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Nos. 15-1024 and 15-1084

In the Supreme Court of the United States

LITTLE RIVER BAND OF OTTAWA INDIANS TRIBAL GOVERNMENT, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

SOARING EAGLE CASINO AND RESORT, AN ENTERPRISE OF THE SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICUS CURIAE* STATE OF MICHIGAN IN SUPPORT OF PETITIONERS

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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 tribal government employees working on tribal trust lands.

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INTEREST OF *AMICUS CURIAE*

The State of Michigan is the home of twelve federally recognized Indian tribes, including the Little River Band of Ottawa Indians and the Saginaw Chippewa Indian Tribe. As their petitions explain, these two tribes seek to vindicate their sovereign authority to establish rules governing employees at the casinos they operate on tribal land.

The economic security and vitality of all twelve of the Indian tribes is a critical interest to Michigan. The State is home to more than 130,000 Native Americans, thousands of whom live on tribal lands throughout Michigan. And the commercial gaming industry plays a significant role in providing economic security for the tribes. The State recognizes the unique role this industry plays for the economic welfare and independence of the tribes.

The State also has an interest in protecting its own authority to negotiate with tribes about particular subjects under the compact system governed by the Indian Gaming Regulatory Act. This Act provides that the State may negotiate civil, criminal, and regulatory limitations on gaming on Indian lands through a compact with the tribe. Broad interpretations of federal law, including the National Labor Relations Act, would displace this state authority. Further, the State has an interest in enforcing existing limitations on the authority of federal agencies, such as the National Labor Relations Board.[1]

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[1] Under Rule 37.2, the State of Michigan provided notice to the parties at least ten days prior to this filing of its intention to file.

INTRODUCTION AND SUMMARY OF ARGUMENT

The gaming industry now plays a unique role in the tribal community. This is true for both the tribe's sovereignty and the tribe's relationship to the State and federal government with regard to gaming.

It is unique for the tribe's sovereignty, because it has become an important source of revenue for the tribes, and the industry comprises the majority of tribal employees. All of the twelve tribes in Michigan operate casinos on tribal lands.

It also serves as a juncture of tribal, state, and federal sovereignty in the area of gaming. Each government plays a role in the regulation of this industry. Congress recognized the central importance of state regulation in IGRA. Under IGRA's provisions for casino (Class III) gaming, the State has established compacts with the Michigan tribes, creating certain limitations on the tribes' relationships to their employees.

The issue here arises from the National Labor Relations Act, first passed in 1935, which governs the labor practices of "employers" defined as excluding the United States and the States. The Act is silent with respect to the Indian tribes.

The courts below have fissured into three approaches on how to interpret such congressional silence. In the first, the Ninth Circuit in *Donovan* v. *Coeur d'Alene,* 751 F.2d 1113, 1115 (9th Cir. 1985), held that a general statute applies to Indian tribes unless expressly excluded. The decision relied on language from this Court's decision in *FPC* v. *Tuscarora*

Indian Nation, 362 U.S. 99, 116 (1960). In the second, the Tenth Circuit took the opposite view in *National Labor Relations Board* v. *Pueblo of San Juan,* 276 F.3d 1186, 1196 (10th Cir. 2002) (en banc), holding that "the correct presumption is that silence does not work a divestiture of tribal power," and thus establishing that a general statute does *not* apply to tribes unless there is a clear statement expressly including them. In the third, noting that the issue involves "conflicting Supreme Court canons of interpretation" and also "out-of-circuit precedent [that] is inconsistent as to the applicability of general federal laws to Indian tribes," the D.C. Circuit in *San Manuel Indian Bingo & Casino* v. *National Labor Relations Board,* 475 F.3d 1306, 1311, 1313 (D.C. Cir. 2007), navigated between these poles. The D.C. Circuit concluded that whether the presumption should attach depends on "the extent to which application of the general law will constrain the tribe with respect to its governmental functions." Under this approach, if the statute would constrain the tribe, then a "clear expression" of congressional intent that it applies to the Indian tribes is necessary, but if the statute did not constrain the tribe's governmental functions, then the statute may apply without any clear statement applying it to tribes. *Id.*

In Case Nos. 15-1024 and 15-1034, the Sixth Circuit has elected to follow the *Tuscarora-Coeur d'Alene* presumption that statutes of general applicability extend to tribes, even though the dissent from Judge McKeague and the second opinion from the Circuit would have adopted the Tenth Circuit's clear-statement rule. In the face of this split, this Court should grant the petitions and provide a resolution.

