No. 15-1024

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

BRIEF FOR *AMICI CURIAE* UNITED SOUTH AND EASTERN TRIBES, INC., *ET AL.*,* IN SUPPORT OF PETITIONER

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This brief is filed on behalf of the following *amici curiae*:

United South and Eastern Tribes, Inc.

Seminole Tribe of Florida

Jamestown S'Klallam Tribe

Pala Band of Mission Indians

Cheyenne and Arapaho Tribes

Absentee Shawnee Tribe

Confederated Tribes of the
Umatilla Indian Reservation

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INTEREST OF *AMICI CURIAE*[1]

Amicus United South and Eastern Tribes, Inc. ("USET") is an intertribal organization comprised of 26 federally recognized Indian Tribes in the southern and eastern United States.[2] The remaining *amici* are all federally recognized Indian Tribes from across the United States. *Amici* Tribes and USET member Tribes operate governmental programs such as police and fire departments, schools, health clinics, public transportation, foster care and elder care programs, and many more. They also operate tribal enterprises (including gaming facilities) to generate revenue to support these governmental programs.

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici*, their members, and their counsel provided any monetary contribution to fund the preparation or submission of this brief. The Petitioner in this case has filed blanket consent to the filing of *amicus curiae* briefs in support of either party or neither party, and a letter from the Respondent consenting to the filing of this brief is on file with the clerk. Counsel of record provided each party's attorney at least ten days' notice of the intent to file this brief.

[2] The USET member Tribes are: Alabama-Coushatta Tribe of Texas; Aroostook Band of Micmacs; Catawba Indian Nation; Cayuga Nation; Chitimacha Tribe of Louisiana; Coushatta Tribe of Louisiana; Eastern Band of Cherokee Indians; Houlton Band of Maliseet Indians; Jena Band of Choctaw Indians; Mashantucket Pequot Tribal Nation; Mashpee Wampanoag Tribe; Miccosukee Tribe of Indians of Florida; Mississippi Band of Choctaw Indians; The Mohegan Tribe; Narragansett Indian Tribe; Oneida Indian Nation; Passamaquoddy Tribe - Pleasant Point; Passamaquoddy Tribe - Indian Township; Penobscot Indian Nation; Poarch Band of Creek Indians; Seminole Tribe of Florida; Seneca Nation of Indians; Shinnecock Indian Nation; Saint Regis Mohawk Tribe; Tunica-Biloxi Tribe of Louisiana; and Wampanoag Tribe of Gay Head (Aquinnah).

Amici share a strong interest in this case because of the impact the Sixth Circuit's ruling will have on their ability as governmental entities to regulate the presence and conduct of labor organizations on their tribal lands, and to effectively manage the impacts of organized labor activity on their delivery of essential governmental services to tribal citizens. As illustrated in this brief, many Tribes including *amici* and USET member Tribes have in place tribal laws to govern public sector employment and protect governmental programs, services, and interests.[3] The ruling below threatens the ability of Tribes to adopt and enforce those laws. As such, this case implicates the self-government rights and sovereign interests of *amici* Tribes and USET member Tribes.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns whether the National Labor Relations Act ("NLRA"), a federal statute designed to regulate private employers that is silent with respect to its applicability to Indian tribal governments, nevertheless abrogates tribal sovereignty interests in enacting and enforcing tribal labor laws to govern tribal employment on tribal lands. The Sixth Circuit in this case ruled that it does, creating a three-way circuit split with alarming implications for the displacement of tribal governing authority by the National Labor Relations Board ("NLRB").

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[3] Specific tribal labor laws of *amici* and USET member Tribes are discussed at Sections I.A (employee strike and interest arbitration provisions), I.B (right-to-work laws), I.C (employment preference and employee rights laws), and I.D (tribal powers of exclusion) of this brief.

As noted by the Petitioner, underlying this circuit split is an apparent disagreement as to whether application of the NLRA to Indian Tribes interferes with tribal sovereignty. In sharp contrast to the Tenth Circuit's opinion in *NLRB v. Pueblo of San Juan*, 276 F.3d 1186 (10th Cir. 2002) (en banc), the Sixth Circuit in this case determined that application of the NLRA would *not* infringe on the Petitioner's inherent rights to tribal self-government, and therefore no specific showing of legislative intent was required to subject the Tribe to its terms.

Amici agree with Petitioner that the Sixth Circuit's conclusion is deeply flawed, and that its rejection of the Tenth Circuit's (and this Court's) clear legislative intent requirement will have significant and damaging consequences for tribal governments and their citizens in many regions of the country. This brief supplements the Petitioner's argument by illustrating that Tribes across the country do exercise their sovereign rights to adopt labor and employment laws that are carefully crafted to respond to the particular needs and public policy concerns of tribal governments, and as such the Sixth Circuit's decision *will* impermissibly infringe on the meaningful exercise of tribal self-government.

