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IN THE
Supreme Court of the United States

LITTLE RIVER BAND OF OTTAWA INDIANS TRIBAL GOVERNMENT,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

AMICUS CURIAE BRIEF OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC., IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the National Labor Relations Board exceeded its authority by ordering an Indian tribe not to enforce a tribal labor law that governs the organizing and collective bargaining activities of employees working on tribal trust lands.

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INTEREST OF THE AMICUS

The National Right to Work Legal Defense Foundation, Inc. ("Foundation")[1] is a nonprofit organization that provides free legal aid to individuals whose rights are infringed upon or threatened by compulsory unionism. Since its founding in 1968, the Foundation has been the nation's leading litigation advocate

[1] Pursuant to Supreme Court Rule 37.2(a), counsel of record for all parties received notice, at least ten days prior to the due date, of the Foundation's intention to file this brief. The Foundation has filed with the Clerk of Court letters evidencing consent to file this brief from all parties. Pursuant to Supreme Court Rule 37.6, the Foundation affirms that no counsel for any party authored this brief in whole or in part, and that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the Foundation, its members, or its counsel made a monetary contribution to its preparation or submission.

against compulsory union fee requirements. Currently, Foundation staff attorneys represent workers in almost 200 federal and state court and administrative agency cases involving compulsory unionism requirements. Foundation attorneys have represented individual workers in almost all compulsory union fee cases that have come before this Court.[2]

The Foundation believes that every worker should have the right to decide whether or not to join a union and to be free from compulsory union requirements, including monopoly bargaining (i.e., "exclusive representation"). The National Labor Relations Board's ("Board" or "NLRB") attempt to expand its jurisdiction to the Little River Band of Ottawa Indians ("Band") and its employees is but one of several recent initiatives by the Board to extend its reach. The Board's aggressive assertion of jurisdiction represents a significant threat to worker freedom by potentially subjecting additional classes of workers to the compulsory unionism provisions of the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151-69.[3] The Foundation submits this brief to urge the Court to rein in this increasingly rogue federal agency.

SUMMARY OF ARGUMENT

Over the last decade, the NLRB has made a concerted effort to expand its jurisdiction to employees not currently covered by the NLRA. This latest attempt to broaden its dominion to employees on Indi-

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[2] *See Foundation Supreme Court Cases*, National Right to Work Legal Defense Foundation, Inc., http://www.nrtw.org/en/foundation-cases.htm (last visited Mar. 13, 2016).

[3] *See infra* Part I.

an reservations is especially problematic because it undermines longstanding precedent that presumes Congress does not intend to interfere with tribal sovereignty. The NLRB and Sixth Circuit turned that deduction on its head by creating a presumption that the NLRA *does* apply to tribal lands, and did so based on the Ninth Circuit's misinterpretation of a single sentence of this Court's dicta. This Court should grant the Band's petition for certiorari to apply its traditional Indian law principles to the facts of this case and reverse the Sixth Circuit's decision as contrary to established precedent.

REASONS FOR GRANTING THE WRIT

I. The NLRB Is Attempting to Expand Its Jurisdiction Beyond Its Statutory Authority.

The NLRB's ongoing accretion of jurisdiction into matters over which its exercise of jurisdiction was never intended is troubling. The Board is continually pushing the boundaries of its jurisdiction, regulating ever more religious institutions, *see Pacific Lutheran University*, 361 N.L.R.B. No. 157 (Dec. 16, 2014); considering overruling prior precedent to assert jurisdiction over teaching assistants at universities, *see* Order, *Columbia University*, No. 02-RC-143012 (N.L.R.B. Dec. 23, 2015); deeming an ever increasing number of independent contractors to actually be employees subject to the NLRA, *see Fedex Home Delivery*, 361 N.L.R.B. No. 55 (Sept. 30, 2014); and investigating whether for-hire drivers who use ride-sharing applications are employees subject to unionization, *see* Memorandum in Support of Application, *NLRB v. Uber Technologies, Inc.*, No. 3:16-cv-

987 (N.D. Cal. Feb. 29, 2016) (NLRB seeking to compel enforcement of a subpoena against Uber).

The NLRB has even claimed that it could, if it wished, assert jurisdiction over all private college football players. *See Nw. Univ.*, 362 N.L.R.B. No. 167, at *6 (Aug. 17, 2015) ("[W]e are declining jurisdiction only in this case involving the football players at Northwestern University; we therefore do not address what the Board's approach might be to a petition for all FBS scholarship football players (or at least those at private colleges and universities).").[4]

The Board's ever-expanding jurisdiction impinges upon the freedom of workers by subjecting them to the NLRA's compulsory unionism provisions. Any such expansion, therefore, should be carefully examined. This latest push, impinging on the sovereign rights of Indian tribes, is a bellwether of the Board's aggressive expansion of jurisdiction. This is especially true because the Board's rationale for its attempted expansion contravenes decades of precedent.