The IGRA creates an interplay between the State and the tribes by conditioning the tribes' permission to conduct gaming on the establishment of a compact with the State. Consistent with their compacts with Michigan, the tribes may regulate the activities of these employees and may protect their economic security, both earmarks of their inherent sovereign authority under *Montana* v. *United States,* 450 U.S. 544 (1981). And leaving this regulation to be worked out between the tribes and the State respects the sovereignty of both, just as Congress intended.

Further, regardless of what presumption courts should apply to ambiguous statutes, there is no reason to think that Congress intended to delegate the decision of whether to abrogate tribal immunity to an agency. This case thus also raises significant issues of agency authority, and offers this Court the chance to make clear that agencies should not assume that Congress has delegated authority to them over such significant questions as tribal sovereignty.

STATEMENT OF THE CASE

In its current state, the law is a patchwork of different, competing rules. In the Ninth Circuit, there is a presumption that general statutes apply to Indian tribes. In the Tenth Circuit, the presumption is reversed—that general statutes do not apply unless Indian tribes are expressly mentioned. And in the D.C. Circuit, a middle position governs. The Sixth Circuit has expanded the quilt by adopting the first approach.

A. The circuits are divided three ways on how to interpret congressional silence about tribes in statutes of general applicability.

1. Several circuits presume that generally applicable statutes apply to tribes.

In *Tuscarora,* this Court stated that "a general statute in terms applying to all persons includes Indians and their property interests." 362 U.S. at 116. Relying on this statement, the Ninth Circuit in *Coeur d'Alene* addressed whether the standards within the Occupational Safety and Health Act (OSHA) applied to Indian tribal farms and held they did. The Ninth Circuit held that the presumption that federal laws applied equally to Indians governed subject to three exceptions: (1) the law touches on exclusive rights of self-governance in purely intramural matters; (2) the application of the law would abrogate rights protected by treaty; and (3) there is proof by legislative history or other means that Congress did not intend the law to apply to Indians. *Coeur d'Alene,* 751 F.2d at 1116.

Other federal appellate courts have applied this approach to federal laws of general applicability, like the American Disabilities Act. See, e.g., *Florida Paraplegic Ass'n* v. *Miccosukee Tribe of Indians,* 166 F.3d 1126, 1129 (11th Cir. 1999). And the Ninth Circuit applied this test in finding as a preliminary matter that the NLRB did not lack jurisdiction over a tribal organization. *NLRB* v. *Chapa De Indian Health Program,* 316 F.3d 995, 999–1002 (9th Cir. 2003).

2. The Tenth Circuit requires a clear statement that a generally applicable statute applies to tribes.

In face of the *Tuscarora* approach, the Tenth Circuit rejected the contention that *Tuscarora* applied to a question of Indian sovereign authority, reasoning that in *Tuscarora* this Court was examining only the issue of property rights. *Pueblo of San Juan,* 276 F.3d at 1198–99. Instead, the Tenth Circuit ruled that *Tuscarora* cannot be applied to divest a "tribe of its sovereign authority without clear indications of such congressional intent," which were not present in the NLRA. *Id.* at 1199.

3. The D.C. Circuit rejects either bright line and applies a middle approach.

Noting the two competing interpretive approaches to whether laws of general applicability, like the NLRA, apply to Indian tribes, the D.C. Circuit examined the difference between "a purely intramural act of reservation governance" and "an off-reservation commercial enterprise." *San Manuel Indian Bingo & Casino,* 475 F.3d at 442. In creating a third approach, the circuit established a legal framework that examined whether the law "constrain[ed]" the tribe's governmental functions:

> The determinative consideration appears to be the extent to which application of the general law will constrain the tribe with respect to its governmental functions. If such constraint will occur, then tribal sovereignty is at risk and a clear expression of Congressional intent is necessary. Conversely, if the general

> 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 on tribal sovereignty. [*Id.*]

With respect to the NLRA, the D.C. Circuit held that the total impact on tribal sovereignty was "probably modest" as it was "secondary" to the commercial undertaking. *Id.* at 443–44. Thus, it found the NLRA applied to the tribe.