Though Congress was silent with respect to the application of the NLRA to Indian Tribes specifically, it excluded a range of governmental employers precisely because of the impact it would have on those governments' sovereign interests. Hence, the federal government, States, and other governmental entities (including Tribes, until recently) have been consistently exempted from the scope of the NLRA, and have adopted labor relations laws and practices that would otherwise be prohibited under the NLRA

in order to protect the integrity of government operations. These include prohibitions or limitations on employee strikes and employer lockouts; alternative dispute resolution provisions such as interest arbitration; and, in many States, "right-to-work" laws prohibiting union security agreements. Not surprisingly, Tribes adopt similar labor relations provisions for similar reasons. They also adopt provisions designed to meet their particular needs, including mandating tribal preference in hiring and excluding such preference policies from collective bargaining, and protecting the Tribe's inherent right to exclude nonmembers from tribal lands.

These tribal self-government interests are threatened by the Sixth Circuit's ruling in this case, which permits the blanket application of inflexible national labor standards designed for private employers. The threat is by no means mitigated by the fact that this case involves labor relations at a tribal gaming enterprise. For Indian Tribes, gaming is not merely a "commercial enterprise" but is a sovereign activity conducted in accordance with the Indian Gaming Regulatory Act and for the purpose of raising public revenue to support governmental programs and services. Further, this case has ramifications for all tribal programs—not just tribal casinos. The NLRB takes the position that the NLRA applies to Tribes generally, and that the NLRB will decline *in its discretion* to exercise that jurisdiction with respect to "traditional tribal or governmental functions." Not only is the NLRB as a body ill-equipped to make this determination, but its case-by-case approach will lead to inconsistent results and provides no guidance to Tribes as to which of their many programs will be deemed sufficiently "governmental" to qualify for exemption.

ARGUMENT

I. Much like the federal and state governments, tribal governments as sovereigns adopt labor laws that differ from the NLRA to suit their governmental needs, but their ability to do so is threatened by the ruling below.

Like other governmental entities, Tribes have adopted their own laws governing labor relations on their lands.[4] In many ways, these tribal labor laws mirror the NLRA, in that they allow for collective bargaining, recognize employee unions, define unfair labor practices, and adopt other specific employee protections. However, much like the federal and state governments, Tribes have found a need to tailor their laws to fit their particular circumstances. That is because common private sector labor practices, such as employee strikes, can have entirely different and unacceptable consequences for Indian tribal governments operating in the public sector—including the disruption or even cessation of government operations and essential government services.

The adoption of carefully crafted tribal labor laws that avoid these consequences and meet local tribal needs is nothing more than an exercise of Tribes' inherent sovereignty. Nearly two centuries of unbroken precedent from this Court establishes that Tribes "possess[] attributes of sovereignty over both their members and their territory," *United States v. Mazurie*, 419 U.S. 544, 557 (1975), including the right

[4] Though Tribes across the United States have adopted their own tribal labor laws, this brief specifically addresses those adopted and implemented by the *amici* Tribes and USET member Tribes.

"to make their own laws and be ruled by them," *Williams v. Lee*, 358 U.S. 217, 220 (1959), and to regulate nonmember activities to the extent "necessary to protect tribal self-government or control internal relations[.]" *Nevada v. Hicks*, 533 U.S. 353, 359 (2001). Moreover, Tribes' sovereign powers specifically include the regulation of economic activity within reservation boundaries, even with respect to nonmembers. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335-36 (1983).

These inherent tribal powers are retained unless and until Congress expresses a clear intent to abrogate them. *Merrion*, 455 U.S. at 149; *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2032, 2037 (2014). As Petitioner notes, however, the Sixth Circuit's decision turns this rule on its head by adopting a presumption, in the absence of any indication of congressional intent, that the NLRA applies to Tribes in derogation of their sovereign powers. If allowed to stand, the Sixth Circuit's ruling would treat Tribes like private employers. It would prohibit them from adopting their own rules not in agreement with the NLRA, and subject them to conduct contrary to their interests and values, including employee work stoppages and collective bargaining over tribal preference.

