Case No. 14-2239

United States Court of Appeals for the Sixth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

LITTLE RIVER BAND OF OTTAWA INDIANS TRIBAL GOVERNMENT
Respondent.

On Application to Enforce an Order of the National Labor Relations Board

AMICUS BRIEF OF THE SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN IN SUPPORT OF PETITION FOR REHEARING EN BANC

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Statement of Related Cases

A related appeal is pending in this Court before the Honorable Judges Helene White, Bernice Donald, and visiting Federal Circuit Judge Kathleen O'Malley, *Soaring Eagle Casino & Resort v. NLRB*, Nos. 14-2405 and 14-2558, 791 F.3d 648 (6th Cir. 2015).

Interest of *Amicus Curiae* Saginaw Chippewa Indian Tribe of Michigan

For sixty years, the National Labor Relations Board properly refused to apply the National Labor Relations Act to Indian tribes acting within Indian country. In 2004, the Board changed its mind. Since then, the Board has attempted to apply the Act to tribes across the United States, including, the Little River Band and the Saginaw Chippewa Tribe (whose related cases proceeded under the name of its casino, Soaring Eagle Casino & Resort). In fact, the Little River Band and the Saginaw Chippewa Tribe have both battled the Board's improper exercise of jurisdiction in parallel cases that proceeded at the same time. Both the Saginaw Chippewa Tribe and the Little River Band exhausted their administrative remedies to reach this Court. Both the Saginaw Chippewa Tribe and the Little River Band briefed their cases to this Court. This Court vacated and remanded the Boards' decisions in both cases in light of *NLRB* v. *Noel Canning*.[1] In both cases, the Board adopted its initial orders without change. And on parallel re-appeals, this Court once again considered the propriety of the Board's exercise of jurisdiction in both the *Soaring Eagle* and the *Little River* cases.

There was just one procedural difference between the two cases: when this Court remanded the *Little River* case, it noted that the case presented "a question of unsettled law[,]"and stated that "we expect that the NLRB will also proceed

[1] 573 U.S. ___, 134 S. Ct. 2550 (2014).

expeditiously on remand."[2] This Court made no similar statement in *Soaring Eagle*. After the *Noel Canning* remands, the Board re-adopted its *Little River* decision on September 15, 2014. Despite two requests from the Saginaw Chippewa Tribe that the Board expedite its decision, it did not re-adopt its *Soaring Eagle* decision until October 27, 2014.

The tandem cases reached this Court again when the Board sought enforcement of the *Little River* order and the Saginaw Chippewa Tribe appealed the Board's *Soaring Eagle* decision. On June 9, 2015, the *Little River* panel issued its decision adopting the so-called *Coeur d'Alene* test[3] and holding that the Board may exercise jurisdiction unless a case falls within one of three narrow exceptions. Barely three weeks later, the *Soaring Eagle* panel was bound by the breadth of the *Little River* holding to apply the *Coeur d'Alene* test to the Saginaw Chippewa Tribe, even though that test is contrary to longstanding Supreme Court caselaw.

The Saginaw Chippewa Tribe has a concrete and immediate interest in this Court's en banc reconsideration of the *Little River* decision because the *Little River* decision required the *Soaring Eagle* panel to apply a test that it knew turns controlling law on its head. Under that test, the *Soaring Eagle* panel ordered

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[2] *Little River Band of Ottawa v. NLRB*, Nos. 13-1464 and 13-1518, Doc. 128 (Order) (6th Cir. Aug. 13, 2014).
[3] *NLRB v. Little River Band of Ottawa Indians Tribal Government*, No. 14-2239, slip op. 17 (6th Cir. June 9, 2015).

enforcement of the Board's order against the Saginaw Chippewa Tribe even though the panel understood that longstanding principles of Indian law announced by the Supreme Court forbid the Board's exercise of jurisdiction over the Saginaw Chippewa Tribe. En banc reconsideration of the *Little River* and *Soaring Eagle* cases allows this Court to align its decisions with controlling Supreme Court caselaw.