II. The Sixth Circuit's Decision Widens an Existing Circuit Split.

Historically, tribal sovereignty was respected by the NLRB.[5] In recent times, however, the NLRB has attempted to assert its dominion over Indian tribes' labor relations. Three circuits have weighed in on

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[4] The Foundation filed *amicus curiae* briefs in the *Columbia University* and *Northwestern University* cases.

[5] *See, e.g.*, *Fort Apache Timber Co.*, 226 N.L.R.B. 503 (1976) (holding a tribal council exempt from the NLRA); *S. Indian Health Council, Inc.*, 290 N.L.R.B. 436 (1988) (exempting a consortium of tribes from the NLRA).

the NLRB's campaign against tribal nations, announcing three conflicting jurisdictional standards.

In *NLRB v. Pueblo of San Juan*, 276 F.3d 1186 (10th Cir. 2002), the Tenth Circuit, sitting *en banc*, rejected the NLRB's broad claims to jurisdiction. The court upheld the tribe's sovereignty against the NLRB's encroachment based on the traditional Indian law standard that congressional silence means Congress did not intend to divest tribes of their sovereignty. *Id.* at 1196-1200. Thus, the court held, that the NLRA does not presumptively apply where "an Indian tribe has exercised its authority as a sovereign . . . rather than in a proprietary capacity such as that of employer or landowner." *Id.* at 1199.

In *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306 (D.C. Cir. 2007), the D.C. Circuit held that the determinative consideration as to whether a law was applicable to a tribe was "the extent to which application of the general law [would] constrain the tribe with respect to its governmental functions." *Id.* at 1313. If such a constraint would occur, then express congressional intent would be necessary. *Id.* However, if the law "relates only to the extra-governmental activities of the tribe, and in particular activities involving non-Indians, then application of the law *might* not impinge upon tribal sovereignty." *Id.* (emphasis added) (internal citation omitted). Using this standard, the court determined that applying the NLRA to the tribe, "would not significantly impair tribal sovereignty" and declared the Act applicable to a tribal-owned casino. *Id.* at 1318.

Here, a sharply divided Sixth Circuit further eroded the inherent sovereignty of tribes. The court not only determined that the Board had jurisdiction over

the tribe and its employees, but it adopted the *Tuscarora-Coeur d'Alene* standard announced by the Ninth Circuit in *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1115-16 (9th Cir. 1985). *See* Pet. 25a, 34a. That standard presumes that a general federal law applies to Indian tribes *unless*:

> (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 by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations.

Id. at 17a-18a (quoting *Coeur d'Alene*, 751 F.2d at 1116).

The Ninth Circuit based that standard on dictum from *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960), that "it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests." The Ninth Circuit in *Coeur d'Alene* misinterpreted this statement regarding "Indians and their property interests" as a "basic principle that generally applicable federal statutes ordinarily apply to Indian tribes and their activities." 751 F.2d at 1115 n.2.

The Ninth Circuit's application of that dictum to sovereign interests was erroneous, because the cases this Court cited in *Tuscarora* applied federal statutes to the rights of *individual* Indians, not to sovereign tribes. Jessica Intermill, *Competing Sovereigns: Circuit Courts' Varied Approaches to Federal Statutes in*

Indian Country, 62-SEP Fed. Law. 64, 67 (2015). This error is the basis of the *Tuscarora-Coeur d'Alene* standard, which the Sixth Circuit adopted in this case. *See* Pet. 25a.[6]

The Tenth and D.C. Circuits have questioned the *Tuscarora* dictum upon which the Sixth and Ninth Circuit's *Tuscarora-Coeur d'Alene* standard is based. In *Pueblo of San Juan*, the Tenth Circuit correctly recognized that *Tuscarora* "dealt solely with issues of ownership, not with questions pertaining to the tribe's sovereign authority to govern the land." 276 F.3d at 1198. Indeed, the Tenth Circuit holds that the *Tuscarora* dictum was overruled by *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). *Donovan v. Navajo Forest Prods. Indus.*, 692 F.2d 709, 713 (10th Cir. 1982).