A. Tribes prohibit or limit strikes, but provide for interest arbitration.

Labor laws in many jurisdictions prohibit strikes by government workers.[5] Strikes and lockouts are unusually disruptive in the public sector because

[5] *See, e.g.*, 5 U.S.C. § 7311 (prohibiting federal employees from participating in a strike or asserting the right to strike against the government); James Duff, Jr., Annotation, *Labor Law: Right*

governmental employees are responsible for carrying out essential governmental functions, not merely commercial activities. Their work is critical to government efforts to protect public health and safety, provide public services like education and public transportation, and collect revenue to support government operations. *Local Union No. 370, Int'l Union of Operating Eng'rs v. Detrick*, 592 F.2d 1045, 1046 (9th Cir. 1979) (per curiam) ("Strikes impede government economy and performance of services."); *United Fed'n of Postal Clerks v. Blount*, 325 F. Supp. 879, 883 (D.D.C. 1971) (three-judge panel), aff'd 404 U.S. 802 (1971) ("[I]t is not irrational or arbitrary for the Government to . . . prohibit strikes by those in public employment, whether because of the prerogatives of the sovereign, some sense of higher obligation associated with public service, to assure the continuing functioning of the Government without interruption, to protect public health and safety or for other reasons.").

In enacting the NLRA, Congress specifically cited the policy against government strikes as a reason for exempting governmental employers from the scope of the law. *See NLRB v. Natural Gas Util. Dist. of Hawkins Cnty., Tenn.*, 402 U.S. 600, 604 (1971). As an alternative to employee strikes and employer lockouts, public sector labor laws frequently provide for collective bargaining agreements and dispute resolution mechanisms, like interest arbitration, to address employee grievances. *See, e.g., Joint Sch. Dist. No. 1, City of Wis. Rapids v. Wis. Rapids Educ. Ass'n*, 234

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of Public Employees to Strike or Engage in Work Stoppage, 37 A.L.R. 3d 1147 (orig. pub. 1971) (collecting cases upholding validity of State legislation prohibiting public employees from striking).

N.W. 2d 289, 300 (Wis. 1975); Catherine L. Fisk & Adam R. Pulver, *First Contract Arbitration and the Employee Free Choice Act*, 70 LA. L. REV. 47, 50-51 (2009) (discussing widespread use of interest arbitration in public sector labor disputes); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-835, COLLECTIVE BARGAINING RIGHTS: INFORMATION ON THE NUMBER OF WORKERS WITH AND WITHOUT BARGAINING RIGHTS 10 (2002) (same).[6]

Amici and other Indian Tribes also recognize "that government employees provide essential services to their communities and that labor strikes could inflict unique harms in those communities." 32 MASHANTUCKET PEQUOT TRIBAL LAW ("M.P.T.L.") ch. 1 § 2(d).[7] For example, *amicus* Jamestown S'Klallam's tribal code prohibits both employee strikes and employer lockouts. 3 JAMESTOWN S'KLALLAM TRIBAL CODE § 3.03.07(F) (employee strikes prohibited); *id.* at § 3.03.09(A)(1); (employer lockouts prohibited); *id.* at §§ 3.03.12(A), (B) (enforcement of prohibitions).[8] As an alternative, the Jamestown S'Klallam Labor Code provides for mediation followed by binding arbitration (or binding arbitration without any prior mediation attempt, if the parties agree) with limited Tribal Court and Tribal Council review. 3 JAMESTOWN S'KLALLAM TRIBAL CODE § 3.03.11.

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[6] By contrast, interest arbitration is not a mandatory subject of collective bargaining for private employers under the NLRA. *See NLRB v. Mass. Nurses Ass'n*, 557 F.2d 894, 898 (1st Cir. 1977).

[7] The Mashantucket Pequot Tribal Laws are available online at http://www.mptnlaw.com/TribalLaws.htm.

[8] The Jamestown S'Klallam Tribal Code is available online at www.jamestowntribe.org/govdocs/gov_code.htm.

Similarly, the Mashantucket Pequot Tribal Nation, a USET member Tribe, strictly prohibits strikes by tribal employees and lockouts by tribal employers. 32 M.P.T.L. ch. 1 § 11. However, a mediation panel appointed by the Tribal Peacemaker Council can be requested, or a single mediator selected by agreement of the parties, at any time to facilitate in collective bargaining negotiations. *Id.* at §§ 10(a), (b). If the parties reach an impasse, either party may file a petition with the Mashantucket Pequot Employment Rights Office ("MERO") and the dispute may be resolved by a MERO Board or referred to the Tribal Court under specified procedures. *Id.* at § 10(c).[9] These procedures have been used successfully to resolve labor disputes while preserving the integrity of tribal law and governing authority. *See, e.g., United Food & Commercial Workers Local 371 v. Mashantucket Pequot Gaming Enter.*, Case No. IR-2012-002 (2013) (Scheinman, Brown, Appel, Arbs.).[10]

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[9] *Amicus* Pala Band of Mission Indians also has a binding dispute resolution mechanism as part of its Tribal Labor Relations Ordinance (an ordinance bargained for and agreed to between the tribal government and the State of California as part of the Band's tribal-state gaming compact). The Tribal Labor Relations Ordinance is located at Addendum B to the Pala Band gaming compact, and is available at: http://www.indianaffairs.gov/cs/groups/xoig/documents/text/idc1-026588.pdf (beginning at page 57). Substantially identical to the ordinances of other gaming Tribes in California, the Band's ordinance provides that if a designated tribal forum does not resolve a labor dispute, one to three arbitrators from a ten-person pool of individuals with federal labor and Indian law experience (called the "Tribal Labor Panel") will arbitrate labor disputes. Pala Band of Mission Indians Tribal Labor Relations Ordinance § 13.