B. The Sixth Circuit extended the split by adopting the presumption that generally applicable statutes apply to tribes.

The Sixth Circuit issued two decisions on the applicability of the NLRA to tribal casinos operated on Indian lands. In the first (No. 15-1024), the Sixth Circuit in a 2-to-1 decision adopted the *Tuscarora-Coeur d'Alene* approach, determining that a "comprehensive regulatory scheme presumptively applies to Indian tribes." 15-1024 Pet. App. 16a. In dissent, Judge McKeague disagreed, reasoning that the "analysis employed by the Tenth Circuit in *Pueblo of San Juan* is true to the governing law and should be adopted in the Sixth Circuit as well." *Id.* 43a–44a.

In the second (No. 15-1034), the Sixth Circuit was bound to follow the prior decision. 15-1034 Pet. App. 25a–26a. Nonetheless, all three judges indicated that "absent a clear statement by Congress, to determine whether a tribe has the inherent authority necessary to prevent application of a federal statute to tribal activity, we apply the analysis set forth in *Montana*." *Id.* 34a. This test would first examine whether "Congress

has demonstrated a clear intent" for a general statute to apply, and, if not, then it would consider whether the law "impinges on the Tribe's control over its own members and its own activities." *Id.* 35a. If the question were still open in the Sixth Circuit, the second panel would have found that the NLRA impinges on tribal sovereignty by inhibiting the tribe's sovereign authority to govern this commercial relationship between the tribe and nonmembers. *Id.* 42a.

ARGUMENT

I. The Indian Gaming Regulatory Act enables the States to regulate tribal gaming on tribal lands through a negotiated compact.

The State of Michigan has an interest in fostering comity between the State and the sovereign tribal communities in Michigan. The gaming industry is now one of the critical features of tribal independence because it has become an important source of revenue for the Michigan tribes. IGRA provides the legal structure for navigating the authority of the State and the tribes for gaming that occurs on Indian lands, and of preserving the authority of each. While the State has not to date limited the ability of the tribes to enact the labor policies at issue here, it retains the authority to condition its compact negotiations for gaming on the tribes' acceptance of labor rules.

A. IGRA was passed in response to this Court's decision in *Cabazon* to provide a specific mechanism for regulating issues relating to tribal gaming.

The role for the State in regulating conduct on tribal lands is subject to some limitations. Generally,

the State's laws apply to Indian members on Indian reservations only when Congress expressly provides that they shall apply. *McClanahan* v. *Arizona State Tax Comm'n,* 411 U.S. 164, 170–71 (1973). The State may under certain circumstances exercise authority over nonmembers on reservations, and even under exceptional circumstances may exercise "jurisdiction over the on-reservation activities of tribal members." *New Mexico* v. *Mescalero Apache Tribe,* 462 U.S. 324, 331–32 (1983). The collection of state tobacco taxes serves as one of the prime examples. See, e.g., *Washington* v. *Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134 (1980).

The issue of Indian gaming on tribal lands is a particularly sensitive question because the industry marks the convergence of interests important to both states and tribes. In *California* v. *Cabazon Band of Mission Indians,* this clash resulted in an Indian tribal action against a county government that sought to enforce its local rules against poker and other forms of gambling. 480 U.S. 202, 206 (1987). The State of California intervened seeking to vindicate its regulatory law, which included a ceiling on prizes of $250. *Id.* at 205–206. This Court determined that the state and local laws "impermissibly infringe[d] on tribal government." *Id.* at 222. The congressional response was swift.

IGRA, passed in 1988, just one year after *Cabazon*, expressly declared three purposes: (1) to promote tribal economic development, self-sufficiency, and strong tribal governments; (2) to enable state regulation; and (3) to identify the importance of independent federal regulatory authority over gaming on Indian

lands as necessary for the success of tribal gaming. 25 U.S.C. § 2702. The statute divides gaming into three classifications. 25 U.S.C. § 2703. Class III gaming includes the kinds of activities operated by tribal casinos as here. See *Seminole Tribe of Florida* v. *Florida,* 517 U.S. 44, 48 (1996).