In *San Manuel*, the D.C. Circuit held *Tuscarora*'s dictum to be of "uncertain significance" and "in tension with the longstanding principles that (1) ambiguities in a federal statute must be resolved in favor of Indians, and (2) a clear expression of Congressional intent is necessary before a court may construe a federal statute so as to impair tribal sovereignty." 475 F.3d at 1311 (internal citations omitted).[7]

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[6] Less than one month after this case was decided, a second Sixth Circuit panel considered the same question in *Soaring Eagle Casino & Resort v. NLRB*, 791 F.3d 648 (6th Cir. 2015). That panel was bound by the Sixth Circuit's decision in this case, but was vociferous in its disagreement with the adoption of the *Tuscarora-Coeur d'Alene* framework and the holding in this case. *Id.* at 662-75.

[7] The Board first applied the *Tuscarora-Coeur d'Alene* standard in 2004, and the D.C. Circuit declined to adopt it in *San Manuel*. 475 F.3d at 1315.

Tellingly, "[i]n the more than 50 years since [this] Court announced *Tuscarora, no* Supreme Court justice has *ever* relied on this dictum—whether writing for a majority, concurrence, or dissent." Intermill, *supra,* at 67.

This circuit split creates a confusing and uncertain legal environment for tribes and their employees. Depending on where it is located, a tribe may or may not: (1) be subject to the Board's jurisdiction; (2) have its employees subject to the NLRA; or (3) be able to promulgate labor regulations for those individuals it employs or are employed on its land. By granting certiorari here, this Court could establish a consistent standard for Indian tribes nationwide.

As discussed next, the Court should overrule the *Tuscarora-Coeur-d'Alene* framework as clearly inconsistent with this Court's precedents concerning the NLRA and presumptions of tribal sovereignty.

III. The Sixth Circuit's Decision Is Contrary to This Court's Longstanding Precedents Governing Tribal Sovereignty and the NLRA.

A. The Sixth Circuit's Decision Is Inconsistent with This Court's Indian Law Precedents.

Traditionally, this Court has upheld the principle that "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." *Merrion*, 455 U.S. at 149 (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978)). As recently as 2014, this Court reaffirmed its holdings that Indian tribes are

"'domestic dependent nations' that exercise 'inherent sovereign authority.'" *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014) (citing *Okla. Tax Comm'n v. Citizens Band Potawatomi Tribe*, 498 U.S. 505, 509 (1991)); *see also Santa Clara Pueblo*, 436 U.S. at 56 (noting that Indian tribes remain "separate sovereigns pre-existing the Constitution"); *United States v. Wheeler*, 435 U.S. 313, 322 (1978), *superseded by statute*, Act of Oct. 28, 1991, Pub. L. No. 102-137, 105 Stat. 646, *as recognized in United States v. Lara*, 541 U.S. 193, 207 (2004) (quoting F. Cohen, *Handbook of Federal Indian Law* 122 (1945)) (noting that "[t]he powers of Indian tribes are, in general, *inherent powers of a limited sovereignty which has never been extinguished*"); *Cherokee Nation v. Georgia*, 30 U.S. 1, 13 (1831) (recognizing Indian tribes as "domestic dependent nations"). This sovereignty is unique in that "[i]t exists only at the sufferance of Congress and is subject to complete defeasance." *Rice v. Rehner*, 463 U.S. 713, 719 (1983) (emphasis omitted) (quoting *Wheeler*, 435 U.S. at 323). However, "unless and until Congress acts, the tribes retain their historic sovereign authority." *Bay Mills*, 134 S. Ct. at 2030 (quoting *Wheeler*, 435 U.S. at 323).

Accordingly, "[a]mbiguities in federal law have been construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence." *Merrion*, 455 U.S. at 152 (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 (1980)). "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 . . . re-

mains intact." *Iowa Mut. Ins. Co. v. LaPlante,* 480 U.S. 9, 18 (1987) (quoting *Merrion,* 455 U.S. at 149, n.14); *see also Santa Clara Pueblo,* 436 U.S. at 60.

"Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty." *LaPlante,* 480 U.S. at 18 (citing *Montana v. United States,* 450 U.S. 544, 565-66 (1981); *Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134, 152-53 (1980); *Fisher v. District Court,* 424 U.S. 382, 387-89 (1976)). Consistent with these principles, "[a] tribe may regulate, through taxation, licensing, or other means, *the activities of nonmembers who enter consensual relationships with the tribe or its members,* through commercial dealing, contracts, leases, or other arrangements"; and "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that 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 565-66 (emphasis added).

The Sixth Circuit's *Tuscarora-Coeur d'Alene* standard is inconsistent with those well-established principles. That standard does not respect the inherent sovereignty of the tribe, as this Court has done by presuming tribes retain their sovereignty unless Congress has clearly indicated otherwise. Rather, the Sixth Circuit's standard presumes that tribal sovereignty is divested by a generally applicable statute unless there is evidence of congressional in-

tent to maintain tribal sovereignty.[8] *See* Pet. 17a-18a.

