No. 12-30177

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL BRYANT, JR.,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Montana
Case No. 1:11-cr-00070-JDS-1

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

John Dossett
Virginia Davis
National Congress of American Indians
1516 P Street, NW
Washington, DC 20005
Telephone: 202-466-7767
Fax: 202-466-7797

Joshua M. Segal
Devi M. Rao
Jenner & Block LLP
1099 New York Avenue, NW
Washington, DC 20001
Telephone: 202-639-6000
Fax: 202-639-6066

Counsel for Amicus Curiae National Congress of American Indians

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29(c)(1), Amicus Curiae the National Congress of American Indians hereby states that it is a nonprofit corporation that does not have a parent corporation and is not owned in any part by a publicly held corporation.

/s/ Joshua M. Segal
Joshua M. Segal
Counsel for the National Congress of American Indians

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE

The National Congress of American Indians (NCAI) is the oldest and largest national organization representing Indian tribal governments, with a membership of more than 250 American Indian tribes and Alaska Native villages. NCAI was established in 1944 to protect the rights of Indian tribes and improve the welfare of American Indians. American Indian and Alaska Native women are battered, raped, and stalked at far greater rates than any other population of women in the United States. Since the establishment of the NCAI Task Force on Violence Against Women in 2003, enhancing the safety of Native women has been a critical focus of NCAI's work.

NCAI submits this amicus curiae brief, accompanied by a motion for leave to file the same, pursuant to Federal Rule of Appellate Procedure 29(a) and Circuit Rule 29-2(a).

No party's counsel authored this brief in whole or in part. No person other than NCAI or its counsel contributed money intended to fund preparation or submission of the brief.

INTRODUCTION

Amicus curiae the National Congress of American Indians respectfully requests that this Court grant rehearing en banc. The three-judge panel held that tribal court convictions must comply with the Sixth Amendment right to appointed counsel in order to "count" for purposes of 18 U.S.C. § 117. It reached this conclusion even though an uncounseled tribal court conviction is not itself unconstitutional, and even though Congress has seen fit to provide tribal court defendants with a right to appointed counsel only in certain circumstances. Not only does the panel opinion conflict with decisions of two other circuits, *see United States v. Cavanaugh*, 643 F.3d 592 (8th Cir. 2011); *United States v. Shavanaux*, 647 F.3d 993 (10th Cir. 2011), but two judges on this Court have expressed a desire to reexamine the rule in this case, *see United States v. Bryant*, 769 F.3d 671, 679-81 (9th Cir. 2014) (Watford, J., concurring); *United States v. Ant*, 882 F.2d 1389, 1396-98 (9th Cir. 1989) (O'Scannlain, J., dissenting).

The issue in this case is one of exceptional importance. Domestic violence against American Indians and Alaska Natives has long been a serious problem. Recognizing that gaps in federal law impeded efforts to deal with this problem effectively, Congress passed 18 U.S.C. § 117 in 2006. That statute makes it a federal crime to commit a domestic assault in Indian country, if the perpetrator has at least two prior domestic violence convictions – including convictions in "Indian tribal

court proceedings." Indeed, long before Section 117 was passed, the lack of federal response to domestic violence in Indian country was well-documented and understood by this Court. *See* John C. Coughenour, et al., *The Effects of Gender in the Federal Courts, The Final Report of the Ninth Circuit Gender Bias Task Force*, 67 S. Cal. L. Rev. 745, 908-09 (1994) (discussing underprotection of domestic violence victims in Indian country).[1]

The panel's ruling that tribal court defendants must receive appointed counsel in order for their convictions to "count" eviscerates Section 117. The statute includes no requirement that such convictions have been counseled, and tribal courts often do not – and cannot – provide appointed counsel. As a result, many tribal court convictions will be barred from serving as predicates for purposes of Section 117. Victims of domestic violence in tribal communities will be left, once again, without adequate protection.