Significantly, class III gaming is lawful only when conducted in conformance with a compact established between the tribe and the state in which it resides. 25 U.S.C. § 2710(d)(1)(C); see also *Michigan* v. *Bay Mills Indian Community,* 134 S. Ct. 2024, 2035 (2014) ("a tribe cannot conduct class III gaming on its lands without a compact"). The Act contemplates that the following provisions may be the subject of the compact:

> (i) 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 such activity;
>
> (ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;
>
> (iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;
>
> (iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;
>
> (v) remedies for breach of contract;

> (vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and
>
> (vii) any other subjects that are directly related to the operation of gaming activities. [25 U.S.C. § 2710(d)(3)(C).]

The federal courts have recognized that the seventh provision may include labor-relations issues. See, e.g., *In re Indian Gaming Related Cases,* 331 F.3d 1094, 1115–16 (9th Cir. 2003) ("We hold that the [labor relations] provision falls within the scope of § 2710(d)(3)(C)(vii).").

The compact process is initiated by the tribe in which it requests the state to negotiate with it for the purpose of entering into a "compact governing the conduct of gaming activities." 25 U.S.C. § 2710(d)(3). The State has a duty to negotiate in good faith, which the statute sought to make enforceable under §§ 2710(d)(7)(A)(i) and (B)(i), but the States continue to enjoy their immunity from suit in federal court under the Eleventh Amendment absent a waiver. *Seminole Tribe of Florida,* 517 U.S. at 50, 72. The compact becomes effective when it is approved by the Secretary of the Interior and published in the federal register. 25 U.S.C. § 2710(d)(3)(B). The Act provides the Secretary with the authority to approve or disapprove the compact, depending on whether the compact violates IGRA or any other provision of federal law. *Id.*

Given the significance of compacts to the regulation of gaming, Michigan has an interest in retaining its authority to negotiate on labor-relations issues, an

authority that would be diminished if the NRLA itself applies.

B. The State of Michigan has established compacts with each of the twelve federally recognized tribes.

All twelve tribes in Michigan have established a compact with the State under IGRA for class III gaming. All the tribes in Michigan operate casinos on Indian lands, some operating more than one.

The two tribes here—the Little River Band and the Saginaw Chippewas—entered into compacts with the State in the 1990s. Each of the compacts follows the same structure, authorizing certain class III gaming activities, while providing separately for certain regulations.

In each, under § 4 of the compact, the State recognizes the tribal gaming regulatory ordinances. See Little River Band Compact, p. 5; Saginaw Chippewa Compact, p. 6. Consistent with § 2710(d)(5), the compact governs over tribal ordinances where it is more "stringent or restrictive." *Id.* The key provisions of this compact provide the following shared elements:

- the tribe shall not hire or employ primary management officials who are under the age of 18, have been convicted of certain criminal offenses, or are determined to have been involved in organized crime;
- the tribe is required to conform its management contracts to § 2711 of IGRA;

- the tribe is to maintain its accounting records on a double-entry system;
- the tribe shall not allow anyone under the age of 18 to participate in the gaming;
- the tribe shall not conduct class III gaming outside of Indian lands;
- the tribe shall post certain information in each card room; and
- the tribe shall provide information on its employees and others to allow the State to perform its own background investigations.

LRB Compact, pp. 5–7; SC Compact, pp. 6–8. Michigan has other laws governing casino gambling, but these laws do not apply to gaming activities that occur on federally recognized tribal lands. Mich. Comp. Laws § 432.203(2)(d).

The compacts also provide that the tribes shall comply with all "applicable federal law" in their conduct of class III gaming activities. *Id.* The compacts further require the tribes to provide to their employees with unemployment insurance and with worker's compensation benefits equivalent to those under Michigan law. LRB Compact, p. 11, SC Compact, p. 9; see also Mich. Comp. Laws § 421.1 *et seq.*; Mich. Comp. Laws § 481.1 *et seq.* Other states have sought to include state protections for collective bargaining for casino employees in their compacts. See, e.g., *In re Indian Gaming,* 331 F.3d at 1106, 1115–16 (California proposing that the compact include a labor-relations provision that the tribe must establish an agreement or other procedure for addressing organizational and representation rights of casino employees).

