face from its original stance to not consider the issue – because the exceptions within the statute showed the law was anything but. *Id.* at 1199. Thus, the Tenth Circuit was presented with the same statute and the same silence and it nevertheless reached the exact opposite result of the Ninth Circuit both in terms of process and substance – exercising its prescribed judicial role to interpret the statute in the first instance and doing so in a manner that upheld the tribal labor law under review.

C. Sixth Circuit – NLRA Applies to Invalidate Tribal Labor Laws, Though Likely Unconstitutionally

The truly disjointed state of the law on this issue comes to light upon considering the approach of the Sixth Circuit, which abandoned statutory interpretation and applied the NLRA to Indian tribes using a federal-Indian-law test from the Ninth Circuit – one that was not even the basis for the Ninth Circuit's own decision and which four of the six Sixth Circuit judges to hear the issue in two nearly simultaneous cases thought violated Supreme Court precedent. *See NLRB v. Little River Band of Ottawa Indians Tribal Gov't*, 788 F.3d 537 (6th Cir. 2015); *Soaring Eagle Casino & Resort v. NLRB*, 791 F.3d 648 (6th Cir. 2015). The opinion that set all of this in motion is *Little River*, the majority opinion for which engaged in statutory interpretation just long enough to say "[t]he NLRA is a statute of general applicability and is silent to Indian tribes." *Little River*, 788 F.3d at 542. From there, the opinion then

talks about how "[t]he Supreme Court has long been suspicious of tribal authority to regulate the activities of non-members," and it was thus going to "accommodate principles of federal and tribal sovereignty" by limiting a tribe's ability to do so on the reservation in the labor context using a common law test created by the Ninth Circuit in *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985). *Id.* at 544-51. This test that helped form the second part of the NLRB's new approach in *San Manuel* would, again, apply a silent statute like the NLRA to an Indian tribe in all but the rarest of situations – when it can show either protective treaty rights or that outsiders are simply uninvolved. *Id.* at 548 (citing *Coeur d'Alene*, 751 F.2d at 1116).

The reaction from the dissenting judge in *Little River* – Judge McKeague – was rather colorful to say the least, explaining that the majority's test was just "a house of cards built on a fanciful foundation with a cornerstone no more fixed and sure than a wild card." *Id*. at 557-58. The faulty underpinning was *Coeur d'Alene* itself, which *"reverse*[*d*] the established presumption arising from Congressional silence" and automatically applied any law that a court could brand as being generally applicable to a tribe "unless one of three" – or, in reality, two – "exceptions is shown to apply." *Id.* at 558. According to Judge McKeague, this judicial balancing test in *Coeur d'Alene* failed to adhere to the "enduring principle of Indian law" discussed by the Tenth Circuit in *Pueblo of San Juan* and reiterated by this Court just the year prior in *Bay Mills*: that

"Congress [must] 'unequivocally express' its intent to limit tribal sovereignty." *Id.* at 563 (citing *Bay Mills*, 572 U.S. at 790). With that, Judge McKeague dressed down the majority opinion by saying it "impinges on tribal sovereignty, encroaches on Congress' plenary and exclusive authority over Indian affairs, conflicts with Supreme Court precedent, . . . unwisely creates a circuit split," and "contribute[s] to a judicial remaking of the law that is neither authorized by Congress nor the Supreme Court." *Id.* at 556. A nearly identical litany of critiques is found within the unanimous opinion in the second case of *Soaring Eagle*, the judges for whom believed *Little River* was wrongly decided but they were nevertheless bound to follow it since they were beaten to the punch by a matter of weeks. *See Soaring Eagle*, 791 F.3d at 674-75. The end result of all of this still-unresolved discord is that the Sixth Circuit applies the NLRA to Indian tribes and nullifies tribal labor laws even though a supermajority of presiding judges believes that doing so is unconstitutional. What this and the foregoing case discussions show is that the federal circuits have taken at least three different approaches to addressing the NLRA's applicability to Indian tribes – pseudo-statutory interpretation under *Chevron*, statutory interpretation under the guise of federal Indian law, and straight federal Indian law – and reached three different results, with these results spanning the spectrum and creating splits not only *between* circuits but *within* them as well.

