No. 18-873

In the Supreme Court of the United States

CASINO PAUMA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the National Labor Relations Board (Board) has jurisdiction over a commercial gaming and entertainment establishment, owned and operated by an Indian tribe on tribal land, that competes with other enterprises affecting interstate commerce.

2. Whether the court of appeals erred in its application of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

3. Whether the Board reasonably concluded that petitioner interfered with its employees' right under the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, to distribute union literature in non-work areas during non-work time.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-37) is reported at 888 F.3d 1066. The decision and order of the National Labor Relations Board (Pet. App. 38-45) are reported at 363 N.L.R.B. No. 60.

JURISDICTION

The judgment of the court of appeals was entered on April 26, 2018. A petition for rehearing was denied on August 7, 2018 (Pet. App. 113-114). On September 28, 2018, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including January 4, 2019, and the petition was filed on that date. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, "empower[s]" the National Labor Relations Board (Board) "to prevent any person from engaging in any unfair labor practice * * * affecting commerce." 29 U.S.C. 160(a). "[I]n passing the [NLRA], Congress intended to and did vest in the Board the fullest *jurisdictional* breadth constitutionally permissible under the Commerce Clause." *NLRB* v. *Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963) (per curiam).

As relevant here, the NLRA proscribes unfair labor practices committed by "employer[s]." 29 U.S.C. 158(a). Section 158(a)(1) provides that "[i]t shall be an unfair labor practice for an employer * * * to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title." 29 U.S.C. 158(a)(1). Those rights of employees include "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. 157.

The NLRA provides that "[t]he 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 Labor Act * * * , 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.

29 U.S.C. 152(2).

b. In 1976, the Board first considered the application of the NLRA to an enterprise owned and operated by a federally recognized Indian tribe on its reservation. See *Fort Apache Timber Co.*, 226 N.L.R.B. 503 (1976). The Board concluded that the tribal council and its timber enterprise were "implicitly exempt as employers" within the meaning of Section 152(2), reasoning that tribes are "governmental entit[ies] recognized by the United States" and that the tribe was, "*qua* government, acting to direct the utilization of tribal resources through a tribal commercial enterprise on the tribe's own reservation." *Id.* at 504, 506 & n.22. The Board reiterated that reasoning in *Southern Indian Health Council, Inc.*, 290 N.L.R.B. 436, 437 (1988), which involved a tribal health clinic operated by a tribal consortium on reservation land. The Board declined to extend that reasoning to off-reservation tribal enterprises in *Sac & Fox Industries, Ltd.*, 307 N.L.R.B. 241, 242-245 (1992).

c. In *San Manuel Indian Bingo & Casino*, 341 N.L.R.B. 1055 (2004), enforced, 475 F.3d 1306 (D.C. Cir. 2007), the Board revisited its decisions concerning Indian tribes as employers. The Board concluded that its prior cases had failed to strike "a satisfactory balance between the competing goals of Federal labor policy and the special status of Indian tribes in our society and legal culture." *Id.* at 1056. The Board explained that, since its initial decisions, "Indian tribes and their commercial enterprises have played an increasingly important role in the Nation's economy," and have "become significant employers of non-Indians and serious competitors with non-Indian owned businesses." *Ibid.* After reconsidering the text, purpose, and legislative history of the NLRA, the Board concluded that Indian

tribes are "employers" within the meaning of Section 152(2) and do not fall within that provision's exceptions. *Id.* at 1057-1059.

The Board then addressed whether "Federal Indian policy" required the Board to decline jurisdiction over a tribally owned and operated casino, and determined that it did not. *San Manuel*, 341 N.L.R.B. at 1059-1062 (emphasis omitted). To evaluate that question, the Board adopted the approach used by several courts of appeals to address the application to Indian tribes of other federal statutes—an approach it called the "*Tuscarora–Coeur d'Alene* standard." *Id.* at 1059-1061. That approach began with this Court's statement in *Federal Power Commission* v. *Tuscarora Indian Nation*, 362 U.S. 99 (1960), that "a general statute in terms applying to all persons includes Indians and their property interests." *Id.* at 116; see *id.* at 120 (noting that "general Acts of Congress apply to Indians as well as to all others in the absence of a clear expression to the contrary"). In *Donovan* v. *Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (1985), the Ninth Circuit, in holding that the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*, applied to a tribal enterprise, adopted that statement from *Tuscarora* as a general rule. But *Coeur d'Alene* concluded that a general federal statute would nevertheless be inapplicable to an Indian tribe if "(1) the law touches exclusive rights of self-governance in purely intramural matters; (2) the application of the law to the tribe would abrogate rights guaranteed by Indian treaties; or (3) there is proof * * * that Congress intended the law not to apply to Indians on their reservation." 751 F.2d at 1116 (brackets, citation, and internal quotation marks omitted).

