No. 14-2405 & 14-2558

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SOARING EAGLE CASINO AND RESORT,
an Enterprise of the Saginaw Chippewa Indian Tribe of Michigan,
Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner.

On Petition for Review and Cross-Application for Enforcement
of an Order of the National Labor Relations Board

BRIEF FOR THE NATIONAL CONGRESS OF AMERICAN INDIANS AS AMICUS CURIAE IN SUPPORT OF REHEARING EN BANC

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Sixth Circuit Rule 26.1, the National Congress of American Indians makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

   No.

2. Is there a publicly owned corporation, not a party to this appeal, that has a financial interest in the outcome?

   No.

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INTEREST OF AMICUS CURIAE

The National Congress of American Indians (NCAI), founded in 1944, is the nation's oldest and largest association of Indian tribal governments, representing 252 tribal governments and many individuals. NCAI serves as a forum for consensus-based policy development among its member Tribes from every region of the country. Its mission is to inform the public and all branches of the federal government about tribal self-government, treaty rights, and a broad range of federal policy issues affecting tribal governments.[1]

INTRODUCTION

The panel's holding—that the National Labor Relations Board (NLRB) has jurisdiction to regulate tribal gaming activities on tribal land—raises two exceptionally important issues that warrant rehearing en banc. The panel in this case was simply applying the holding in *Little River Band of Ottawa Indians* (*LRBOI*), with which it disagreed. *See* Op. 17. The Court should correct the holding of *LRBOI* by rehearing en banc either that case, this one, or both.

First, the *LRBOI* panel misconceived the relationship between Congress, Indian Tribes, and the courts when it interpreted the National Labor Relations Act (NLRA) to apply to Tribes notwithstanding the statute's silence. The NLRA's

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than amicus, its members, or its counsel made any monetary contribution toward the preparation or submission of this brief. The parties have consented to the filing of this brief.

history forecloses the inference that Congress meant it to govern Tribes. The Court should correct *LRBOI*'s departure from settled canons of federal Indian law, which require that ambiguous statutes be read in favor of tribal sovereignty.

Second, in holding that the power to regulate tribal employees sits at the "periphery" of tribal sovereignty, *LRBOI* diminished the importance of tribal gaming operations to tribal economic independence and self-government.

ARGUMENT

I. THE *LRBOI* PANEL'S DISREGARD FOR BEDROCK PRINCIPLES OF STATUTORY INTERPRETATION WARRANTS REHEARING EN BANC

"Although Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2031-2032 (2014). The Supreme Court has repeatedly and emphatically held that Congress must speak clearly before courts may infer that it meant to abrogate tribal sovereignty.[2] As the leading treatise on Indian law explains, this clear-statement canon "ha[s] quasi-constitutional status; [it] provide[s] an interpretive methodology for protecting fundamental constitutive, structural values against all but explicit congressional

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[2] *See, e.g.*, *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987) ("'Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence ... is that the sovereign power ... remains intact.'"); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-144 (1980) ("Ambiguities in federal law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence.").

derogation." Cohen's Handbook of Federal Indian Law § 2.02[2], at 118-119 (Newton ed. 2012). Indeed, it protects not just the boundary between federal and tribal sovereignty but also Congress' primacy in regulating the federal government's relationship with Tribes.[3]

The *LRBOI* panel violated this precept by construing an ambiguous statute to curtail tribal sovereignty. All parties (and the panel) agree that the NLRA is silent as to whether it governs tribal employers. And the history of the statute affords no evidence, let alone the "clear evidence" required by the Supreme Court, "that Congress actually considered the conflict between its intended action on the one hand and Indian [sovereignty] on the other, and chose to resolve that conflict by abrogating" tribal sovereignty. *United States v. Dion*, 476 U.S. 734, 740 (1986). To the contrary, everything about the NLRA's history and purpose suggests that Congress did *not* want it to govern tribal enterprises.[4]

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[3] *See, e.g.*, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978) ("[A] proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent."); *see also Bay Mills*, 134 S. Ct. at 2039 ("[A] fundamental commitment of Indian law is judicial respect for Congress's primary role in defining the contours of tribal sovereignty.").

[4] Congress excluded governments from the ambit of the NLRA, at a time when it was addressing issues of tribal self-governance and self-determination—*i.e.*, when it would clearly have thought of Tribes as governments. *See* Br. for the National Congress of American Indians as Amicus Curiae 5-19, *Soaring Eagle Casino and Resort v. NLRB*, Nos. 14-2405 (Dkt. 40) & 14-2558 (Dkt. 37).

The *LRBOI* panel's disregard of this principle is an issue of "exceptional importance" warranting en banc review (Fed. R. App. P. 35(a)(2)). *See, e.g.*, *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 588, 589 (5th Cir. 2014) (Smith, J., dissenting from denial of rehearing en banc) (test of "exceptional importance" was "easily met" where panel decision "profoundly upset[] the delicate balance that the Supreme Court has struck between Indian tribal governance … and American sovereignty"), *cert. granted sub nom. Dollar Gen. Corp. v. Mississippi Band of Choctaw Indians*, 135 S. Ct. 2833 (2015); *Kerr v. Hickenlooper*, 759 F.3d 1186, 1188 (10th Cir. 2014) (Tymkovich, J., dissenting from denial of rehearing en banc) (urging en banc consideration of questions "of exceptional importance to the separation of powers that undergirds our constitutional structure"), *cert. granted*, 135 S. Ct. 2927 (2015).[5]

II. THE RIGHT TO REGULATE LABOR AT TRIBAL GAMING FACILITIES IS ESSENTIAL TO TRIBAL SOVEREIGNTY

The *LRBOI* panel's decision also undermines the longstanding federal commitment to tribal self-determination by impeding Tribes' ability to support themselves economically in the manner contemplated by Congress.