II. The Ninth Circuit's Invocation and Application of *Chevron* Violates at Least Three Core Principles of the Doctrine According to a Commensurate Number of Opinions Issued by this Court Last Term

The foregoing section explains how the Ninth Circuit was quick to invoke *Chevron*, simply concluding that the NLRA was ambiguous in its application to Indian tribes and then turning its attention towards reviewing the sufficiency of the Board's decision. App. 11-16. Though the second step of the test does involve a measure of deference, *Chevron* is not some get-out-of-jail-free card whereby a court can punt an issue it would rather not address and assume a more secondary role where it just reviews whether the latest interpretation offered by a non-Article III tribunal falls within an expansive and often subjective range of reasonableness. In fact, three opinions from this Court last term sought to rein in the misuse of *Chevron* by explaining that a federal court must take a first stab at interpreting a statute using the tools available to it in its statutory-construction toolbox, and should be loath to defer to an agency adjudicating questions of its own jurisdiction if it does so in a manner that is either opportunistic or gives short shrift to the express language of the statute. Unfortunately, the Ninth Circuit applied *Chevron* in derogation of the principles set forth in all three of these opinions, which justifies review of not only the decision below but the continued viability of *Chevron* as well.

A. *Wisconsin Central* – Do not Defer if the Words, Given their Ordinary Meaning and the Broader Statutory Context, Provide an Answer

Perhaps the most fundamental rule of *Chevron* is that a federal court does not invoke the second step and consider whether to defer to an agency's interpretation unless "after employing traditional tools of statutory construction, [it] find[s] [itself] unable to discern Congress's meaning." *SAS Inst., Inc. v. Iancu*, 584 U.S. ___, 138 S. Ct. 1348, 1358 (2018). The very first step in this search for Congressional intent is to interpret the words at issue in light of both "their ordinary meaning . . . at the time Congress enacted the statute" and "[t]he broader statutory context." *Wisconsin Cent.*, 138 S. Ct. at 2070-71. Here, the entire question of the applicability of the NLRA to Indian tribes came down to the Ninth Circuit looking at how the NLRB in turn looked at the singular definition for the term "employer." App. 13. However, definitions elsewhere in the NLRA pertaining to the resolution of the core disputes thereunder as well as events bookending the enactment of the Act provide ample evidence that Congress never envisioned that the statute would apply to Indian tribes.

1. Contemporaneous Evidence – Other Definitions in the NLRA

When it comes to addressing whether the NLRB has jurisdiction over a certain unfair labor practice charge, the most logical starting point for an analysis

would seem to be whether a tribe is a "person" who is subject to the administrative adjudication process rather than an "employer" who is merely proscribed from engaging in certain defined conduct. *Compare* 29 U.S.C. §§ 152(1) *and* 160(a) *with* § 152(2) *and* 158(a). The Statutory Provision section at the outset of the Petition, *supra*, recites the authorizing language in Section 10(a) that "empowers" the Board to "prevent any *person* from engaging in any unfair labor practice (listed in section 8) affecting *commerce*." 29 U.S.C. § 160(a). The definition of "person" used therein is set forth in the preceding Section 2(2) and covers "one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in cases under title 11 of the United States Code, or receivers." 29 U.S.C. § 152(2). Putting aside "labor organizations" that were added to the definition in 1947 once they, too, became the subject of unfair labor practices (*see* 29 U.S.C. § 158(b)), all of the entries listed in this definition are business entities or natural persons/professionals associated with them. What is conspicuously absent from this definition is any type of government, which goes to show why this Court said "congressional attention [during the legislative process] focused on employment in private industry and on industrial recovery." *See NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 504 (1979) (citing, *e.g.*, 79 Cong. Rec. 7573 (1935) (remarks of Sen. Wagner)).