Applying that approach in *San Manuel*, the Board concluded that the NLRA is "a statute of general applicability." 341 N.L.R.B. at 1059. It further concluded that the NLRA's application would not implicate "critical self-governance issues" where the tribal activities in question—the operation of a casino that "employs significant numbers of non-Indians" and "caters to a non-Indian clientele"—are "commercial in nature" rather than "governmental." *Id.* at 1061.

As "the final step" in its analysis, the Board considered "whether policy considerations militate in favor of or against the assertion" of the Board's jurisdiction as a matter of discretion. *San Manuel*, 341 N.L.R.B. at 1062. In doing so, it "balance[d] the Board's interest in effectuating the policies of the [NLRA] with its desire to accommodate the unique status of Indians in our society and legal culture." *Ibid.* The Board declined to adopt a categorical rule either exempting or including tribes. *Ibid.* But it explained that "[r]unning a commercial business is not an expression of sovereignty in the same way that running a tribal court system is," and that tribes "affect interstate commerce in a significant way" when they "participate in the national economy in commercial enterprises, when they employ substantial numbers of non-Indians, and when their businesses cater to non-Indian clients and customers." *Ibid.* By contrast, the Board continued, its "interest in regulation" is "lessened" when a tribe is fulfilling "traditional tribal or governmental functions." *Id.* at 1063.

In *San Manuel*, the Board asserted jurisdiction over a tribal casino, 341 N.L.R.B. at 1063-1064, and its decision was upheld by the D.C. Circuit in *San Manuel Indian Bingo & Casino* v. *NLRB*, 475 F.3d 1306 (2007). In a companion case decided the same day, the Board

declined to exercise jurisdiction over a tribal health clinic because it was serving a governmental function by "provid[ing] free health care to Indians." *Yukon Kuskokwim Health Corp.*, 341 N.L.R.B. 1075, 1076-1077 (2004).

2. The Pauma Band of Luiseno Mission Indians of the Pauma and Yuima Reservation (Band) is a federally recognized Indian tribe with 236 members. Pet. App. 47. As authorized by the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701 *et seq.*, and a compact with the State of California, Pet. App. 49, the Band owns and operates Casino Pauma (Casino or petitioner), a gaming and entertainment establishment located on the Band's reservation in Pauma Valley, California, *id.* at 47, 96. The Casino "has slot machines, gaming tables and several restaurants." *Id.* at 47. It is open around the clock, *ibid.*, and has 462 employees, five of whom are members of the Band, *id.* at 4, 97-98. The Casino advertises "in various California counties" and on its website, *id.* at 48, and the vast majority of the 2900 customers who visit the Casino each day are not members of the Band or of any other Indian tribe, *id.* at 47, 98. The Casino in 2013 had gross revenues of at least $50 million. *Id.* at 48, 97.

In 2013, UNITE HERE International Union began a campaign to organize the Casino's employees. Pet. App. 51. Over the course of a day in December 2013, various off-duty employees of the Casino distributed union leaflets to customers at the Casino's valet entrance, *id.* at 4, 52, 70, which was located "on the front or 'public' side of the casino, facing and immediately adjacent to the visitor parking lot," *id.* at 52. On four separate occasions on that day, the Casino's security personnel told the employees that they could not distribute leaflets at that location and "threatened them with discipline if they persisted." *Id.* at 61. On one occasion, a

security guard "took a photograph of two of the employees distributing the flyers." *Ibid.*

3. The Board's Acting General Counsel filed administrative complaints against petitioner. Pet. App. 5; see 29 U.S.C. 160. The complaints alleged, *inter alia*, that petitioner had committed unfair labor practices in violation of Section 158(a)(1) by interfering with its employees' rights under Section 157. Pet. App. 45-46.