[10] *Available at* http://ufcw371.org/sites/ufcw371.org/files/doc121113.pdf.

Several *amici* Tribes and USET member Tribes have adopted similar provisions that effectively balance the Tribes' non-negotiable need for stability in governmental operations against the rights of tribal governmental employees to enforce fair labor practices.[11] If the NLRA is broadly extended to Tribes, as the Sixth Circuit has ruled, these tribal law provisions would be unlawful and the viability of tribal governmental programs would be put at risk.

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[11] *E.g.*, 95 EASTERN BAND OF CHEROKEE INDIANS TRIBAL CODE art. IV § 95-41 (prohibiting strikes by employees of the Tribe or any agency, enterprise, entity, unit, or instrumentality of the Tribe) (the Eastern Band of Cherokee Indians' Tribal Code is available online at https://www.municode.com/library/nc/cherokee_indians_eastern_band/codes/code_of_ordinances?nodeId=PTIICOOR_CH95WAEMRI); 4 MOHEGAN TRIBE OF INDIANS CODE art. XI §§ 4-407(6), 4-409(2)(j) (employee strikes prohibited); *id.* at § 4-410 (special master process and tribal court appeal for complaints of fair labor practice violations) (the Mohegan Tribe's laws are available online at https://www.municode.com/library/tribes_and_tribal_nations/mohegan_tribe/codes/code_of_laws?nodeId=PTIIMOTRINCO_CH4EM). Some *amici* Tribes and USET member Tribes have adopted laws as part of tribal-state gaming compact negotiations under the Indian Gaming Regulatory Act that limit the right to strike to instances of a collective bargaining impasse lasting more than 60 days. Pala Band of Mission Indians Tribal Labor Relations Ordinance § 11; Mashpee Wampanoag Tribal Labor Relations Ordinance § 11 (Appendix C to the Tribe's gaming compact, available at http://mass gaming.com/wp-content /uploads/Tribal-State-Compact-Signed-3-19-13.pdf (beginning on page 66)). These ordinances are referenced or incorporated into the Tribes' compacts, which were approved (in the case of the Pala Band) or deemed approved (in the case of Mashpee) by the Secretary of the Interior. *See* 65 Fed. Reg. 31,189 (May 16, 2000) (approving Pala Band's compact with ordinance); 79 Fed. Reg. 6213 (Feb. 3, 2014) (Mashpee Wampanoag compact deemed approved to the extent consistent with IGRA (25 U.S.C. § 2710(d)(8)(C))).

B. Like most States, many Tribes have enacted "right-to-work" laws to protect employee freedom of choice and combat discrimination.

The NLRA allows a union and an employer to enter into union security agreements requiring an employee to join the union within thirty days of employment, 29 U.S.C. § 158(a)(3), unless such agreements are prohibited by "State or territorial law." *See* 29 U.S.C. § 164(b). Twenty-six state governments have acted to prohibit union security agreements through "right-to-work" laws.[12]

Many Tribes likewise adopt "right-to-work" laws that include non-discrimination clauses protecting the rights of workers on tribal lands to be free from discrimination based on union participation. For example, *amicus* Jamestown S'Klallam Tribe's Labor Code prohibits employers from inhibiting employee choice on unions, 3 JAMESTOWN S'KLALLAM TRIBAL CODE § 3.03.07(A)(2), and both employers and unions are prohibited from "discriminating against any Employee with regard to Labor Organization membership." *Id.* at § 3.03.09(B)(3); *see also id.* at § 3.03.09(A)(3). The substantive provisions of the right-to-work law at Jamestown S'Klallam Tribe are nearly identical to those passed by several States. *See, e.g.*, OKLA. CONST. art. 23, § 1A(B); WIS. STAT. § 111.04(3) (2016); MICH. COMP. LAWS § 423.14 (2016).

USET member Mohegan Tribe, among others, has enacted a similar right-to-work ordinance that prohibits any requirement that an employee on the

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[12] *See* Right to Work States, National Right to Work Legal Defense Foundation, http://www.nrtw.org/rtws.htm (last visited Mar. 13, 2016).