Even then, this concern for private industry only stretched so far, and certainly not to the Indian reservations that were bereft of it at the time. The other

term worth mentioning in the Section 10(a) authorizing clause is "commerce," the definition for which mentions four distinct political entities – *i.e.*, States, Territories, the District of Columbia, and foreign countries – and then details the zigzagging commercial activities "between" various combinations of these entities that creates Board jurisdiction. *See* 29 U.S.C. § 152(6). For instance, NLRB jurisdiction over an unfair practice charge could arise from commerce "between the District of Columbia . . . and any State," "foreign country and any . . . Territory," or even "points in the same State but through . . . the District of Columbia." 29 U.S.C. § 152(6). Again, Indian tribes are not mentioned, and this Court was quick to note in one of the first and foremost cases on the NLRA "that the commerce thus contemplated by the Act (aside from that within a Territory or the District of Columbia) is interstate and foreign commerce in the constitutional sense." *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 31 (1937) (citing 29 U.S.C. § 152(6)). Only three types of commerce are listed in the Commerce Clause of the United States Constitution, which means the statement in *Jones & Laughlin* that Congress was considering "[c]ommerce with foreign nations[] and among the several states" when it authored the NLRA is an acknowledgement that it was *not* considering the third and final form of "[c]ommerce . . . with the Indian tribes." U.S. Const. art. I, § 8, cl. 3. Having NLRB jurisdiction extend onto reservation lands would have required little more than inserting language referring to "Indian tribes" into this definition of the Act, something Congress unquestionably knew how to do given its

enactment of the Indian Reorganization Act, 25 U.S.C. § 461 *et seq*., the prior year.

2. Immediately Preceding Evidence – the Indian Reorganization Act

The import of the Indian Reorganization Act ("IRA") goes beyond base textual issues to show the economic realities facing Indians and Indian tribes at the time that Congress enacted the NLRA. The oft-repeated policy of the NLRA is to eliminate certain obstructions to collective bargaining with the aim of alleviating "*industrial* strife and unrest." 29 U.S.C. § 151. Industry is "[a]ny department or branch of art, occupation, or business; esp., one which employs much labor and capital and is a distinct branch of trade; as the sugar *industry*." Webster's New International Dictionary 1271 (2d ed. 1934). What was painfully evident in 1934 is that Indians were not engaged in industry let alone positioned as industrial employers, and Congress was enacting legislation that was designed to perpetuate this state of affairs *ad infinitum* by pulling them out of commerce altogether.

The IRA is essentially a reversal in policy from the General Allotment Act of 1887 ("Dawes Act"), 24 Stat. 388 (1887), which splintered reservation lands into individual allotments in the hopes of assimilating Indians into *some* stream of society. *See Bay Mills*, 572 U.S. at 810 (Sotomayor, J., concurring). The Dawes Act failed miserably at achieving this goal, and chiefly for economic reasons. *Id.* In the legislative history for the

IRA, one of the co-sponsors of the bill, Representative Edgar Howard, explained that the past thirty-plus years of assimilationist policy under the Dawes Act had provided "no reason to believe that the Indians, as a class, can or should be absorbed into industrial employment." 78 Cong. Rec. 11728 (1934). Put aside the issue of competing against "all of the white unemployed," and Representative Howard still "kn[e]w of no system by which the Indians could be trained and transported to industrial centers to enter industrial work." *Id*. Yet, the implementation of this legislative strategy without first realizing that Indians could not secure industrial work devastated the entire population, leaving "nearly one-half . . . [as] virtual paupers" and producing an "average per capita income . . . [of] $48 per annum in money *and* in produce raised and consumed" – a figure that translates to roughly $915 in present-day terms. 78 Cong. Rec. 11726.

