H.R. 511, TRIBAL LABOR SOVEREIGNTY ACT OF 2015

HEARING

BEFORE THE

SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND PENSIONS

COMMITTEE ON EDUCATION AND THE WORKFORCE

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

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C O N T E N T S

H.R. 511, TRIBAL LABOR SOVEREIGNTY ACT OF 2015

Tuesday, June 16, 2015
House of Representatives
Subcommittee on
Health, Employment, Labor, and Pensions
Committee on Education and the Workforce
Washington, D.C.

The subcommittee met, pursuant to call, at 2:11 p.m., in Room 2175, Rayburn House Office Building, Hon. Phil Roe [chairman of the subcommittee] presiding.

Present: Representatives Roe, Foxx, Walberg, Salmon, Guthrie, Messer, Carter, Grothman, Allen, Polis, Courtney, Pocan, and Bonamici.

Also present: Representatives Kline, Rokita, Scott, and Thompson of California.

Staff present: Janelle Belland, Coalitions and Members Services Coordinator; Ed Gilroy, Director of Workforce Policy; Callie Harman, Staff Assistant; Tyler Hernandez, Press Secretary; Marvin Kaplan, Workforce Policy Counsel; Nancy Locke, Chief Clerk; John Martin, Professional Staff Member; Krisann Pearce, General Counsel; Alissa Strawcutter, Deputy Clerk; Juliane Sullivan, Staff Director; Alexa Turner, Legislative Assistant; Tylease Alli, Minority Clerk/Intern and Fellow Coordinator; Austin Barbera, Minority Staff Assistant; Amy Cocuzza, Minority Labor Detailee; Denise Forte, Minority Staff Director; Christine Godinez, Minority Staff Assistant; Kendra Isaacson, Minority Labor Detailee; Brian Kennedy, Minority General Counsel; Kevin McDermott, Minority Senior Labor Policy Advisor; Richard Miller, Minority Senior Labor Policy Advisor; Veronique Pluviose, Minority Civil Rights Counsel; and Dillon Taylor, Minority Labor Policy Fellow.

Chairman ROE. A quorum being present, the Subcommittee on Health, Employment, Labor, and Pensions will come to order. Good afternoon, I would like to welcome our guests and thank you all for joining us today to discuss the very important subject of tribal sovereignty.

For our witnesses, I realize this issue is not only important, it is deeply personal. And I appreciate you all being here to share your views and your experiences. I believe that will be valuable in our discussion of H.R. 511, the *Tribal Labor Sovereignty Act of 2015*.

Upholding Native American rights of self-determination has long been a priority. As far back as the 1830s, when the governmental authority of the tribes was first challenged, our courts have held that the "tribes possess a nationhood status and retain inherent powers of self-government."

For decades, policymakers have agreed on the importance of protecting these fundamental rights. We should never stand idly by while the sovereignty of Native Americans is threatened, and that is exactly why we are here today.

A little more than 10 years ago, the National Labor Relations Board overturned long-standing precedent with the landmark San Manuel Bingo and Casino decision that began using a subjective test to determine when and where to exert its jurisdiction over Indian tribes.

This action was met with significant opposition from the Native American community and considered by many to be an attack on tribal sovereignty. In fact, at a hearing of this subcommittee in 2012, Robert Porter, president of the Seneca Nation of Indians, called the move "unfounded" and a violation of treaty rights.

During the same hearing, I myself expressed concern with the Board's policy and its flawed interpretation of the law. Unfortunately, the Board has ignored these and similar concerns and continues to exert its authority over Indian tribes.

To make matters worse, the NLRB's actions have had ramifications that extend beyond threatening tribal sovereignty. The subjective nature of the Board's process for determining jurisdiction has also produced a mess of legal confusion. And that, I think you can say with the legal confusion, is an understatement.

Years of litigation have produced inconsistent and misguided Board decisions, compounding the uncertainty felt by Native American tribes and their businesses. To help address these concerns and preserve tribal sovereignty over labor policies our colleague, Todd Rokita introduced H.R. 511, the *Tribal Labor Sovereignty Act*. The bill would prevent the NLRB from asserting its jurisdiction over businesses owned by Native Americans on tribal lands, codifying a Board standard that existed long before the San Manuel decision.