Mohegan Reservation pay union dues, be a member of a union, or resign or refrain from union membership, 4 MOHEGAN TRIBE OF INDIANS CODE art. VI § 4-142, as well as a labor ordinance that prohibits discrimination on the basis of, among other things, labor organization membership. *Id.* at art. XI § 4-409(2)(c).[13]

As an exercise of tribal governmental power, a tribal government may adopt freedom of choice and nondiscrimination as its public policy. This policy protects tribal citizens against coercion or discrimination; increases the economic opportunities available to tribal members and their families, particularly in areas where unemployment is high or where the tribal government is the largest employer; and preserves the tribal government's right and ability to hire qualified applicants to carry out its governmental functions and comply with tribal or Indian employment preference laws. In *NLRB v. Pueblo of San Juan*, the Tenth Circuit correctly held that it is within the scope of a Tribe's retained inherent sovereignty to regulate economic activity within its own territory, and thus to

[13] *See also*, ABSENTEE SHAWNEE TRIBE OF OKLAHOMA RIGHT TO WORK LAW § 2 (prohibiting, as condition of employment, any requirement to resign or refrain from membership in, or become or remain a member of, a labor organization), *available at* http://www.narf.org/nill/codes/absentee-shawnee/righttw.html; 95 EASTERN BAND OF CHEROKEE INDIANS CODE art. III §§ 95-30, 95-32 (stating that tribal policy is to allow workers free choice in employment and union participation and guaranteeing freedom from discrimination based on union membership); 32 M.P.T.L. ch. 1 § 5 (providing freedom of choice for union participation); Mashpee Wampanoag Tribal Labor Relations Ordinance § 4 (similar); 33 POARCH BAND OF CREEK INDIANS CODE ch. VIII §§ 33-7-1 to 33-7-5 (similar). The Poarch Band of Creek Indians Tribal Code is available at https://www.municode.com/library/tribes_and_tribal_nations/poarch_band_of_creek_indians/codes/code_of_ordinances.

make these determinations regarding the regulation of union security agreements unless Congress clearly and unambiguously provides otherwise. *Pueblo of San Juan*, 276 F.3d at 1192-93, 1194-95. The Sixth Circuit's decision below, however, expressly rejected the Tenth Circuit's reasoning in *Pueblo of San Juan*, wrongly concluding that presumptive application of the NLRA to Tribes in the absence of any indication of congressional intent would not infringe on tribal rights of self-government. Pet. at 21a.

C. Consistent with federal law, tribal labor laws provide for Indian preference in employment and shield the terms of those preferences from collective bargaining.

Though many of the governmental concerns reflected in tribal labor laws are shared in common with state and federal governments, tribal governments also contend with a variety of concerns that are unique to Indian Tribes. One such concern is the enforcement of tribal employment preference laws.

Though unique, tribal (and Indian) preference is well-founded in federal law. Congress provided for Indian preference as early as 1834, stating that in the appointment of those employed by the United States for the benefit of the Indians, "a preference shall be given to persons of Indian descent[.]" Act of June 30, 1834 § 9, 25 U.S.C. § 45. The purpose of that federal preference was that, in carrying out its trust responsibility on behalf of Tribes, the government seeks "to give Indians a greater participation in their own self-government . . . and to reduce the negative effect of having non-Indians administer matters that

affect Indian tribal life." *Morton v. Mancari*, 417 U.S. 535, 541-42 (1974) (citations omitted).

Congress has consistently sustained this federal policy, for example, by instituting Indian hiring preferences in the Bureau of Indian Affairs and Indian Health Service, 25 U.S.C. § 472a; by excluding Indian Tribes from the definition of "employer" under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(b); by authorizing employers on or near reservations to grant preference in hiring to Indians, 42 U.S.C. § 2000e-2(i); by requiring Indian preference in connection with federal contracts and grants to Tribes and tribal organizations, 25 U.S.C. § 450e(b); and by requiring compliance with tribal employment preferences with respect to any contract under the Indian Self-Determination and Education Assistance Act. 25 U.S.C. § 450e(c). *See also, FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1314-15 (9th Cir. 1990), cert. denied 499 U.S. 943 (1991) (upholding application of a tribal employment preference law to non-Indian owned company located on a reservation). The Department of the Interior has approved tribal preference provisions in mineral leases on Indian lands, *EEOC v. Peabody W. Coal Co.*, 773 F.3d 977, 988 (9th Cir. 2014) (holding that tribal preference does not constitute discrimination based on national origin in violation of Title VII), and in tribal-state gaming compacts. *E.g.*, Gaming Compact Between the Seminole Tribe of Florida and the State of Florida, Part XVIII(G) (2010).[14]