The panel decision also undermines the balance that Congress has struck between tribal sovereignty and the rights of criminal defendants. The Bill of Rights does not bind tribes of its own force. Over the past five decades, however, Congress has guaranteed tribal court criminal defendants various procedural rights sim-

[1] NCAI has repeatedly brought this report to policymakers' attention, and it has served as a framework for much of the congressional response to domestic violence in Indian country, including the development of Section 117. *See Law Enforcement in Indian Country: Hearing Before the Comm. on Indian Affairs*, 110th Cong. 50 (2007) (statement of Hon. Joe Garcia, President of NCAI).

ilar to those included in the Bill of Rights. In doing so, Congress has delicately balanced tribal sovereignty, on one hand, and the rights of criminal defendants, on the other. Congress has deliberately chosen *not* to require appointed counsel. Yet the panel decision effectively requires just that – undermining the balance that Congress struck – if prosecutions under Section 117 are to have any vitality.

NCAI respectfully requests that this Court grant rehearing en banc to rule that, contrary to the panel opinion, uncounseled tribal convictions qualify as predicates for purposes of Section 117.

ARGUMENT

I. THE PANEL OPINION WILL HINDER EFFORTS TO ADDRESS THE PERVASIVE PROBLEM OF DOMESTIC VIOLENCE IN INDIAN COUNTRY.

A. Violence Against American Indian and Alaska Native Women Is a Serious Problem.

American Indian and Alaska Native women experience domestic violence at startling rates. Sixty-one percent of American Indian and Alaska Native women have been assaulted. Patricia Tjaden & Nancy Thoennes, Nat'l Inst. of Justice, U.S. Dep't of Justice & Ctrs. for Disease Control and Prevention, *Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women: Findings from the National Violence Against Women Survey* 22 (2000). American Indian and Alaska Native women are 2.5 times as likely to experience violent crimes as women of other races. Steven W. Perry, Bureau of Justice Statistics, U.S. Dep't

of Justice, *A BJS Statistical Profile, 1992-2002: American Indians and Crime* 4-5 (2004).

Rape and sexual assault are particularly prevalent. One-third of Native women will be raped in their lifetimes. Attorney Gen.'s Advisory Comm. on American Indian/Alaska Native Children Exposed to Violence, *Ending Violence So Children Can Thrive* 38 (2014). American Indian and Alaska Native women are 2.5 times as likely to be raped or sexually assaulted as women in the United States in general. *Id.; see also* Michele C. Black et al., Ctrs. for Disease Control and Prevention, Nat'l Ctr. For Injury Prevention and Control, *The National Intimate Partner and Sexual Violence Survey: 2010 Summary Report* 3 (2011).

Much of this violence is at the hands of intimate partners. Forty-three percent of American Indian women, and 46 percent of Alaska Native women, will be subjected to rape, physical violence, or stalking by an intimate partner in their lifetimes. Black, et al., *supra*, at 39.

As shocking as these numbers are, they may not even capture the true scope of the problem. That is because violence against women is systematically underreported. According to one recent study, between 50% and 75% of intimate-partner assaults are never reported. *See* Ronet Bachman et al., *Violence Against American Indian and Alaska Native Women and the Criminal Justice Response: What is Known* 27 (2008). Women may distrust police, may fear that they will take too

long to respond, or may believe the law will not be enforced. *Id.* at 104. They also may fear breaches of confidentiality or retaliation. Amnesty Int'l, *Maze of Injustice: The Failure to Protect Indigenous Women from Sexual Violence in the USA* 4 (2007).

Repeat offenders are commonplace, with domestic violence "often escalat[ing] in severity over time." *United States v. Castleman*, 134 S. Ct. 1405, 1408 (2014). One recent study found that women who were physically assaulted by an intimate partner averaged nearly seven physical assaults by the same partner. Patricia Tjaden & Nancy Thoennes, Nat'l Inst. of Justice, U.S. Dep't of Justice & Ctrs. for Disease Control and Prevention, *Extent, Nature, and Consequences of Intimate Partner Violence: Findings from the National Violence Against Women Survey*, at iv (2000). Indeed, the defendant in this case has at least eight prior domestic abuse convictions. See U.S. Pet'n for Reh'g En Banc 2.

Frequent violent episodes, moreover, are a harbinger of deadly violence in the future. *See* Jacquelyn C. Campbell, et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 Am. J. Pub. Health 1089, 1091 (2003). It is not the severity of the violence, but rather the pattern of controlling and abusive behavior, that leads to the increased risk. As a result, the availability of felony-level sanctions for repeat offenders – even where the level of

violence committed in any particular incident might not otherwise constitute felony assault – is an important tool to respond to an ongoing pattern of violence.