After a hearing, an administrative law judge (ALJ) found, among other violations, that petitioner had violated Section 158(a)(1) "by interfering with the distribution of Union literature by employees" at "the public or guest entrances to its casino." Pet. App. 81; see *id.* at 45-87. The ALJ first determined that the Board had jurisdiction over petitioner. *Id.* at 49. The ALJ observed that the parties had stipulated to the same facts that had established jurisdiction over petitioner in an earlier case, *Casino Pauma*, 362 N.L.R.B. 421 (2015) (*Casino Pauma I*). Pet. App. 46-47. Relying on *San Manuel*, the Board in *Casino Pauma I* had concluded that petitioner is an "employer" within the meaning of the NLRA. *Id.* at 107; see *id.* at 89 n.3. In light of the Board's decision in *Casino Pauma I*—as to which neither party had sought judicial review, *id.* at 6—the ALJ found "the issue of jurisdiction" to be "res judicata." *Id.* at 48. The ALJ therefore concluded that petitioner is "an employer engaged in commerce" subject to the NLRA. *Ibid.*

Turning to the alleged violation of Section 158(a)(1), the ALJ stated that, under *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793 (1945), it is "well-settled that employees are allowed, absent unusual or special circumstances, to distribute union literature on their em-

ployer's premises during nonwork time in nonwork areas." Pet. App. 68. The ALJ found "[n]o unusual or special circumstances * * * to exist in the present case." *Id.* at 69. The ALJ therefore concluded that petitioner's "off-duty employees" had the right under Section 157 to "distribute union literature" at the Casino's valet entrance—a "public, nonworking area"—and that petitioner's "interference with such activity" violated Section 158(a)(1). *Id.* at 70.

The Board affirmed the ALJ's findings and conclusions. Pet. App. 38-40. As relevant here, the Board ordered petitioner to "[c]ease and desist" from "[i]nterfering with the distribution of union literature by employees in nonworking public or guest areas" and from "[t]hreatening employees with discipline if they engage in protected concerted activities." *Id.* at 40.

4. The court of appeals granted the Board's application for enforcement and denied petitioner's petition for review. Pet. App. 1-37.

a. The court of appeals upheld the Board's determination that petitioner is an employer subject to the NLRA. Pet. App. 3. The court concluded that even if the Board's earlier decision on the issue in *Casino Pauma I* were entitled to preclusive effect, the Board had "affirmatively waived any preclusion defense" by "deciding instead to litigate the question of its ability to regulate tribes under the NLRA on the merits." *Id.* at 9-10. Turning to the merits of that question, the court found it significant that the statute's definition of "employer" "exempts federal and state governments" but "is silent as to Indian tribes." *Id.* at 11. The court also observed that "Congress apparently did not discuss the NLRA's application to tribes when adopting the Act," and that "other federal employment statutes, such as

Title VII of the Civil Rights Act of 1964 and Title I of the Americans with Disabilities Act, do define the word 'employer' to exclude Indian tribes." *Id.* at 13. Given statutory text and context, the court concluded that the Board had reasonably construed the NLRA to apply to tribal employers and that the Board's construction is entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Pet. App. 11-16.

The court of appeals next considered whether "the Board's approach is unacceptable as a matter of federal Indian law." Pet. App. 16. "[R]eview[ing] de novo the Board's conclusions as to federal Indian law" because "Indian law is 'outside the [Board's] "special expertise,"'" *ibid.* (citation omitted), the court determined that "federal Indian law does not preclude the Board's application of the NLRA to [petitioner]," *id.* at 20. The court explained that under its prior decision in *Coeur d'Alene*, discussed on p. 4, *supra*, a statute of general applicability will be construed not to apply to tribes if one of three exceptions is met. Pet. App. 17. Here, the court reasoned, the NLRA is a statute of general applicability, and none of those exceptions is met. *Id.* at 19. In particular, the court concluded (1) that "there can be no treaty violation in applying the NLRA to the Tribe" because the Band has no treaty with the United States, (2) that "there is no proof one way or the other that Congress meant to preclude the NLRA's application to tribes," and (3) that "the NLRA's application to a tribe-owned casino such as Casino Pauma does not affect 'purely intramural matters' or the Tribe's 'self-government." *Ibid.* (quoting *Coeur d'Alene*, 751 F.2d at 1116). In reaching that last conclusion, the court ex-

plained that "Casino Palma is not 'the tribal government, acting in its role as provider of a governmental service'; rather, '[i]t is . . . simply a business entity that happens to be run by a tribe or its members.'" *Ibid.* (brackets in original; citation omitted). And the court emphasized that "[t]he labor dispute that gave rise to this case is * * * one between a tribe-owned business and its employees, 'the vast majority' of whom 'are not members of any Native American Tribe.'" *Id.* at 19-20 (brackets omitted).