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[5] The Supreme Court's demonstrated readiness to take up questions like this one further weighs in favor of rehearing en banc. *See, e.g.*, *Ricci v. DeStefano*, 530 F.3d 88, 93 (2d Cir. 2008) (Jacobs, C.J., dissenting from denial of rehearing en banc) ("If issues are important enough to warrant Supreme Court review, they are important enough for our full Court to consider and decide on the merits."), *cert. granted*, 550 U.S. 1091 (2009); *see also Igartua v. United States*, 654 F.3d 99, 103 (1st Cir. 2011) (Torruella, J., concerning the denial of rehearing en banc) (same).

Tribes are "'separate sovereigns pre-existing the Constitution.'" *Bay Mills*, 134 S. Ct. at 2030. And their sovereignty extends to the regulation of tribal employees on tribal land for two reasons. First, as the federal government has acknowledged, a Tribe has the power to regulate the conduct of nonmembers "on land belonging to the Tribe or held … in trust for the Tribe." *Montana v. United States*, 450 U.S. 544, 557 (1981); *see Nevada v. Hicks*, 533 U.S. 353, 360, 370 (2001) (land ownership is so "significant" a factor that it "may sometimes be … dispositive"); Br. for the United States as Amicus Curiae 9-12, *Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, No. 13-1496 (U.S. May 12, 2015). Second, even on land they do not own, Tribes have "inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations," including (1) when those non-members "enter consensual relationships with the tribe or its members" and (2) when the non-members' conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 565-566. The regulation of tribal employees on tribal land implicates *all* of these sovereign interests.

The connection between tribal sovereignty and self-sufficiency is deeply rooted in federal law and policy. In the late 19th and early 20th centuries, the government pursued "a calculated policy favoring elimination of tribal institutions, sale of tribal lands, and assimilation of Indians as individuals into the dominant

culture." *Duro v. Reina*, 495 U.S. 676, 691 (1990). That policy, embodied in the Dawes Act of 1887, 24 Stat. 388, "proved to be a disastrous failure" (*Hagen v. Utah*, 510 U.S. 399, 425 (1994) (Blackmun, J., dissenting)). Faced with evidence that it "had proved both exploitative and destructive of Indian interests," Congress determined "that institutional changes were required." *Morton v. Mancari*, 417 U.S. 535, 553 (1974). The result was the Indian Reorganization Act of 1934, 48 Stat. 984, which sought to enable Tribes "to assume a greater degree of self-government, both politically and economically." *Morton*, 417 U.S. at 542. It did so in part by authorizing "the creation of chartered corporations, with power to conduct the business and economic affairs of [a] tribe." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973); *see* 25 U.S.C. § 477. The goal was for a Tribe's businesses to "generate substantial revenues for the education and the social and economic welfare of its people." *Mescalero*, 411 U.S. at 151-152.

Congress has since continued to encourage tribal self-sufficiency through economic activities. In 1974, it enacted the Indian Financing Act, with the goal of "provid[ing] capital on a reimbursable basis to help develop and utilize Indian resources." 25 U.S.C. § 1451; *see* 25 C.F.R. § 101.2(a)(1) (authorizing loans for tribal enterprises). And in 1988, it enacted the Indian Gaming Regulatory Act, recognizing gaming "as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1).

Tribal government gaming activities remain "critical to the goals of tribal self-sufficiency." *Bay Mills*, 134 S. Ct. at 2043 (Sotomayor, J., concurring). They are often "'the only means by which a tribe can raise revenues,'" a fact "due in large part to the insuperable (and often state-imposed) barriers Tribes face in raising revenue through more traditional means"—including that "States have the power to tax certain individuals and companies based on Indian reservations, making it difficult for Tribes to raise revenue from those sources" without "discourag[ing] economic growth" through "double taxation." *Id.* at 2043-2044.

Like all governments, Tribes therefore have a strong interest in avoiding strikes that could hamper the provision of vital public services to their members. That is precisely why Congress exempted governments from the NLRA.[6] Indeed, unionization poses *more* of a threat to Tribes than it does to most other government employers. The unionization of workers at a tribal gaming site, and the concomitant right to strike, can pose an existential threat to a Tribe whose

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[6] *See* 29 U.S.C. § 152(2) (exempting "the United States … or any State or political subdivision thereof"); *see also* 1 *Legislative History of NLRA* 1117 (1949) (op-ed from Chairman of the Senate Committee on Education and Labor, explaining the importance of preventing strikes by public employees); *Virgin Islands Port Auth. v. SIU de Puerto Rico*, 354 F. Supp. 312, 313 (D.V.I. 1973) (explaining that strikes against the government "would be to some extent contrary to the notion of government," and that because "[a] particular activity is usually undertaken by the government precisely because it is critically important to a large segment of the public, … the public is therefore especially vulnerable to 'blackmail' strikes"), *aff'd*, 494 F.2d 452 (3d Cir. 1974).

economic survival depends on gaming revenue. And because Tribes are smaller political entities than many other governments, a labor organization at an enterprise on which the Tribe is economically dependent can assume outsize importance in the Tribe's political life. It can effectively become an alternative political organization, undermining the Tribe's actual government.

Thus, under *Montana*, Tribes possess "inherent sovereign power" to regulate labor at tribal gaming facilities. The *LRBOI* panel's holding reads statutory silence to abrogate this core element of tribal sovereignty, notwithstanding the Supreme Court's repeated admonitions to the contrary. This Court should not pass up the opportunity to set its doctrine straight.

CONCLUSION

The Court should grant the petition for rehearing en banc.

Respectfully submitted.

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August 28, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of August, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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