Tribes, however, are ill-equipped to mete out such sanctions themselves. Tribal courts focus on misdemeanor-level crimes with shorter periods of incarceration, while relying on the federal government to prosecute more serious felonies.[2] Many simply do not have the resources to exercise felony-level jurisdiction themselves. And even when perpetrators are convicted in tribal courts, tribes often lack the resources and facilities to incarcerate them for a meaningful period of time – so they are quick to reoffend, often more seriously than before.

B. Congress Enacted Section 117 to Assist Tribal Courts in Addressing Domestic Violence Against American Indians and Alaska Natives.

Against this background, and to ensure the availability of an appropriate response to habitual domestic violence, Congress enacted 18 U.S.C. § 117. *See* Violence Against Women and Dep't of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 901, 119 Stat. 2960, 3077-78 (2006) (VAWA of 2005) (setting forth findings regarding severity of domestic violence problem among American Indians and Alaska Natives). Section 117 imposes criminal penalties on a person

[2] Until passage of the Tribal Law and Order Act (TLOA) in 2010, federal law limited tribal court sentencing authority to only one year. Pub. L. No. 111-211, tit. II, § 234(a), 124 Stat. 2258, 2279-80 (2010) (codified at 25 U.S.C. § 1302(a), (b)). Under TLOA, tribes can sentence offenders to up to three years, *id.*, but only a handful of tribes have elected to make use of this provision.

who commits domestic assault and "who has a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court proceedings" of offenses equivalent to federal "assault, sexual abuse, or [a] serious violent felony against a spouse or intimate partner." 18 U.S.C. § 117(a). In other words, Section 117 created a new federal offense "to charge repeat domestic violence offenders before they seriously injure or kill someone" and "use tribal court convictions for domestic violence for that purpose." 151 Cong. Rec. 8983, 9061 (2005) (statement of Sen. McCain).

In enacting Section 117, Congress understood that limits on tribal court authority under federal law, paired with resource constraints, prevented tribes from sufficiently addressing domestic violence. Section 117 was necessary, Congress found, precisely because "Indian tribes require[d] additional . . . resources to respond to violent assaults against women." VAWA of 2005 § 901. And as a result of "the unique legal relationship of the United States to Indian tribes," the federal government had a "trust responsibility to assist tribal governments in safeguarding the lives of Indian women." *Id.*

In enacting Section 117, Congress recognized that existing legal tools were too weak to address the problem. Introducing the provision, Senator McCain noted that although domestic violence was a national problem, combating it in Indian communities was particularly challenging: "[D]ue to the unique status of Indian

tribes, there are obstacles faced by Indian tribal police, Federal investigators, tribal and Federal prosecutors and courts that impede their ability to respond to domestic violence in Indian Country." 151 Cong. Rec. 9062 (statement of Sen. McCain). As a result, Senator McCain continued, "perpetrators may escape felony charges until they seriously injure or kill someone." *Id.*

Section 117 struck directly at this problem. Specifically, Congress sought to close legal loopholes to "ensure that perpetrators of violent crimes committed against Indian women are held accountable for their criminal behavior." VAWA of 2005 § 902. With Section 117, federal prosecutors are able to meaningfully intervene in the cycle of abuse to prevent serious injury or even death. Even a single federal criminal prosecution under Section 117 can send a strong deterrent message on a reservation: habitual domestic violence offenders will be brought to justice.

C. The Panel Opinion Will Severely Undermine the Efficacy of Section 117.

If allowed to stand, the panel opinion will render Section 117 a dead letter exactly where it is most needed. The panel opinion recognizes that uncounseled convictions in tribal courts do not themselves violate the Constitution. Yet it holds that if indigent defendants do not receive appointed counsel in tribal court, those same convictions cannot "count" as predicate offenses for purposes of Section 117. The upshot is that, for the most part, tribal court convictions cannot give rise to Section 117 convictions.