The court of appeals also concluded that petitioner's compact with California under IGRA "does not displace the application of the NLRA" to petitioner's activities. Pet. App. 25. The court observed that IGRA provides that "any Tribal-State compact . . . may include provisions relating to . . . the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of [gaming] activity." *Id.* at 24 (quoting 25 U.S.C. 2710(d)(3)(C)(i)) (brackets omitted). The court explained, however, that IGRA "in no way signifies that compacts *must* include certain state labor law provisions—or that, if the compacts do, those provisions trump otherwise applicable federal laws." *Id.* at 25. Finding "no IGRA provision stating an intent to displace the NLRA * * * or any other federal labor or employment law," the court rejected the contention that IGRA "'immunize[s] the operation of Indian commercial gaming enterprises from the application of other generally applicable congressional statutes.'" *Id.* at 24 (citation omitted).

b. Turning to the Board's finding of unfair labor practices, the court of appeals upheld "the Board's conclusion that [petitioner] violated its employees' NLRA

right to distribute union literature." Pet. App. 36. The court observed that under *Republic Aviation*, "a rule prohibiting employee solicitation or distribution of literature during non-working time in nonwork areas is presumptively invalid unless special circumstances warrant the adoption of the rule." *Id.* at 30 (citation omitted). The court explained that the "rationales for *Republic Aviation*'s principle"—namely, that "'the freedom to communicate is essential to the effective exercise of organizational rights,'" and that time outside work "'is an employee's time to use as he wishes without unreasonable restraint, even though he is on company property'"—"apply to solicitation of customers as well as to solicitation of fellow employees." *Id.* at 31 (brackets and citation omitted). The court therefore concluded that "the Board properly interpreted *Republic Aviation*'s holding concerning section [157] to reach employees' customer-directed union literature distribution on non-work time in non-work areas of the employer's property." *Id.* at 32.

5. The court of appeals denied rehearing en banc, with no judge requesting a vote on whether to rehear the case en banc. Pet. App. 113-114.

ARGUMENT

Petitioner, a casino owned and operated by the Pauma Band of Luiseno Mission Indians, contends (Pet. 16-35) that the court of appeals erred in concluding that the Board may exercise jurisdiction over petitioner acting as an employer in a large commercial enterprise. That contention lacks merit, and the court's decision does not conflict with any decision of this Court or another court of appeals. To the contrary, all three courts of appeals to have considered the question have upheld the Board's exercise of jurisdiction over large-scale

commercial gaming enterprises operated by Indian tribes. This Court has previously denied petitions for writs of certiorari presenting the same question, see *Soaring Eagle Casino & Resort* v. *NLRB*, cert. denied, 136 S. Ct. 2509 (2016) (No. 15-1034); *Little River Band of Ottawa Indians Tribal Gov't* v. *NLRB*, cert. denied, 136 S. Ct. 2508 (2016) (No. 15-1024), and the same result is warranted here. Petitioner also contends (Pet. 24-35) that the court of appeals misapplied *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), in construing the NLRA. The court's application of *Chevron*, however, does not conflict with any decision of this Court. Finally, petitioner briefly contends (Pet. 36-38) that the court of appeals erred in upholding the Board's determination that petitioner violated its employees' right under the NLRA to distribute union literature in non-work areas during non-working time. That decision does not conflict with any decision of this Court or another court of appeals. The petition for a writ of certiorari should be denied.

1. Petitioner argues (Pet. 16-35) that the court of appeals erred in upholding the Board's exercise of jurisdiction over petitioner's actions as employer in the operation of the Casino. That argument does not warrant this Court's review.

a. Contrary to petitioner's contention (Pet. 16-23), the court of appeals' decision does not conflict with any decision of another court of appeals. As the Ninth Circuit observed, every court of appeals to have considered the issue has "upheld the Board's determination that tribe-owned casinos can be NLRA-covered employers." Pet. App. 23; see *NLRB* v. *Little River Band of Ottawa Indians Tribal Gov't*, 788 F.3d 537, 555-556 (6th Cir. 2015), cert. denied, 136 S. Ct. 2508 (2016); *San Manuel*

Indian Bingo & Casino v. *NLRB*, 475 F.3d 1306, 1308 (D.C. Cir. 2007).