When the Court's principles reaffirmed in *Montana* are applied to the facts of this case, the Band's ordinance falls outside of the Board's jurisdiction, because it reaches non-member employees of the casino who entered into *consensual* relationships with the Band. *See* 450 U.S. at 565-66. Thus, the ordinance is a valid exercise of tribal sovereignty under *Montana,* into which the Board has no authority to intrude.

B. The Sixth Circuit's Decision Is Inconsistent with This Court's Interpretations of the NLRA.

In cases involving "public questions particularly high in the scale of our national interest," the Board does not have jurisdiction without "the affirmative intention of the Congress clearly expressed." *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979) (quoting *McCulloch v. Sociedad Nacional de Marineros de Honduras,* 372 U.S. 10, 17, 21-22 (1963)). For example, the Court in *McCulloch* held that the Board's jurisdiction did not extend to foreign employees and employers on the high seas, because that assertion of jurisdiction would raise questions "high in the scale of our national interest," and because of the absence of an affirmative intent by Congress for the NLRA to regulate foreign vessels. 372

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[8] The *Tuscarora-Coeur d'Alene* standard has two additional exceptions to its presumption. *See* Pet. 17a-18a. However, these exceptions are extraneous to this case because the initial presumption itself is inconsistent with this Court's well-established precedent, as discussed above.

U.S. at 17, 22. Similarly, the Court in *Catholic Bishop* held that the Board's jurisdiction does not apply to church operated schools and their employees, because that assertion of jurisdiction would raise profound First Amendment issues, and because the NLRA does not expressly require that extension of jurisdiction. 440 U.S. at 507.

The requirement of a clearly expressed, affirmative congressional intent to extend the NLRA to situations of national importance parallels this Court's Indian Law precedents. As in the aforementioned cases, questions relating to Indian tribes are public questions "high in the scale of our national interest." *Id.* at 500.

The status of Indian tribes in the United States is a unique one rooted in pre-constitutional history. This Court has recognized that the United States "'has charged itself with moral obligations of the highest responsibility and trust' [to Indian tribes,] obligations, 'to the fulfillment of which the national honor has been committed.'" *United States v. Jicarilla Apache Nation,* 564 U.S. 162, 131 S. Ct. 2313, 2324 (2011) (internal citations omitted) (citing *Seminole Nation v. United States,* 316 U.S. 286, 296-97 (1942); *Heckman v. United States,* 224 U.S. 413, 437 (1912)). In protecting this relationship, this Court has taken special care to prevent the tribe's inherent sovereignty from being diminished unnecessarily or unintentionally. This care has taken the form of requiring affirmative congressional intent, to include Indian tribes in statutory regimes that would otherwise impinge upon the tribes' inherent sovereignty. *See, e.g., Merrion,* 455 U.S. at 149; *Santa Clara Pueblo,* 436 U.S. at 60.

The Sixth Circuit's adoption of the *Tuscarora-Coeur d'Alene* standard is inconsistent with those principles. Instead of requiring clear affirmative congressional intent for a statute to be applicable to an Indian tribe acting in its sovereign capacity, the Sixth Circuit has turned this Court's standard on its head and presumed that the NLRA is applicable to the Band *unless* Congress says otherwise. *See* Pet. 17a-18a. This is a clear repudiation of this Court's established precedent and should be overturned.

C. The Sixth Circuit's Decision Is Inconsistent with the Board's Lack of Jurisdiction over Political Subdivisions.

In this case, the Sixth Circuit held that the Board had jurisdiction, not only over individuals on tribal lands, but over *the Band itself*, because the Band owns and operates the casino at issue. Thus, pursuant to the Sixth Circuit's decision, the Board may impose its dominion over a sovereign tribal nation. This is beyond the pale, and inconsistent with the spirit of Section 2(2) of the NLRA, which exempts from the Board's jurisdiction "any State or political subdivision thereof." 29 U.S.C. § 152(2) (defining "employer"). This direct attack on the Band's ability to operate a casino, which is like the operation of lotteries by sovereign states, strikes at the heart of the tribal sovereignty.

CONCLUSION

This case presents an opportunity for the Court to clarify its position on whether the NLRA grants the Board statutory authority over tribal governments when they promulgate labor relations ordinances. Specifically, it presents an opportunity for the Court

to overrule the aberrant *Tuscarora-Coeur-d'Alene* standard and apply this Court's longstanding Indian law precedent to this issue, especially in light of the Court's 2014 reaffirmation of these principles in *Bay Mills*. 134 S. Ct. at 2030. Thus, the writ of certiorari should be granted.

Respectfully submitted,

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