In doing so, it would protect Native Americans from NLRB interference and provide legal certainty to the nation's Indian tribes. It is a common sense proposal that has attracted bipartisan support.

Today, we will hear from tribal leaders who will share their experiences and discuss the importance of protecting your cherished sovereignty. I look forward to hearing the views on the reforms outlined in the bill.

And with that, I will now recognize the senior Democratic member of the subcommittee from Colorado, Representative Jared Polis, for his opening remarks.

Mr. Polis, you are recognized.

[The statement of Chairman Roe follows:]

Prepared Statement of Hon. David P. Roe, Chairman, Subcommittee on Health, Employment, Labor, and Pensions

Good afternoon. I'd like to welcome our guests and thank you all for joining us today to discuss the very important subject of tribal sovereignty. For our witnesses, I realize this issue is not only important, it's deeply personal, and I appreciate you

being here to share your views and your experiences. I believe they will be valuable in our discussion of H.R. 511, the Tribal Labor Sovereignty Act of 2015.

Upholding Native American rights of self-determination has long been a priority. As far back as the 1830s, when the governmental authority of tribes was first challenged, our courts have held that "tribes possess a nationhood status and retain inherent powers of self-government." For decades, policymakers have agreed on the importance of protecting these fundamental rights. We should never stand idly by while the sovereignty of Native Americans is threatened, and that is exactly why we're here today.

A little more than 10 years ago, the National Labor Relations Board overturned long-standing precedent with the landmark San Manuel Bingo & Casino decision and began using a subjective test to determine when and where to exert its jurisdiction over Indian tribes.

This action was met with significant opposition from the Native American community and considered by many to be an attack on tribal sovereignty. In fact, at a hearing of this subcommittee in 2012, Robert Odawi Porter, president of the Seneca Nation of Indians, called the move "unfounded" and a violation of treaty rights. During the same hearing, I myself expressed concern with the board's policy and its flawed interpretation of the law. Unfortunately, the board has ignored these and similar concerns and continues to exert its authority over Indian tribes.

To make matters worse, the NLRB's actions have had ramifications that extend beyond threatening tribal sovereignty. The subjective nature of the board's process for determining jurisdiction has also produced a mess of legal confusion. Years of litigation have produced inconsistent and misguided board decisions, compounding the uncertainty felt by Native American tribes and their businesses.

To help address these concerns and preserve tribal sovereignty over labor policies, our colleague Todd Rokita introduced H.R. 511, the Tribal Labor Sovereignty Act. The bill would prevent the NLRB from asserting its jurisdiction over businesses owned by Native Americans on tribal lands, codifying a board standard that existed long before the San Manuel decision. In doing so,

it would protect Native Americans from NLRB interference and provide legal certainty to the nation's Indian tribes. It's a commonsense proposal that has attracted bipartisan support.

Today, we will hear from tribal leaders who will share their experiences and discuss the importance of protecting their cherished sovereignty. I look forward to hearing their views on the reforms outlined in the bill.

Mr. POLIS. Well, thank you, Mr. Chairman. I want to begin by thanking the chairman for pursuing regular order with this legislation. I am glad we are, first, having a hearing on this legislation in order to collect facts and get feedback from various perspectives. This really shows how this committee should work. And I am glad for this opportunity to listen and ask questions on this important issue.

And thank you to our terrific group of panelists for taking your time to give us your in-depth perspective.

As all legislative hearings should, I believe this hearing needs to be about fact-finding. This bill highlights the inherent tension between two important principles that many of us hold dear: tribal sovereignty over Indian nations and workers' rights.

I fully support the sovereignty of our Native American nations, and I know many of us place a great deal of importance on their right to self-governance, control, and independence. I also believe deeply in the right of workers to organize, including Native American workers. And the ability of workers to fight for a safe and fair working environment.

All legislation and National Labor Relations Board decisions must balance these competing principles. They should try their best, as should we, to make them complimentary rather than competitive. We should not favor one at the expense of another.

Reconciling these two priorities may be difficult, but we as a committee have a responsibility to dig in to how we can effectively and fairly reconcile the issues and ensure that we protect tribal sovereignty while also respecting workers' rights. And discussing the implications of this bill on these two issues is where we begin the process.