Many Tribes have adopted comprehensive tribal laws governing employment, hiring, and contracting

[14] The Seminole Compact is available at http://www.indianaffairs.gov/cs/groups/xoig/documents/text/idc1-026001.pdf.

preferences, commonly called Tribal Employment Rights Ordinances (TEROs). The underlying interest of the Tribe in enacting the tribal preference is largely the same as the federal government's: a Tribe's own people must be involved in the Tribe's self-governance, including employment in enterprises that sustain the tribal polity. It is also the Tribe's governmental responsibility to ensure that opportunities for economic advancement are available to tribal citizens and their families residing or working on tribal lands, particularly in light of the high unemployment rates on and near Indian reservations and historic employment discrimination against Indians.[15]

In order to maintain the integrity of tribal employment preference laws, tribal labor laws often expressly require union compliance. For example, a TERO enacted by *amici* Cheyenne and Arapaho Tribes not only requires employers to grant preference to qualified members of federally recognized Indian Tribes residing on tribal lands "in hiring, promotion, training, pay, benefits, and other terms and conditions of employment[,]" but it also requires every union with a collective bargaining agreement to certify that it will comply with the tribal preference ordinance and give preference to Indians in job referrals. Cheyenne and Arapaho Tribal Employment Rights Ordinance No. 5199002 §§ 6(c)-(e) (July 28, 1995).[16] The stated

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[15] *See Unemployment on Indian Reservations at 50 Percent: The Urgent Need to Create Jobs in Indian Country: Hearing Before the S. Comm. On Indian Affairs*, 111th Cong. (2010) (S. Hrg. 111-580).

[16] *See also*, ABSENTEE SHAWNEE TRIBE EMPLOYMENT RIGHTS ACT § 115 (similar requirements placed on unions), *available at* http://www.narf.org/nill/codes/absentee-shawnee/employment_rights.html.

purpose of the tribal preference ordinance is "to assist [in] and require the fair employment of Indians and to prevent discrimination against Indians in the employment practices of employers who are doing business with the Cheyenne & Arapaho Tribes of Oklahoma on tribal lands." *Id.* at § 3(a).

The TERO adopted by the Mashpee Wampanoag Tribe (a USET member Tribe) also requires that covered employers (including the Tribe and tribal entities) give preference in employment to tribal members, then to other Native Americans. Mashpee Wampanoag Tribe Tribal Employment Rights Ordinance, 2012-ORD-001, § 6 (as amended, March 19, 2014).[17] The Mashpee Tribe's Tribal Labor Relations Ordinance, adopted pursuant to tribal law and as provided in the Tribe's tribal-state gaming compact with Massachusetts, specifically protects the Tribe's right to enforce those tribal employment preference laws. Mashpee Wampanoag Tribe Tribal Labor Relations Ordinance, § 9. Similarly, the Mohegan Labor Relations Ordinance protects the Mohegan Tribe's ability to carry out its TERO and employment preference laws by specifying that an employer is not required or permitted to engage in collective bargaining concerning requirements imposed on the employer under the TERO. 4 MOHEGAN TRIBE OF INDIANS CODE art. XI § 4-408(2)(b).[18]

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[17] The Mashpee Wampanoag TERO is available at http://www.mashpeewampanoagtribe.com/content/pages/83/TRIBAL-EMPLOYMENT-RIGHTS-ORDINANCE-TERO-6.29.15.pdf.

[18] *See also*, 32 M.P.T.L. ch. 1 § 9(c) (same); 3 JAMESTOWN S'KLALLAM TRIBAL CODE, § 3.03.08(B)(2) ("Any policies of an Employer or laws of the Tribe, giving preferences to citizens of the Tribe or other Native Americans with respect to hiring, promotion, or retention of employment with an Employer shall

Application of the NLRA to Tribes would threaten tribal preference policies and the economic and political security they help maintain by invalidating tribal laws, like those of *amici* Tribes and USET member Tribes above, that shield the terms of these preferences from bargaining in labor negotiations. *See* 29 U.S.C. § 158(d) (obligation to bargain collectively with respect to terms and conditions of employment). As a result, tribal self-government interests that have been explicitly acknowledged and encouraged under federal law would be up for negotiation. The Sixth Circuit's conclusion that tribal self-government is not infringed by application of the NLRA to Tribes is refuted by this absurd result.