What, then, was the solution proposed by Congress? Since assimilation failed, the IRA sought to call home Indians by reviving the old reservation system and "set[ting] the entire Indian population in motion to take the initiative for their own salvation." 78 Cong. Rec. 11731. As explained by Representative Howard, the aim of the IRA was not to turn Indian tribes into economic beings, but simply to take the Indian "off the dole, out of the national poorhouse, and set him on the road to earning his living, on that land, in the sweat of his brow" primarily through "[s]mall scale agriculture and livestock growing, chiefly for subsistence." 78 Cong. Rec. 11727-28. In other words, the ideal scenario

envisioned by Congress at the time it enacted the IRA in 1934 was that the legislation would "make the Indians, as a group, self-supporting through agriculture," not that it would turn them into employers of outside people in an industry that actually fell under the purview of the NLRA. 78 Cong. Rec. 11732; *see* 29 U.S.C. § 152(2) (indicating "agricultural laborers" are not "employees" under the Act).

3. Immediately Ensuing Evidence – the NLRB's Interpretive Regulation

Congress went into the legislative process for the NLRA believing that Indian tribes would not fall under the ambit of the Act, and the Executive branch came out thinking the exact same thing. As mentioned, Section 6(a) of the NLRA empowered the Board to issue rules and regulations to "carry out the provisions of the Act." 29 U.S.C. § 156(a). Nine months into the effective life of the NLRA, the Board used this authority to publish general rules and regulations for the prevention of unfair labor practices, the definition section for which explained that the term State "shall include all States, Territories, and possessions of the United States and the District of Columbia." 32 Fed. Reg. 277 (Apr. 28, 1936). At the time, "Territory" with a capital "T" was a very specific term that referred to just Alaska and Hawaii, the two officially-organized "portions of the Country not included within any State, and not yet admitted as a State into the Union." Webster's New International Dictionary 2608 (2d ed. 1934). The term "possessions" with a lowercase "p" is conceptually different,

however; it is actually an umbrella term that encompasses a number of constituent political entities that are something other than inchoate states. One of these is "dependencies," which are regarded as a type of possession that a sovereign holds by right of conquest. *See Posadas v. Nat'l City Bank*, 296 U.S. 497, 502 (1936) (describing the dependency of the Philippine Islands as a "possession[ ] held by right of cession from Spain"); Black's Law Dictionary 557 (3d ed. 1933). One fundamental principle of federal Indian law that has remained consistent from the earliest days of the subject to the present is that Indian tribes are domestic dependencies (*see Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831)); specifically because "[c]onquest renders the tribe subject to the legislative power of the United States, and . . . terminates the external powers of sovereignty of the tribe." Felix S. Cohen, *Handbook of Federal Indian Law* 123 (1942). Thus, working backwards, the two-step legal syllogism that says tribes are dependencies and dependencies are in turn possessions verifies that tribes are supposed to be possessions under the NLRB's regulatory definition of "State."

B. *Encino Motorcars* – Do not Defer if the Agency Narrowly Construes Exemptions to Create Overbreadth

The problem with the Ninth Circuit's application of *Chevron* lies not only in what *it* failed to do, but what it allowed *the agency* to do while carrying the water on the interpretation issue. Last term, this Court dealt with a case in which the Ninth Circuit similarly issued

an opinion that narrowly construed the exemptions in a federal statute – this time, the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq*. – on the basis that the statute at issue "pursues its remedial purpose at all costs." *Encino Motorcars*, 138 S. Ct. at 1142. However, a narrow reading was a flawed substitute for a "fair reading," in the opinion of this Court, especially given that the statute contains "over two dozen exemptions." *Id.* In the opinion below, the Ninth Circuit signed off on an interpretation of the NLRA that did the exact same thing, "narrowly constru[ing]" the exemptions in Section 2 because the Act – supposedly – generally applied and "vest[ed] the Board with the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause." App. 13.