Petitioner errs in asserting (Pet. 21-23) that Sixth Circuit precedent conflicts with the decision below. Although the Sixth Circuit in *Little River* reviewed the NLRA's applicability without giving any deference to the Board, 788 F.3d at 543, it reached the same conclusion as the Ninth Circuit did here—namely, that the Board may assert jurisdiction over "a tribal government's operation of tribal gaming," *id.* at 555. Like the Ninth Circuit in this case, moreover, the Sixth Circuit reasoned that the "NLRA is a statute of general applicability." *Id.* at 542. And in applying the framework set forth in *Donovan* v. *Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985), the Sixth Circuit in *Little River*—like the Ninth Circuit here—found none of "the exceptions to the presumptive applicability of a general statute" to be satisfied. 788 F.3d at 551-555. *Little River* remains binding precedent in the Sixth Circuit. See *Soaring Eagle Casino & Resort* v. *NLRB*, 791 F.3d 648, 662 (6th Cir. 2015), cert. denied, 136 S. Ct. 2509 (2016).

Petitioner likewise errs in asserting (Pet. 19-21) the existence of a conflict with the Tenth Circuit's decision in *NLRB* v. *Pueblo of San Juan*, 276 F.3d 1186 (2002) (en banc). The question in *Pueblo of San Juan* was not whether the Board could assert jurisdiction over a tribe acting as an employer in a commercial enterprise, but rather whether the NLRA preempted a tribe's sovereign governmental authority to enact a right-to-work ordinance. See *id.* at 1191. In addressing that question, the Tenth Circuit stated that it does "not lightly construe federal laws as working a divestment of tribal sovereignty and will do so only where Congress has made

its intent clear that we do so." *Id.* at 1195. It therefore declined to read the NLRA as "stripping tribes of their retained sovereign authority to pass right-to-work laws and be governed by them," *ibid.*, even though the provision of the NLRA expressly reserving the power to adopt right-to-work laws refers only to "State or Territorial law," 29 U.S.C. 164(b).

If the Tenth Circuit were to take the same approach to the different issue in this case—whether the NLRA applies to a tribe in its capacity as an employer in a commercial enterprise—that approach could perhaps lead to a result that would create a conflict with the Sixth, Ninth, and D.C. Circuits. But the en banc court in *Pueblo of San Juan* expressly disclaimed such a ruling. It emphasized that it was not addressing "the general applicability of federal labor law" and, further, that the tribal right-to-work ordinance in that case did "not attempt to nullify the NLRA or any other provision of federal law." 276 F.3d at 1191. Moreover, when it distinguished the references to statutes of general applicability in *Federal Power Commission* v. *Tuscarora Indian Nation*, 362 U.S. 99 (1960), the Tenth Circuit distinguished between a tribe's "proprietary" interests and its "sovereign" interests. *Pueblo of San Juan*, 276 F.3d at 1198-1200. Thus, it explained that its decision to sustain the tribal right-to-work ordinance (in the absence of express federal statutory authorization) protected the tribe's exercise of "its authority as a sovereign * * * rather than in a proprietary capacity *such as that of employer* or landowner." *Id.* at 1199 (emphasis added).

A subsequent Tenth Circuit decision characterized *Pueblo of San Juan* as holding that "Congressional silence exempted Indian tribes from the [NLRA]." *Dobbs* v. *Anthem Blue Cross & Blue Shield*, 600 F.3d 1275,

1284 (2010). But *Dobbs*, which was not about the NLRA, still recognized the distinction in the Tenth Circuit's decisions "between cases in which an Indian tribe exercises its property rights and cases in which it 'exercise[s] its authority as a sovereign.'" *Id.* at 1283 n.8 (quoting *Pueblo of San Juan*, 276 F.3d at 1199) (brackets in original). The Tenth Circuit has not yet addressed the question at issue here: whether the NLRA applies to a tribe acting in its capacity as an employer in the commercial sphere.

b. The court of appeals correctly upheld the Board's exercise of jurisdiction over petitioner as an employer under the NLRA. Pet. App. 10-25.

i. The NLRA confers upon the Board a broad power to prevent "any person from engaging in any unfair labor practice * * * affecting commerce," 29 U.S.C. 160(a), and it provides that "[i]t shall be an unfair labor practice for an employer * * * to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title," 29 U.S.C. 158(a)(1). The NLRA defines "employer" to "include[] any person acting as an agent of an employer, directly or indirectly," but not to include "the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof." 29 U.S.C. 152(2).