The reason, quite simply, is that many tribal courts do not appoint counsel for indigent defendants as a matter of course – which is unsurprising in light of the resource constraints that confront tribal justice systems. *See* U.S. Comm'n on Civil Rights, *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country* 77 (2003) (noting that tribal courts "confront many of the same problems as state and federal courts, but with considerably fewer resources"). Indeed, tribal courts "have been underfunded for decades." *Id.*; *see also* U.S. Gov't Accountability Office, GAO-11-252, *Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts* 21 (2011) (noting tribal courts' budgetary constraints and heavy reliance on federal funding).

It is not plausible to suppose that tribes will easily adjust to the panel's decision by providing appointed counsel where they previously did not. Tribal justice systems normally are underfunded and understaffed. It is difficult to attract attorneys of any sort to rural Indian communities – let alone pay for them out of tribal funds. Indeed, a world in which tribes can easily afford to appoint counsel – or a world in which tribes have the authority and resources to impose extended incarceration for habitual offenders – is a counterfactual world in which Section 117 would not have been necessary. *See* VAWA of 2005 § 901 ("Indian tribes require additional criminal justice and victim services resources to respond to violent assaults against women.").

To be sure, some tribes – particularly those with significant revenues from gaming or natural resources – may be better equipped to fund and operate robust criminal justice systems that adequately address felony-level crime. Yet many tribes have little or no revenue from these sources.[3] In Montana, for instance, the state has engaged in only limited compact negotiations for Class III (casino-style) gaming; in addition, tribal governments generally have rural locations not conducive to revenue generation. Tribes that lack revenues from gaming or natural resources may find it particularly difficult to fund a criminal justice system that includes incarceration for felony-level offenses. *Cf. Law and Order in Indian Country: Field Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. 24 (2008) (statement of Hon. Diane Enos, President, Salt River Pima-Maricopa Indian Cmty.) ("[W]e could not do what we do [in law enforcement], I dare say, without the resources available to us through gaming.").

By largely eliminating Section 117 as a tool to punish and deter domestic violence among Native Americans and Alaska Natives, in short, the panel opinion

[3] This lack of resources at the tribal level parallels the socioeconomic status of individual American Indians and Alaska Natives. On average, nearly one in four American Indian and Alaska Native families have incomes below the poverty line; in Arizona, the figure is nearly one in three. U.S. Dep't of the Interior, *2013 American Indian Population and Labor Force Report* 54-56 (2014). Thirty-nine percent of American Indian and Alaska Native children under the age of five live in poverty, nearly twice as high as the percentage for the total U.S. population. Jill Fleury DeVoe et al., Nat'l Ctr. for Educ. Statistics, *Status and Trends in the Education of American Indians and Alaska Natives: 2008*, at 22.

leaves tribes to address the problem, once again, on their own with the limitations on their authority still in place. Without Section 117, prosecutors will again have to wait until serious bodily injury – or worse – occurs before they can intervene to hold a known repeat domestic violence offender accountable. Meanwhile, Native women trapped in vicious cycles of abuse will again be left with no protection under federal law until they are seriously injured – regardless of how often they are harassed or abused. These far-reaching consequences warrant rehearing en banc.

II. THE PANEL OPINION UNDERMINES THE DELIBERATE BALANCE CONGRESS HAS STRUCK BETWEEN TRIBAL SOVEREIGNTY AND DEFENDANTS' RIGHTS.

The panel opinion's devastating consequences for efforts to combat domestic violence in Indian communities are reason enough to grant the petition. Of no less significance, however, is the opinion's disruption of the delicate balance that Congress has struck between tribal sovereignty, on one hand, and the rights of criminal defendants, on the other.

A. Congress Has Repeatedly Addressed the Intersection of Tribal Sovereignty and Defendants' Rights, and Has Declined to Require the Appointment of Counsel for All Tribal Court Defendants.

As sovereigns, Indian tribes possess the power to prosecute crimes by and against Indians within the limits of their jurisdiction. *See* Cohen's Handbook of Federal Indian Law § 9.04 (2012). In such prosecutions, tribes are not restrained by the Bill of Rights, for their "powers of local self government . . . existed prior to

the [C]onstitution." *Talton v. Mayes*, 163 U.S. 376, 384 (1896). Congress, however, has broad plenary power to legislate with respect to Indian tribes, which overlaps with the federal territorial authority invoked in Section 117. *See United States v. Lara*, 541 U.S. 193, 200 (2004); *United States v. Celestine*, 215 U.S. 278, 285 (1909); *Seymour v. Superintendent*, 368 U.S. 351, 359 (1962). In exercising this power, Congress has extended an appointed-counsel right to tribal court defendants in certain limited circumstances – but it has never done so across the board.