D. Tribal labor laws recognize and protect the inherent tribal power of exclusion.

A core power of tribal governments, recognized and enshrined in federal treaties, laws, and court decisions, is the right to exclude persons from tribal territory. *Mescalero Apache Tribe*, 462 U.S. at 333 ("A tribe's power to exclude nonmembers entirely or to condition their presence on the reservation is . . . well established."); *see also Montana v. United States*, 450 U.S. 544 (1981). This power flows from Tribes' inherent sovereignty and includes the derivative power to regulate conduct as a condition of entry or presence in tribal territory. *Merrion*, 455 U.S. at 144.

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not be subject to collective bargaining."); 95 EASTERN BAND OF CHEROKEE INDIANS TRIBAL CODE art. II § 95-14 (requiring unions to comply with Indian preference laws and regulations); *see also id.* at § 95-11 (discussing public policy underlying employment preference).

Amici Tribes and USET member Tribes have exercised this fundamental power to exclude in conjunction with tribal labor laws. The Mashantucket Pequot Tribe's code specifically cites the Tribe's powers to exclude persons from the reservation or from employment if they violate the law. 32 M.P.T.L. ch. 1 § 1 ("[T]he Tribe has the inherent authority to exclude persons from the Reservation and to place conditions on entry and continued presence on the Reservation, and to govern conduct within the Reservation."); *see also* 3 M.P.T.L. ch. 3 § 6 (sanctions for violation of gaming laws includes exclusion from the reservation).[19] The Mohegan Tribal Code explicitly states that labor organizations and their agents' failure to comply with tribal licensing and registration laws may, among other penalties, result in exclusion from the Reservation. 4 MOHEGAN TRIBE OF INDIANS CODE art. XI §§ 4-403(6)(c), 4-404(4). Tribes also delineate these powers in more general laws, such as standalone code provisions, *see* POARCH BAND OF CREEK INDIANS CODE tit. 24 (Removal and Exclusion), or through foundational documents like tribal Constitutions, *see* CONST. OF THE JAMESTOWN S'KLALLAM TRIBE art. VII, § 1(h) (enumerating a power of the tribal governing body to "prescribe conditions upon which non-citizens may remain within the territory of the Tribe.").

Tribes' exclusion authority (and the concomitant power to regulate the conditions of entry) would be diminished if the NLRA applied to Tribes. For example, while this Court has said that employers may bar nonemployees from an employers' *private property* for union solicitation, *Lechmere Inc. v. NLRB*,

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[19] The Eastern Band of Cherokee Indians has adopted a similar provision in its labor code. 95 EASTERN BAND OF CHEROKEE INDIANS TRIBAL CODE art. III § 95-30.

502 U.S. 527 (1992), the NLRB has ruled that employers may not bar off-duty employees from solicitation on employer property unless the exclusion rule is limited only to the interior of a facility. *Marina Del Rey Hospital*, 363 NLRB No. 22, 2015 WL 6429400, at *2 (Oct. 22, 2015) (citing *Tri-County Medical Center*, 222 NLRB 1089 (1976)). Under either of these rules, it is not clear whether a tribal government could fully exercise its right to exclude individuals from its sovereign territory and remain in compliance. Further, courts have ruled that access to an employer's premises is a mandatory subject of bargaining under the NLRA. *See, e.g., NLRB v. Unbelievable, Inc.*, 71 F.3d 1434, 1438 (9th Cir. 1995). Again, then, application of the NLRA would likely create the anomalous situation where a core sovereign power of Tribes is suddenly on the table for union negotiations.

II. That this case involves labor relations at a tribal gaming enterprise does not lessen the broad impact of the Sixth Circuit's ruling on Tribes or tribal self-government interests.

This case has broad implications for gaming and non-gaming Tribes and for the operation of *all* tribal programs throughout the country. First, both the NLRB and the Sixth Circuit erred in concluding that the NLRB has jurisdiction in this case because it involves Petitioner's gaming operation—"a typical commercial enterprise" in the words of the NLRB—as opposed to a "governmental function." *See* Pet. at 71a. As Petitioner notes, Pet. at 25, the conduct of gaming under the Indian Gaming Regulatory Act is a sovereign activity, and gaming Tribes use their revenues for the operation of tribal governments and the provision

of tribal services, as is required under the IGRA. 25 U.S.C. § 2710(b)(2)(B).[20]

Just as the Petitioner's gaming revenues provide "over fifty percent of [Petitioner's] total budget," Pet. at 3a, *amici* Tribes and USET member Tribes with gaming operations depend upon gaming revenues to provide funding for their government and public programs.[21] *See, e.g.*, 32 M.P.T.L. ch. 1 § 2(h) (finding of the Mashantucket Pequot Tribal Council that: "As provided by the Indian Gaming Regulatory Act, the Tribe's gaming operation funds the tribal government including various governmental services such as police, fire, utilities, education, the judicial system, environmental, health, social services and parks and recreational facilities."). As the Assistant Secretary for Indian Affairs has testified:

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[20] Moreover, Tribes are not alone in categorizing employees of certain revenue-generating enterprises as governmental for purposes of public sector labor laws. The government exception in the NLRA applies to "any wholly owned Government corporation," 29 U.S.C. § 152(2), and States sometimes extend their governmental labor provisions to similar entities. *See, e.g.*, MASS. GEN. LAWS ch. 150E, § 1 (2016) (state labor laws cover employees of state lottery commission); Collective Bargaining Agreement between the State of New Hampshire and the Service Emps. Int'l Union Local 1984 at 6, 79 (2015-2017) (including employees of State Lottery Commission in agreement), *available at* http://www.seiu1984.org/files/2016/01/2015-2017-Union-Handbook-inside_4th_FX.pdf; Collective Bargaining Agreement between the State of Washington and Am. Fed'n of State, Cnty., & Mun. Emps. Council 28 at 2, 4, A-3 (2015-2017) (same), *available at* http://www.ofm.wa.gov/labor/agreements/15-17/wfse_gg.pdf.

[21] This is in large part because Tribes usually lack the means to support governmental operations through taxation and other traditional means. *See Bay Mills Indian Cmty.*, 134 S. Ct. at 2043-44 (Sotomayor, J., concurring).

> Gaming revenues eclipse, by a large measure, all federal appropriations for Indian tribes. Gaming revenues are devoted to every aspect of tribal communities–from housing to elder care to language revitalization and job training. ... [T]he profits from Indian gaming are used primarily to improve the welfare of Indian people.

Indian Gaming: The Next 25 Years: Hearing Before the S. Comm. on Indian Affairs, 113th Cong. 16 (2014) (statement of Kevin W. Washburn, Assistant Secretary Indian Affairs). Given the reality of Tribes' use of gaming revenues to fund their governmental programs, Tribes simply cannot *afford* to allow casino employees the same rights accorded private employees. This especially includes the right to strike, for much the same reason that the federal government could not afford to permit a strike by employees of the Internal Revenue Service.

Second, while the case before the Court involves a gaming operation, the NLRB's position regarding the application of the NLRA to Tribes is not limited to tribal gaming operations. The NLRB's position is that the NLRA "generally extends to Indian tribes and tribal enterprises," Pet. at 69a, and that it will decline in its discretion and as a *policy* matter to exercise its jurisdiction over Tribes when they are acting "in the particularized sphere of traditional tribal or governmental functions." Pet. at 70a. This standard, however, is unworkable. It ignores the fact that tribal governments operate a wide range of programs, services, and revenue-generating enterprises *in their governmental capacity*, much like state and municipal governments and often under the auspices of federal law, such as the Indian Self-Determination Act,

25 U.S.C. § 450 *et seq.*, and the Indian Gaming Regulatory Act, 25 U.S.C. § 2710 *et seq.*

Further, the NLRB's approach leaves the decision of whether and when to apply the NLRA to Tribes under this flawed standard to the discretion of an ever-changing body composed of political appointees with no experience in Indian law and policy. As the Sixth Circuit noted in denying deference to the NLRB's position, "federal Indian law and policy are areas over which the Board has no particular expertise." Pet. at 9a. Historical experience shows that the NLRB cannot be counted upon to apply its own standard consistently and with due regard for tribal sovereignty. *Compare Yukon Kuskokwim Health Corp.*, 341 NLRB 1075 (2004) (NLRB determined after years of litigation that health clinic operated by a tribal organization was an "employer" covered by the NLRA, but declined jurisdiction on discretionary grounds), *with NLRB v. Chapa-De Indian Health Program*, 316 F.3d 995, 1001-02 (9th Cir. 2003) (upholding NLRB's subpoena against a different tribal organization, stating: "While *Yukon–Kuskokwim* may offer encouragement to Chapa–De about its prospects for success before the [NLRB] on its claim to a § 2(2) [governmental] exemption . . . it does not show that [NLRB] jurisdiction is plainly lacking.").

A denial of certiorari will not only leave tribal casinos within the Sixth Circuit subject to NLRB jurisdiction, but would also subject tribal programs throughout the country to NLRB review to decide whether or not to assert jurisdiction. The result would be an unprecedented (and in each individual case, unpredictable) incursion on tribal self-government by a federal regulatory agency with no expertise in and

little practical experience with federal Indian law and policy.

CONCLUSION

The Sixth Circuit's departure from the Tenth Circuit's and this Court's clear legislative intent requirement for infringements on tribal sovereignty warrants this Court's review to remedy the circuit split and the consequences it will create for Indian Tribes. The Petition should be granted.

Respectfully submitted,

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