We should investigate knowing that this issue is about more than tribal sovereignty, it is about more than gaming restrictions or the *National Labor Relations Act*. It is not only about our respect for tribal sovereignty, it is also about whether the majority cares about unions and the right of workers to form unions. And as we have discussed hundreds of times, unions are the key to shrinking the wage gap, raising up the middle class, and creating good-paying jobs.

Under current law, tribes are subject to many federal employment laws, including the *Fair Labor Standards Act*, OSHA, ERISA, the *Family Medical Leave Act*, the *Americans with Disabilities Act*. Which begs the question, if this conversation is not solely about the right to join a union, should we also be having a discussion around due process and federal exemptions for a variety of American workers, including those under the *Americans with Disabilities Act*, OSHA, ERISA and others, or even laws that prevent the use of child labor.

I will also point out that I believe most of the companies operated by our Indian nations would not take advantage of workers. As is always the case, however, there can be bad actors and good actors. And in circumstances like these we want to make sure that we don't overburden good actors. But at the same time, we want to make sure that workers, including Native American workers, cannot be taken advantage of by the rare bad actor.

American tribal sovereignty is a core principle that I believe in. We also need to analyze the issue with the knowledge that many of these businesses and casinos are part of interstate commerce, and that there are many people who work at businesses owned and operated by Indian nations who may not be enrolled in the tribe that owns the casino.

That means these individuals have no ability to raise the issue of workers' rights within the context of tribal law. So the question becomes: what laws protect them and what rights do they have under American law? I am very interested in hearing from our witnesses on both sides of the issue about how this affects sovereignty, local control, and the health and economic vitality of working families.

Thank you very much, Mr. Chairman, and I yield back the balance of my time.

[The statement of Mr. Polis follows:]

Prepared Statement of Hon. Jared Polis, Ranking Member, Subcommittee on Health, Employment, Labor, and Pensions

I first want to thank the Chairman for pursuing regular order with this legislation. I am glad we are first having a hearing on this legislation and issue in order to collect the facts, and get feedback from various perspectives. I am glad for the opportunity to speak on this important issue. And thank you to our great group of panelists for taking their time to give us an in-depth perspective.

As all legislative hearings should, I believe this hearing must be about fact finding. This bill highlights the inherent tension between two important principles of

American law: tribal sovereignty and workers' rights. I fully support the sovereignty of Native Americans, and I know many of us place a great deal of importance on self-governance, localized control, and the independence of tribal nations.

But I also believe deeply in the right to organize, in protecting our workers and allowing workers, including Native American workers, to fight for a safe and fair working environment. All legislation and NLRB decisions must balance these competing principles, not favor one at the expense of the other. So reconciling these two priorities may be difficult, but we as the committee have a responsibility to dig into how we effectively and fairly reconcile these issues. We must work to honor and protect tribal sovereignty while also respecting workers' rights and discussing the implications of this bill on these two issues is where we begin.

We must analyze this issue in its true context. We should investigate knowing that this issue is about more than tribal sovereignty; it is about more than gaming restrictions or the NLRA. It is not only about a respect for tribal sovereignty and control, it is also – perhaps primarily – about the Majority's dislike of the NLRB and Unions. As we have discussed hundreds of times, unions are the key to shrinking the wage gap, raising up the middle-class and creating good paying jobs. Without unions we wouldn't have weekends, we wouldn't be moving towards equal pay, and there would be many fewer jobs that a family can live comfortably live on.

Under current law, tribes are subject to many federal employment laws, including the Fair Labor Standards Act, OSHA, ERISA, and the Family Medical Leave Act. Which begs the question, if this conversation is not solely about the right to join a union, then shouldn't we also be having a discussion around due process and federal exemptions for a variety of American workers – including those under the American Disabilities Act, OSHA, ERISA and the Federal Labor Standards Act which keeps companies from not using slave labor or child labor.

I will also point out that I believe most of the companies operated by Indian nations would not take advantage of workers. As is always the case, however, there are bad actors and there are good actors. In circumstances like these, we cannot and should not overburden good actors. Nor, though, can or should we allow workers to be taken advantage of by the rare bad actor.

American Tribal sovereignty across this country is vital, but we must also analyze this issue with the knowledge that these businesses, casinos and more, are part of interstate commerce, and that there are many people who work at businesses "owned and operated by Indian nations" who may or may not be of Native American descent. In fact statistics show that an overwhelming majority of workers (75% or more) come from outside the reservation and are not members of an Indian nation. These individuals have no ability to raise the issue of worker's right within the context of tribal law, so the question becomes what laws protect them?