In 1968, Congress enacted the Indian Civil Rights Act (ICRA). Pub. L. No. 90-284, tit. II, 82 Stat. 73, 77-78 (1968) (codified as amended at 25 U.S.C. §§ 1301-1303). ICRA, which balances tribal sovereignty against the rights of criminal defendants, requires tribes to adhere to various criminal procedural requirements similar to those found in the Bill of Rights. *See* 25 U.S.C. § 1302; Zachary S. Price, *Dividing Sovereignty in Tribal and Territorial Criminal Jurisdiction*, 113 Colum. L. Rev. 657, 673 (2013). For instance, ICRA statutorily bars tribes from trying a person twice for the same offense, from compelling any person in a criminal case to be a witness against himself, or from denying a criminal defendant the right to a speedy trial. 25 U.S.C. § 1302(a). ICRA also limits tribal courts' sentencing authority to one year in prison unless they provide additional procedural guarantees. 25 U.S.C. § 1302(a)(7).

ICRA does not, however, confer an across-the-board the right to appointed

counsel in criminal proceedings. Instead, ICRA provides only that a tribal court defendant may have the assistance of counsel *at his own expense*. 25 U.S.C. § 1302(a)(6). This is so even though *Gideon v. Wainwright*, 372 U.S. 335 (1963), the landmark decision guaranteeing the right to appointed counsel in state criminal proceedings, was decided just five years before ICRA's passage. The restriction on tribal courts' sentencing authority may have given Congress comfort with the lack of appointed counsel in tribal court prosecutions because ICRA, when passed, generally limited tribes to imposing penalties not exceeding six month sentences or fines of $500. Pub. L. No. 90-284, § 202. Congress may also have recognized, as Justice O'Connor has observed, that "the decision-making process[es used] by tribal courts need not, and sometimes do not, replicate the process undertaken in State and Federal courts." Sandra Day O'Connor, *Lessons From the Third Sovereign: Indian Tribal Courts*, 33 Tulsa L. J. 1, 3 (1997). Thus, in some cases, tribal justice systems rely on lay advocates, and in others the judge or other decisionmaker plays a larger role in protecting the rights of the accused than is typical in Western justice systems. Regardless of its motives, however, it is clear that in ICRA Congress considered the right to counsel, and decided *not* to require appointed counsel in all tribal court criminal proceedings.

In 2010, Congress revisited the right to counsel in tribal court proceedings when it raised the sentencing limitation on tribal courts, but again declined to cate-

gorically require appointment of counsel. Specifically, the Tribal Law and Order Act of 2010 amended ICRA to permit tribes to impose penalties of up to three years for a single offense. Pub. L. No. 111-211, tit. II, § 234(a), 124 Stat. 2258, 2279-80 (2010) (codified at 25 U.S.C. § 1302(a), (b)). Together with this authorization of increased penalties, Congress provided additional rights to criminal defendants: *If* a tribe imposes a term of imprisonment of more than one year, it must provide the defendant with certain added protections, including appointed counsel. 25 U.S.C. § 1302(c). That right to appointed counsel applies only in these limited circumstances. If the defendant's punishment is less severe, Congress determined, appointed counsel is not required.

Just last year, Congress once again addressed these issues, and once again declined to give all tribal court criminal defendants the right to appointed counsel. The Violence Against Women Reauthorization Act of 2013 "recognized and affirmed" tribes' "inherent power" to exercise criminal jurisdiction over all persons, including non-Indians, who commit domestic violence offenses against an American Indian or Alaska Native on tribal lands. Pub. L. No. 113-4, § 904, 127 Stat. 54, 120-23 (2013) (codified at 25 U.S.C. § 1304(b)(1)). The Act then created a "special domestic violence criminal jurisdiction" over non-Indians that a tribe could not otherwise exercise. 25 U.S.C. § 1304(a)(6). While thus providing tribal courts with more power, Congress granted defendants additional rights: To impose

a term of imprisonment of any length under this special domestic violence criminal jurisdiction, tribes must guarantee defendants the right to appointed counsel. 25 U.S.C. § 1304(d)(2).[4] Again, however, Congress did not see fit to extend an appointed-counsel right to all tribal court criminal defendants – and in any event, whether to exercise jurisdiction under VAWA is completely optional for a tribe.