C. Gaming is an important source of revenue for the tribes and the State.

As noted earlier, all of the twelve federally recognized tribes in Michigan operate casinos on tribal lands. In fact, there are a total of 23 tribal casinos in Michigan, with the largest tribe, the Sault Ste. Marie Tribe of Chippewa Indians, operating five. The casinos generate significant revenue for the tribes, each tribe yielding annually between $17 million and more than $350 million in revenue from electronic gaming alone (without subtracting payments on winnings). See Michigan Gaming Control Board's 2014 Annual Report, p. 5.[2]

For the two tribes at issue here, the Little River Band generated more than $20 million annually, while the Saginaw Chippewa tribe generated around $250 million from the operations of casinos. 15-1024 Pet. App. 2a; 15-1034 Pet. App. 4a. For tribes with approximately 4,000 members and 3,000 members, this revenue reflects the kinds of revenue one would expect for a small to middle-sized city. This reality is relevant because one of IGRA's stated goals is to create financial independence and security for the tribes. 25 U.S.C. § 2701(3) ("a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government").

This revenue translates into an important source of income for the tribes, funding the services that the tribal governments provide. The revenue for the Little

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[2] This report may be found at the following web address: https://www.michigan.gov/documents/mgcb/2014_Indian_Gaming_Annual_Report_2015-4-9_487210_7.pdf.

River Band from its casino comprises 100% of its budget for its court system, 80% for behavioral health services, 77% for its Department of Family Services, 62% for public safety, see 15-1024 Pet. App. 153a–155a, while the casino revenue comprises 90% of the Saginaw Chippewa's income, see 15-1034 Pet. App. 5a.

The fact that gaming revenue is so important to the tribe's sovereignty and independence is supported by this Court's analysis of the tribe's "inherent sovereign power." This Court has identified two strands related to the exercise of that power via jurisdiction over non-members on Indian lands. *Montana,* 450 U.S. at 565.

In the first, a tribe may "regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationship with the tribe or its members through commercial dealing, contracts leasing, or other arrangements." *Id.*

In the second, a tribe retains the inherent power to exercise civil authority over nonmembers on Indian lands when their conduct "has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* For the second of the two *Montana* exceptions, the conduct must "do more than injure the tribe," it must imperil its subsistence. *Plains Commerce Bank* v. *Long Family Land and Cattle Company, Inc.,* 554 U.S. 316, 341 (2008).

No one can doubt the importance that casino revenue plays for the tribes, which is relevant to their sovereign independence. Cf. *Merrion* v. *Jicarilla Apache Tribe,* 455 U.S. 130, 137 (1982) (examining the

power to tax as an attribute of self-governance and territorial management). While it is clear the revenue from a commercial enterprise like gaming is fundamentally different from a tribal tax, the revenue itself is very important to the tribes because it assists the tribal governments in funding its "essential services." *Id.*

Because of the cooperative arrangement envisioned by IGRA, the State and local governments also receive significant revenue. By compact for all of the tribes, the local governments receive 2% from certain gaming, which netted $29.1 million in 2014, while the State was paid different percentages depending on the terms of the compact, which resulted in $56.9 million in revenue in 2014. Michigan Gaming Control Board's 2014 Annual Report, pp. 4–5.

D. Compacts provide the appropriate mechanism to states and tribes to work together to regulate labor relations.

The NLRA regulates labor matters and prohibits "employers" from engaging in unfair labor practices. 29 U.S.C. § 158(a). The definition of "employers" expressly excludes the United States "or any State or political subdivision thereof." 29 U.S.C. § 152(2). The statute does not expressly reference Indian tribes. Rather, it is silent with respect to them, neither expressly applying to them, nor expressly excluding them. Given this silence, the competing approaches from the lower federal courts will yield different answers to the question of the NLRA's applicability.

The provisions of IGRA resolve the matter here. As noted earlier, the Act designates certain legal issues to be addressed by the compacts between the states and the tribes, including ones that are "directly related" to the "operation of gaming activities." 25 U.S.C. § 2710(d)(3)(C)(vii). The Michigan compacts address workers' compensation and unemployment benefits for tribal casino employees. While the compacts do not address the question of collective bargaining or union representation, the subject of labor relations falls within IGRA's ambit, see *In re Indian Gaming,* 331 F.3d at 1115–16, which means the State has authority to negotiate for labor-relations rules.