Yet, beginning statutory analysis from legal conclusions is particularly problematic against this backdrop, as the Tenth Circuit looked at the exact same statute and conversely held that it is *not* generally applicable. *See Pueblo of San Juan*, 276 F.2d at 1199. The reason for this is all of the exemptions in this statute designed to serve as an intermediary between eligible "employers" and "employees." *Id.* Statutory protections for this latter group depend upon satisfying a triumvirate of being in the right field, with the right contract, and the right job title – with the exceptions covering agricultural employees, transportation employees, domestic employees, familial employees, independent contractors and others with alternative work arrangements, and managers and others with supervisory authority. *See* 29 U.S.C. § 152(3). Switch perspectives and

the exemptions for "employers" are just as broad, expressly reaching the much-discussed governments while also implicitly reaching the massive class of "nonemployers" (*i.e.*, the self-employed) that make up 76.2% of the business establishments in the Nation. *See* Adam Grundy, *Three-fourths of the Nation's Businesses Don't Have Paid Employees*, United States Census Bureau, Sept. 18, 2018, https://www.census.gov/library/stories/2018/09/three-fourths-nations-businesses-do-not-have-paid-employees.html. These exemptions deserved a "fair reading," and the failure of the NLRB to do that should have been enough for the Ninth Circuit to refuse to apply *Chevron*.

C. *Epic Systems* – Do not Defer if the Agency Expands a Statute it Administers to Diminish Another it Does Not

The similarity of *Encino Motorcars* to the case at hand is nothing in comparison to another opinion from this Court last term overturning a decision by the Ninth Circuit to give the NLRB *Chevron* deference as it broke from seventy years of precedent to destroy rights authorized by a separate federal statute. Last year's opinion in *Epic Systems*, 138 S. Ct. 1612, dealt with employment agreements requiring individualized arbitration, something the Federal Arbitration Act, 9 U.S.C. § 1 *et seq*., had long allowed and with which the NLRB took no issue – until, that is, 2012. *Id.* at 1620. Then, for the first time in the seventy-seven-year history of the Act, the NLRB took the position that the provisions in Section 7 protecting the concerted

activity rights of employees "effectively nullif[y] the Arbitration Act in cases" of contracted-for individualized arbitration. *Id.* The appellate opinion considered the belated administrative about-face reasonable, but this Court went to great pains to explain to the Ninth Circuit that it had failed to appreciate and apply the law in a situation in which a federal court is "confronted with two acts of Congress allegedly touching on the same topic." *Id.* at 1624. When faced with such, a federal court "must . . . strive to give effect to both" statutes and "[a] party seeking to suggest that two statutes cannot be harmonized . . . bears the heavy burden of showing 'a clearly expressed congressional intention' that such a result should follow." *Id.* But, more importantly, the task of reconciling "distinct statutory regimes is a matter for the courts, *not* agencies," which meant "*Chevron* le[ft] the stage" and the Ninth Circuit's opinion was not only substantively incorrect but procedurally improper as well. *Id.* at 1629-30.

All of the material elements in the instant case are the same as in *Epic Systems*, where one federal statute does not apply to a certain subject matter (*i.e.*, the NLRA's unfair labor practices to Indian tribes) so parties agree to arbitrate disputes arising thereunder pursuant to a second federal statute (*i.e.*, IGRA and its compacting process) before the administrating agency for the first statute enters the picture *years* later to change the law and upset the parties' reliance interests. Yet, this course of conduct that culminated with the Board saying its belated assumption of jurisdiction under the NLRA inherently "preempt[ed] the [IGRA]

Compact" was seen as "reasonably defensible" by the Ninth Circuit through an improper application of *Chevron*. App. 11. Though the opinion does claim to review the statute-compatibility issue from a fallback federal Indian law perspective just to see whether the initial result should be altered, the Ninth Circuit still put the burden of proving displacement on Casino Pauma as it rounded out an opinion in which it never once applied the basic rule of statutory construction for either a single statute or two conflicting ones: find a clear expression of Congressional intent to extend a federal statute to a particular subject or situation.