In short, Congress has—over a period of nearly five decades—balanced tribal sovereignty against the rights of criminal defendants. It has never required the appointment of counsel in all tribal court criminal proceedings. Indeed, when Congress passed Section 117 in 2006, and thus allowed tribal court convictions to be used as predicate offenses for a habitual-offender prosecution, it was well aware that tribal court defendants had no right to appointed counsel. *See, e.g.*, *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) (presumption that "Congress is aware of existing law when it passes legislation"). They had only the more limited right that Congress itself afforded under ICRA: the right to retain (and pay for) counsel oneself.

[4] This provision does not take effect until March 7, 2015, unless the Attorney General designates a tribe as participating in a pilot project. VAWA of 2013 § 908(b).

B. The Panel Opinion Flouts Congressional Intent and Undermines Tribal Sovereignty.

The panel opinion holds that, subject to a narrow exception not applicable here, "tribal court convictions may be used in subsequent prosecutions only if the tribal court guarantees a right to counsel that is, at minimum, coextensive with the Sixth Amendment right." *Bryant*, 769 F.3d at 677. Thus, the panel opinion requires tribal courts to provide indigent defendants with appointed counsel if their convictions are to "count" for purposes of Section 117.

That requirement disrupts the balance that Congress has struck between tribal sovereignty and the rights of criminal defendants. In ICRA and its subsequent amendments, Congress decided "that not all provisions of the Constitution" would "be imposed upon the freedom of Indian tribes to conduct themselves in accordance with their own tribal laws." *Ant*, 882 F.2d at 1398 (O'Scannlain, J., dissenting). Rather, Congress has handled this question in a nuanced fashion, repeatedly refining the interaction of tribal court jurisdiction and the Bill of Rights' criminal procedure protections. Each time, Congress has declined to extend the right to appointed counsel to all tribal court defendants.

The panel's decision disregards Congress's intent *not* to require tribal courts to provide appointed counsel outside the limited circumstances set forth in the amended Indian Civil Rights Act. In doing so, the panel decision deprives Indian tribes – sovereign nations – of the flexibility that Congress intended them to have.

As Judge O'Scannlain explained in his dissent in *Ant*: "Had Congress intended that the full panoply of sixth amendment protections be imposed upon tribal courts, it clearly could have said so in the ICRA." *Id.*; *see id.* ("Because the nature of comity between tribal courts and federal courts . . . is so sensitive and so delicately balanced, it is up to Congress, not [a court], to change the rules if they should be changed at all.").

* * *

As the petition for rehearing demonstrates, the panel opinion contravenes Supreme Court precedent, *see Nichols v. United States*, 511 U.S. 738 (1994), creates a circuit split, and is wrong on the merits. Moreover, as explained above, the opinion will hinder efforts to address the pervasive problem of domestic violence in Indian country. Not only that, but it undermines the deliberate balance Congress has struck between tribal sovereignty and defendants' rights. This Court should grant rehearing en banc.

CONCLUSION

For the foregoing reasons, and for those set forth in the petition, the Court should vacate the panel opinion and rehear the case en banc.

Respectfully submitted,

/s/ Joshua M. Segal

John Dossett
Virginia Davis
National Congress of American Indians
1516 P Street, NW
Washington, DC 20005
Telephone: 202-466-7767
Fax: 202-466-7797

Joshua M. Segal
Devi M. Rao
Jenner & Block LLP
1099 New York Avenue, NW
Washington, DC 20001
Telephone: 202-639-6000
Fax: 202-639-6066

Counsel for Amicus Curiae National Congress of American Indians

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(5) and Circuit Rule 29-2(c)(2), I certify that the foregoing brief is proportionately spaced, has a typeface of 14 points or more, and contains 4,198 words, exclusive of those parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

December 24, 2014

/s/ Joshua M. Segal
Joshua M. Segal
Attorney for the National Congress of American Indians

CERTIFICATE OF SERVICE

I hereby certify that on December 24, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Joshua M. Segal
Joshua M. Segal
Attorney for the National Congress of American Indians