As the court of appeals explained, the NLRA "exempts federal and state governments," but not "Indian tribes," from its definition of "employer." Pet. App. 11. "Congress apparently did not discuss the NLRA's application to tribes when adopting the Act, nor do any statutes addressing tribal self-government mention the NLRA." *Id.* at 13. And "other federal employment statutes, such as Title VII of the Civil Rights Act of 1964

and Title I of the Americans with Disabilities Act, do define the word 'employer' to exclude Indian tribes." *Ibid.*; see 42 U.S.C. 2000e(b)(1); 42 U.S.C. 12111(5)(B)(i). In light of the NLRA's text and history, the Board's determination that tribes are not exempted from the statute's definition of "employer" is correct and, at a minimum, entitled to deference.

As this Court has "consistently declared," the NLRA "vest[s] in the Board the fullest *jurisdictional* breadth constitutionally permissible under the Commerce Clause." *NLRB* v. *Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963) (per curiam). The Court has also recognized that the Board "is entitled to considerable deference" when construing terms in the NLRA. *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 891 (1984).

Here, the "vast majority" of the Casino's customers, as well as the "vast majority" of its employees, are not members of any tribe. Pet. App. 47. Indeed, only five members of the Band were employed by the Casino. *Ibid.* The Casino competes with other enterprises affecting interstate commerce. See *id.* at 48; Board C.A. Supp. E.R. 7-8; Board JX 1, Ex. B (Dec. 15, 2014). Applying the NLRA to petitioner therefore is consistent with the Act's broad scope and purposes, ensuring that petitioner's employees receive the important statutory protections the NLRA affords to workers generally in businesses affecting commerce. Applying the NLRA to petitioner is also consistent with affording respect to tribal sovereignty. Although the Band unquestionably has inherent power, recognized in IGRA, to establish and operate the Casino, it does so subject to Congress's exercise of power to regulate the commerce in which the Band has chosen to participate. This Court made the same point in *California* v. *Taylor*, 353 U.S. 553 (1957),

in sustaining the application of the Railway Labor Act, 45 U.S.C. 151 *et seq.*, to a state-operated railroad. The Court recognized that the State was "acting in its sovereign capacity in operating [the railroad]," but explained that it "necessarily so acted 'in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government.'" *Taylor*, 353 U.S. at 568 (citation omitted). The court of appeals thus correctly upheld the Board's determination that petitioner is an "employer engaged in commerce" within the Board's statutory jurisdiction. Pet. App. 48; see *id.* at 38-40; *NLRB* v. *Fainblatt*, 306 U.S. 601, 604-607 (1939); 29 U.S.C. 152(7).

ii. Petitioner's counterarguments lack merit. Petitioner would read Section 152(2)'s exception for specified governmental entities—"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)—as encompassing all "*public* employers," Pet. App. 15 (emphasis added). But that provision by its terms excludes only certain governments, not all public employers, and does not mention Indian tribes. Section 152(2) thus differs from other statutes in which Indian tribes are expressly excluded from definitions of "employer," as the court of appeals noted. *Id.* at 13. And, well before *San Manuel*, the Board had applied the NLRA to at least one other unlisted category of "public" employer: foreign sovereigns when they are engaged in commercial activities in the United States. See *State Bank of India* v. *NLRB*, 808 F.2d 526, 530-534 (7th Cir. 1986), cert. denied, 483 U.S. 1005 (1987).

Petitioner notes (Pet. 30-31) that the Board has, under a regulation first adopted in 1936, treated the term

"State" as including "the District of Columbia and all States, territories, and possessions of the United States." 29 C.F.R. 102.1(g); see 1 Fed. Reg. 208 (Apr. 18, 1936). The absence of tribes in that list, which was created less than a year after the NLRA was enacted, would suggest, if anything, that Congress did *not* understand the term "State" to encompass Indian tribes. But the regulation does not even purport to construe the statute. The regulation as originally promulgated made that explicit, stating that it addressed "[t]he term 'State'" only "as used herein"—that is, as used within the Board's own rules of procedure. 1 Fed. Reg. at 208; see, *e.g.*, *id.* at 209 (requiring that the deposition of a witness "be taken in accordance with the procedural requirements for the taking of depositions provided by the law of the State in which the hearing is pending"). Indeed, to the extent that the Board's regulations address the term "employer" at all, they do so entirely by reference to "the meaning[] set forth in" Section 152(2). 29 C.F.R. 102.1(a). The Board's regulations therefore do not support petitioner's attempt to read Section 152(2) as a generic exclusion for all public employers.