I am interested in hearing from our witnesses on both sides of this issue about how this bill impacts not only sovereignty and local control, but also the health and economic vitality of all ethnicities and beliefs.

Thank you very much, and I yield back my time.

Closing Statement

Thank you to everyone for your impassioned and honest testimony and answers. I truly hope that everyone on the committee today will analyze this issue objectively, and with an understanding of what has been said here. As you consider this issue, please keep in mind the needed nexus between balancing critical domestic sovereignties with the protection due to all American workers – regardless of whether you are white, black, Hispanic or Native American.

Without the right to self-governance we would not have the strong communities present across this country today, and without the right to collectively bargain we would not have the strong and growing economy that all Americans rely on.

I look forward to continuing this discussion with individuals and experts on both sides of the issue.

Chairman ROE. I thank the gentleman for yielding. Pursuant to committee rule 7(c), all subcommittee members will be permitted to submit written statements to be included in the permanent hearing record. And without objection, the hearing record will remain open for 14 days to allow statements, questions for the record, and other extraneous material referenced during the hearing to be submitted in the official hearing record.

It is now my pleasure and privilege to introduce our distinguished panel of witnesses. Our first witness is Mr. Richard Guest.

He is a staff attorney with the Native American Rights Fund in Washington, D.C. Mr. Guest is the lead attorney for the NARF on the Tribal Supreme Court Project, which is based on the principle that a coordinated and structured approach to tribal advocacy before the U.S. Supreme Court is necessary to preserve tribal sovereignty. Welcome, and thank you for being here.

It is now my privilege to introduce our second witness. But, I would like to recognize for that privilege Mr. Courtney, our colleague.

Mr. COURTNEY. Thank you, Mr. Chairman. And it is a privilege to introduce my friend and neighbor, the Chairman of the Mashantucket Pequot Tribal Council, Rodney Butler, who is here today to share his thoughts and perspectives on this issue. He is the leader of an extraordinary tribe in southeastern Connecticut which has literally transformed the landscape in terms of the contribution that they have made to employment and economic growth in that area. And Chairman Butler has been chairman since 2010, a challenging time with a difficult economy and has made great strides in terms of trying to achieve those goals.

I worked with the tribe in terms of dealing with the leasehold term that BIA requires. And just a couple days ago, he cut the ribbon for a new mall that is adjacent to the casino; 900 new jobs, and there is a job fair that took place a few days ago because they need more. And that is music to everybody's ears.

He is, as I said, a native of southeastern Connecticut, graduated from Marvelwood High School. He also graduated from the University of Connecticut. By the way, Mr. Chairman, did you know that the University of Connecticut women won the 10th—

Chairman ROE. Now, I did not want to talk about that this afternoon, being a UT alum.

Mr. COURTNEY. As you know, he has an orange tie. I will just stop right there in terms of mentioning that. And, again, contributes greatly to non-profits and charitable groups throughout the area. The nice thing about being in a democracy is that friends and neighbors can work together on many issues, and sometimes agree to disagree on some. But I, again, look forward to hearing his testimony here today and certainly welcome him to our committee.

And I yield back.

Chairman ROE. I thank the gentleman for yielding. Mr. Butler, welcome.

It is now my privilege to introduce one of our colleagues from California, Mike Thompson, to introduce our next panelist.

Mr. Thompson of California. Thank you, Mr. Chairman. Thank you, and Ranking Member Polis for organizing this very, very important hearing.

And for your courtesy in allowing me to come down and join you at the dais today to introduce a constituent of mine, Mr. Gary Navarro, who lives in my congressional district in Santa Rosa, California. He is an enrolled member of the Pomo Tribe from the Round Valley Reservation, and he is an employee at the Graton Casino and Resort in Rohnert Park, which is also in my congressional district.

Mr. Navarro can speak first-hand on the important work unions are doing on behalf of workers employed in tribal casinos. He was

part of the organizing effort at the Graton Casino and serves on the bargaining committee for UNITE HERE! Local 2850. He was also elected from Sonoma County as a senior chair to the California Rural Indian Health Board and serves as a Santa Rosa Little League Baseball board member.