As a result, the silence of the compacts on the issue indicates that the issue should be left to be resolved between the states and the tribes. Under IGRA's unique interplay of federal, state, and tribal authority with respect to gaming, the states have a role in regulating gaming through their compacts with the tribes, and applying the NLRA to the tribes would eliminate this opportunity for cooperative agreements between the tribes and states on labor issues. Put simply, the decision of Congress to create this framework under IGRA displaces any obligations under the NLRA. The specific actions at issue here are the Little River Band's fair-employment-practices code, which prohibits strikes among other things, and the Saginaw Chippewa's no-solicitation policy for its casino employees. Allowing Michigan and the tribes in Michigan to address these issues by compact leaves room for both to work together on this industry that is critical for tribes' independence and financial security.

The compact process applicable to gaming also provides a limiting principle. The issue of workers' compensation, unemployment benefits, and collective bargaining are narrower in nature than, for example, the Fair Labor Standards Act, which governs such basic areas as work hours, age requirements, and the minimum wage. See 29 U.S.C. § 201 *et seq.* Federal law generally provides a forest of legal protections for workers, e.g., providing for safety in the work setting. See 29 U.S.C. § 651 *et seq* (Occupational Safety and Health). And this does not begin to address other arenas of law, like environmental ones. But these broad laws stand in contrast to the discrete subjects, such as collective bargaining or rules about strikes or solicitation in labor relations, which fall within the purview of subjects of IGRA that "directly relate" to tribal gaming. 25 U.S.C. § 2710(d)(3)(C)(vii).

IGRA represents "cooperative federalism," balancing the role of the tribes, the states, and federal government. *Pauma Band of Luiseno Mission Indians of Pauma & Yuima Reservation* v. *California,* ___ F.3d ___ (2015), 2015 WL 9245245, *2 ("IGRA is an example of 'cooperative federalism' in that it seeks to balance the competing sovereign interests of the federal government, state governments, and Indian tribes, by giving each a role in the regulatory scheme."). In the circumstance, as here, where the compacts have not limited the tribe's authority to block strikes or prevent solicitation, this Court should not diminish the authority of both the tribes and the states by adopting a rule that would take labor relations off the table for these agreements.

II. Even aside from what rules *courts* should apply, this Court should make clear that *agencies* cannot abrogate tribal immunity without an express delegation of authority from Congress.

Courts have a duty to interpret statutes where necessary to resolve a case or controversy, and in instances like this one, that judicial duty means that courts must resolve ambiguities, instances where Congress, by definition, has not clearly expressed itself. In fulfilling that duty, it may be unavoidable for courts to have to resolve what default rule applies.

But there is no reason to think that Congress wanted to leave a question of this significance—the scope of the sovereignty of the Indian tribes—to an agency, left alone the agency that made the determination here—the National Labor Relations Board.

This Court has repeatedly recognized that the authority federal agencies have to interpret ambiguous statutes does not extend so far as to allow agencies to determine issues of substantial political significance based on ambiguous statutory language. For example, when deciding whether Congress gave the Food & Drug Administration the authority to regulate tobacco, this Court explained that it was "confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000). Similarly, when addressing whether EPA has the authority to regulate greenhouse gases, this Court explained that it "expect[s] Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and

political significance.' " *Util. Air Regulatory Group* v. *EPA*, 134 S. Ct. 2427, 2444 (2014) (quoting *Brown & Williamson*, 529 U.S. at 160. While theories of agency deference are " 'premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps,' " in extraordinary cases " 'there may be reason to hesitate before concluding that Congress intended such an implicit delegation.' " *King* v. *Burwell*, 135 S. Ct. 2480, 2488–89 (2015) (quoting *Brown & Williamson*, 529 U.S. at 159).

This case provides good reason for such hesitation, where the issue to be decided has great political significance—the extent of the sovereignty of Indian tribes—and all agree that Congress has been silent on the issue. In other words, even before this case made its way to court, the National Labor Relations Board should not have assumed it could abrogate tribal sovereignty without an express delegation of authority from Congress. See *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress.").

In short, it is undisputed that *Congress* has the authority to infringe on tribal immunity. E.g., 15-1024 Pet. App. 34a (McKeague, J., dissenting) ("All agree that Congress has plenary authority over Indian affairs and that tribal sovereignty is subject to complete defeasance by Congress."). But it is quite another thing for the National Labor Relations Board to abrogate tribal immunity based on congressional silence. This Court should grant certiorari to reiterate that

federal agencies cannot act beyond the authority expressly given them by Congress.

CONCLUSION

This Court should grant the petitions in both cases.

Respectfully submitted,

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