Petitioner's remaining textual arguments are similarly unavailing. Petitioner contends (Pet. 25-26) that it is not a "person" within the meaning of Section 160(a), which empowers the Board "to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce." 29 U.S.C. 160(a). But the text of Section 160(a) makes clear that Congress intended the term "person" to be *broader* than the term "employer," so as to encompass not just "employers" but "labor organization[s]" and others who might commit "unfair labor practice[s]" listed in Section 158, 29 U.S.C. 158(b). The term "person" thus extends the

Board's jurisdiction beyond "employers," rather than limits it to certain kinds of "employers."

Petitioner also contends (Pet. 26-28) that the term "commerce" in Section 160(a) does not encompass commerce with Indian tribes. This Court has stated, however, that the NLRA "vest[s] in the Board the fullest *jurisdictional* breadth constitutionally permissible under the Commerce Clause." *Reliance Fuel*, 371 U.S. at 226. And even if the term "commerce" encompassed only interstate and foreign commerce, petitioner does not dispute that its conduct "affect[s]" such commerce within the meaning of the NLRA. 29 U.S.C. 152(7); see Pet. App. 48-49 (finding that petitioner "is an employer engaged in commerce within the meaning of" Section 152(2), (6), and (7) of the NLRA).

Finally, petitioner's reliance on other statutes is misplaced. Petitioner contends (Pet. 28-30) that the Indian Reorganization Act (IRA), 25 U.S.C. 5101 *et seq.*, supports excluding tribes from the NLRA's coverage. But petitioner fails to identify any provision of the IRA that conflicts with the NLRA. Petitioner also contends (Pet. 35-36) that its compact with California under IGRA displaces the NLRA. The court of appeals, however, correctly rejected that contention, finding "no IGRA provision stating an intent to displace the NLRA." Pet. App. 24. "IGRA certainly permits tribes and states to regulate gaming activities, but it is a considerable leap from that bare fact to the conclusion that Congress intended federal agencies to have no role in regulating employment issues that arise in the context of tribal gaming." *San Manuel*, 475 F.3d at 1318.

2. Petitioner states as a question presented (Pet. i) "[s]hould this Court reconsider *Chevron*." But in the body of the petition for a writ of certiorari, aside from a

passing reference (Pet. 24) to the "continued viability of *Chevron*," petitioner does not argue that *Chevron* should be narrowed or overruled. That issue therefore is not properly raised in this case. See Sup. Ct. R. 14.2 (requiring that "[a]ll contentions in support of a petition for a writ of certiorari * * * be set out in the body of the petition, as provided in subparagraph 1(h) of this Rule"); Sup. Ct. R. 14.1(h) (requiring "[a] direct and concise argument amplifying the reasons relied on for allowance of the writ"); Sup. Ct. R. 14.4 ("The failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition.").

Rather, petitioner argues (Pet. 24-35) only that the court of appeals misapplied *Chevron* in construing the particular statutory provision at issue in this case. That case-specific argument does not warrant this Court's review.

Contrary to petitioner's contention (Pet. 24-35), the court of appeals' application of *Chevron* in this case does not conflict with any decision of this Court. In *Wisconsin Central Ltd.* v. *United States*, 138 S. Ct. 2067 (2018), the Court construed the words "money remuneration" in the Railroad Retirement Tax Act, 26 U.S.C. 3201 *et seq.*, in light of both "'their ordinary meaning'" and the "broader statutory context," 138 S. Ct. at 2070-2071 (citation omitted), and concluded that the statute "le[ft] no ambiguity for the agency to fill," *id.* at 2074. Petitioner argues (Pet. 25) that the NLRA likewise leaves no ambiguity here for the Board to fill because "definitions elsewhere in the NLRA" and "events bookending the enactment of the Act provide ample evidence that Congress never envisioned" that the term "employer"

"would apply to Indian tribes." As explained above, see pp. 17-19, *supra*, however, the sources on which petitioner relies (Pet. 25-31)—namely, the statute's definitions of "person" and "commerce," the IRA, and a regulation defining "State" for purposes of the Board's own rules of procedure—do not support petitioner's interpretation of "employer," let alone establish that petitioner's interpretation is "unambiguously" correct, *Chevron*, 467 U.S. at 843. They therefore do not undermine the court of appeals' determination that the Board's construction of the term is a reasonable one.