III. The Failure to Grant the Petition will Allow *Chevron* to Destroy Separate Statutory Rights and the Sanctity of Tribal Businesses

A. Impairing IGRA's Substitute Arbitration Process

This case involves more than just a gross misapplication of *Chevron* that exacerbated an already divisive circuit split; it involves an administrative agency with zero expertise about Indian issues reinterpreting two federal statutes to change the legal realities for tribal businesses – if not tribes more generally – around the Nation. Both decisions below involve a tribunal saying a newly-applicable federal statute can vitiate labor laws contained within a Congressionally-sanctioned compact that arose years before under a separate regime, but neither seems willing to acknowledge the fact that this compact contains an "exclusive" and "binding" arbitration process for the very protections the bodies

want to apply. Again, this is an arbitration process the union responsible for bringing the underlying charges negotiated. *See Coyote Valley II*, 331 F.3d at 1106. Not just negotiated, this Union actually interjected itself into a federal lawsuit involving unrelated third parties so it could advance its position that the inclusion of federal labor law protections in an arbitration-based intergovernmental compact was both legal under IGRA and enforceable under the NLRA:

> The ultimate outcome of the question whether there is NLRB jurisdiction over Indian casinos will not be known for years, but in the end it really doesn't matter with respect to the Compact, because its provisions are entirely proper and enforceable under the NLRA.

App. 153. This was a position the Union believed and a federal court accepted – with the Union paraphrasing the dispositive order in the case as saying that "it was not bad faith for the state to negotiate for a [Tribal Labor Relations Ordinance] that substitutes for the National Labor Relations Act." App. 157. The Union may now want more, but that is more than the law allows. There is simply no reason for the issues involved in this case to be in federal court in the first place.

B. Extending *Republic Aviation* to Customers and into Restrooms and Restaurants

Republic Aviation is a commonsense compromise that arose during the wartime era of World War II to allow employees who were often disconnected outside

the workplace to discuss unionization issues in "non-work" areas of their place of employment during "non-work" times. *Republic Aviation*, 324 U.S. at 803 n.10. Both the federal courts and, yes, even the NLRB still interpret *Republic Aviation* as concerning "off-duty employees soliciting one another" in permissible areas. *Dish Network, LLC v. NLRB*, 725 F. App'x 682, 688-89 (10th Cir. 2018); *UPMC*, 2018 NLRB Lexis 29, *35 (2018). Yet, the essential premise of the decision below is that the audience is irrelevant for purposes of *Republic Aviation* such that employees are also able to solicit customers in what are now labeled the non-work "guest" areas of the facility. This agency mutation of age-old Supreme Court precedent fails to account for two considerations, though. The first is that the *audience* does matter because non-business-related employee speech that is directed at customers is done with an eye on striking, not organizing. *See Scott Hudgens*, 230 N.L.R.B. 414 (1977). The second is that the *label* matters too because the traditional perception that employees can solicit *anywhere* in an eligible "nonwork" area has simply carried over to the "guest" area context as well. *See Aqua-Aston Hospitality, LLC*, 2016 NLRB Lexis 402, *53 (2016). Thus, consider what the NLRB has done: it has not only asserted jurisdiction over businesses run by a whole class of long-exempt political entities, but it has permitted strike-minded employees to confront customers in *any* area within the restrooms, restaurants, bars, lounges, meeting halls, and walking halls *inside* these businesses. Radical administrative overreach has upset

the "employer" and "employee" scales in the NLRA, and now only this Court can restore the balance.

CONCLUSION

The petition should be granted.

Respectfully submitted,

CHERYL A. WILLIAMS
KEVIN M. COCHRANE
(*Counsel of Record*)
WILLIAMS & COCHRANE, LLP
28581 Old Town Front Street
Temecula, CA 92590
kmc@williamscochrane.com
T/F: (619) 793-4809
Attorneys for Petitioner
Casino Pauma, an enterprise of the Pauma Band