Amicus Curiae Statement in Support of En Banc Review

Four of the six judges to consider the question agree that the *Little River* majority's adoption of the *Coeur d'Alene* test is not consistent with decisions of the Supreme Court of the United States:

- *Little River* adopted "a different way of construing congressional silence, a way that has never been approved by the Supreme Court or applied in any circuit to justify federal intrusion upon tribal sovereignty under the NLRA."[4]
- "[W]e do not believe that the *Coeur d'Alene* framework properly addresses inherent tribal sovereignty under governing Supreme Court precedent, [and] would choose not to adopt that framework here."[5]
- "I agree that *Little River* was wrongly decided, that *Coeur d'Alene* (the reasoning of which *Little River* adopts) is inconsistent with Supreme Court precedent and premised on inapplicable dictum, and that application of the NLRA to the Tribe is inconsistent with traditional notions of tribal sovereignty."[6]

This unique situation—where circuit judges are bound to issue a ruling that they

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[4] Slip op. 25 (McKeague, J., dissenting).
[5] *Soaring Eagle*, 791 F.3d at 675.
[6] *Id.* (White, J., concurring in part).

understand conflicts with Supreme Court precedent in order to follow Circuit caselaw— presents a question of exceptional importance that warrants en banc reconsideration.

Moreover, as dissenting Judge McKeague detailed, the *Little River* majority's reliance on the *Coeur d'Alene* test "unwisely" created a circuit split with regard to whether the Board has authority to apply the Act to tribes in abrogation of tribal self-governance rights.[7] In *NLRB v. Pueblo of San Juan*, an en banc panel of the Tenth Circuit relied on Supreme Court cases to refuse to allow the Board to assert jurisdiction over a tribe.[8] But *Little River* expressly disclaimed *San Juan*, creating a circuit split on a critical question of federal law that will affect a dozen tribal governments within the Sixth Circuit. But "[i]ntercircuit conflicts create problems[,]" and this particular split—that emboldens the Board to continue to illegally assert jurisdiction over tribes' on-reservation activities—is nearly certain to "generate additional litigation[.]"[9] Because *Little River* created this circuit split, this case involves a question of exceptional importance and warrants en banc reconsideration.

Argument

The *Little River* majority issued a decision that is "exactly 180-degrees

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[7] Slip op. 25 (McKeague, J., dissenting).
[8] 276 F.3d 1186 (10th Cir. 2002).
[9] Fed. R. App. P. 35(b)(1)(B) 1998 cmt.

backward" from controlling law[10] but that nevertheless bound the *Soaring Eagle* panel, creating a significant split with the Tenth Circuit. For the same reasons expressed in the Saginaw Chippewa Tribe's petition for en banc review of *Soaring Eagle*,[11] this Court should also grant en banc review of the *Little River* decision.

Conclusion

The majority of judges to consider the question agree: *Little River* does not follow controlling Supreme Court caselaw. Just three weeks stood between the *Soaring Eagle* panel's desire to apply Supreme Court jurisprudence and its obligation to follow the *Little River* majority's decision in contravention of that law. This Court should vacate both the *Little River* and *Soaring Eagle* decisions and rehear both cases en banc to align the decisions with controlling Supreme Court caselaw and eliminate the circuit split with the Tenth Circuit.

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[10] Slip op. 38 (McKeague, J., dissenting).

[11] Case Nos. 14-2405 and 14-2258, Document 60. For sake of brevity, the Saginaw Chippewa Tribe incorporates that response here by reference. Granting en banc review of the *Little River* decision without granting review of *Soaring Eagle* would leave the Saginaw Chippewa Tribe in the incongruous position of needing to seek certiorari review of an opinion that was decided solely by reference to a vacated *Little River* decision. Because these cases address the same fundamental question of the Board's jurisdiction over tribes but present varied fact patterns illustrating the problematic effects of the Board's assertion of jurisdiction, the most appropriate approach is to grant en banc review in both cases.

Dated: August 28, 2013

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Certificate of Compliance

I certify that this petition is proportionally spaced with a typeface of 14-point Times New Roman, and is 6 pages long.

Dated: August 28, 2015

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