Petitioner's reliance (Pet. 31-33) on *Encino Motorcars, LLC* v. *Navarro*, 138 S. Ct. 1134 (2018) (*Encino II*), is likewise misplaced. The Court's decision in *Encino II* did not involve *Chevron*, since the Court had concluded in an earlier decision in the case that the agency's rule was "procedurally defective" and that *Chevron* therefore did not apply. *Id.* at 1139 (citing *Encino Motorcars, LLC* v. *Navarro*, 136 S. Ct. 2117 (2016)). Construing the statute at issue without administrative deference, the Court in *Encino II* concluded that service advisors are "salesm[e]n . . . primarily engaged in . . . servicing automobiles" within the meaning of an exemption to the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.* 138 S. Ct. at 1140 (brackets in original). In reaching that conclusion, the Court gave the exemption "a fair reading" and faulted the Ninth Circuit for "invok[ing] the principle that exemptions to the FLSA should be construed narrowly." *Id.* at 1142. Petitioner contends (Pet. 33) that the Ninth Circuit in this case similarly failed to give the "exemptions" to the NLRA's definition of "employer" a "'fair reading.'" But as explained above, see p. 17, *supra*, Sec-

tion 152(2)'s exception for specified governmental entities is fairly read not to encompass Indian tribes, because the statutory exception, by its terms, does mention certain governmental entities, but does not mention Indian tribes.

Finally, petitioner errs in asserting (Pet. 33-35) a conflict between the decision below and *Epic Systems Corp.* v. *Lewis*, 138 S. Ct. 1612 (2018). The Court in *Epic* declined to defer to the Board's "opinion suggesting the NLRA displaces" the Federal Arbitration Act, 9 U.S.C. 1 *et seq*. 138 S. Ct. at 1629. Emphasizing that Congress had not delegated to the Board any authority to interpret the Arbitration Act, the Court explained that "the 'reconciliation' of distinct statutory regimes 'is a matter for the courts,' not agencies." *Ibid.* (citation omitted). Contrary to petitioner's contention (Pet. 34), the court of appeals in this case did not abdicate that responsibility. Rather, the court addressed the meaning of IGRA de novo, without any deference to the Board, and found no "conflict between the NLRA and IGRA." Pet. App. 24; see also *id.* at 16 ("We review de novo the Board's conclusions as to federal Indian law, as Indian law is 'outside the NLRB's "special expertise."'") (citation omitted). The court of appeals' decision does not conflict with any decision of this Court.

3. Petitioner briefly contends (Pet. 36-38) that the court of appeals erred in upholding "the Board's conclusion that [petitioner] violated its employees' NLRA right to distribute union literature." Pet. App. 36. The court's decision does not conflict with any decision of this Court or another court of appeals.

Petitioner acknowledges (Pet. 36-37) that, under this Court's decision in *Republic Aviation Corp.* v. *NLRB*,

324 U.S. 793 (1945), the NLRA protects the right of employees to distribute union literature to other employees in non-work areas during non-working time. See 29 U.S.C. 157. Petitioner contends (Pet. 37), however, that employees have no similar right to distribute union literature to *customers* in non-work areas during non-working time. The court of appeals correctly rejected that contention. Pet. App. 28-32. As the court explained, the "rationales for *Republic Aviation*'s principle"—namely, that "'the freedom to communicate is essential to the effective exercise of organizational rights,'" and that time outside work "'is an employee's time to use as he wishes without unreasonable restraint, even though he is on company property'"—apply to distribution to "customers" as well as to distribution to "fellow employees." *Id.* at 31 (brackets and citation omitted).

Petitioner expresses concern (Pet. 37) that the decision below will permit employees to distribute union literature to customers in various areas not at issue here. But under the principles of *Republic Aviation* and subsequent decisions, the right to distribute union literature is limited to non-work areas, see *Beth Israel Hosp.* v. *NLRB*, 437 U.S. 483, 493 n.10 (1978), and the Board has long reasoned that "entrances to hotels and casinos, along with certain other 'guest' areas incidental to the businesses' main operations, are non-work areas," Pet. App. 32; see, *e.g.*, *Santa Fe Hotel, Inc.*, 331 N.L.R.B. 723 (2000); *Flamingo Hilton-Laughlin*, 330 N.L.R.B. 287 (1999); *Dunes Hotel & Country Club*, 284 N.L.R.B. 871 (1987). Applying that reasoning here, the Board reasonably determined that the Casino's valet entrance is a non-work area. See Pet. App. 38-39 & n.1, 69-70. That determination rests on the particular facts of this

case, and it does not implicate any issue of general importance warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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