Accompanying Mr. Navarro are workers employed at tribally-run casinos in California, including Thunder Valley, Cache Creek, San Pablo, and Graton Rancheria. The questions that you are going to be dealing with today are extremely important, and I am very happy that you are taking this up. And I know that Mr. Navarro will add much to your debate and to your hearing. So thank you, Mr. Chairman.

I would also like to thank one of your other witnesses, Lieutenant Governor Keel for his service to his country, as a fellow Vietnam veteran. Thank you, and welcome home.

Chairman ROE. Mr. Navarro, welcome.

And it is my privilege now to introduce our last witness. The Honorable Jefferson Keel is the lieutenant governor of the Chickasaw Nation. Mr. Keel is a retired U.S. Army officer, with over 20 years of active duty. His combat experience included three years of service in Vietnam as an infantryman, where he received a bronze star, with V for Valor, two purple hearts, and numerous other awards and decorations for heroism. He has management experience in the private sector and tribal programs and operations. And as a fellow veteran, welcome home and thank you for your service.

I will now ask our witnesses to stand and raise your right hand.

[Witnesses sworn.]

Let the record reflect the witnesses answered in the affirmative. You may take your seats, and thank you, gentlemen.

Before I recognize your testimony, let me briefly explain our lighting system. You will have five minutes to present your testimony. When you begin, the light in front of you will turn green. When one minute is left, the light will turn yellow. When your time is expired the light will turn red.

And we do have votes, so I am going to be pretty precise on the five minutes. We have votes later today, and I want to make sure we make those. At that time, I will ask that you wrap up your remarks as best you are able. Members will each have five minutes for questions.

Now, Mr. Guest, you are recognized for five minutes.

TESTIMONY OF MR. RICHARD GUEST, SENIOR STAFF ATTORNEY, NATIVE AMERICAN RIGHTS FUND, WASHINGTON, D.C.

Mr. GUEST. Thank you, Chairman Roe, Ranking Member Polis, and distinguished members of this subcommittee. The Native American Rights Fund, NARF, is honored to provide this testimony; the purpose of which is to demonstrate that in furtherance of long-standing policies of Indian self-determination, tribal self-governance, and tribal economic self-sufficiency it is time for this Congress to provide both clarity and parity for tribal governments under the *National Labor Relations Act*, the NLRA.

For the record, NARF fully supports H.R. 511, as well as its companion bill in the U.S. Senate, S. 248.

As you are well aware, the NLRA was enacted by Congress in 1935 to govern labor relations in the private commercial sector. Under Section 2 of the NLRA, the term "an employer" is defined to include any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any state or political subdivision thereof.

Therefore, workers in the public sector, employees of federal, state, and local governments, were not afforded the rights and protections of the NLRA. Based on sound policy determinations, Congress provided those governments an opportunity to choose how best to regulate union organizing, collective bargaining, and labor relations with their workers, given the essential and often times sensitive nature of their employment.

So in this context, for tribal governments, parity encompasses the quality of being treated equally under the law, alongside federal, state, and local governments. Tribal governments are entitled to the same freedom to choose for themselves the appropriate time, place, and manner for regulating union activity on Indian lands and collective bargaining for their employees.

H.R. 511 provides the necessary clarity and certainty, recognizing that those sound policy determinations apply with equal force to tribal governments.

In terms of parity with the Federal Government, it was not until 1978—43 years after it passed the NLRA—that Congress enacted the *Federal Labor Relations Act* to regulate labor relations with federal workers. To meet the special requirements and needs of the Federal Government, Congress chose to exclude employees of certain federal agencies, limited collective bargaining with no right to negotiate wages, hours, or employee benefits, and eliminated the right to strike of federal workers.

In terms of parity with state and local governments, according to the 2002 GAO report only 26 states and the District of Columbia had statutorily protected collective bargaining rights for their employees. Twelve states had allowed collective bargaining only for specific groups of workers, such as teachers and firefighters, and 12 states did not have any laws protecting the rights of its employees to collectively bargain.

According to the GAO report, most state government workers entitled to collective bargaining rights under state law are all prohibited from striking. Instead, those states provide compulsory binding interest arbitration, a procedure not available under the NLRA.

Mr. Chairman, we hope that you and each member of the Committee will recognize that each of the 566 federally recognized tribes, as governments, must have the opportunity to make their own policy judgments regarding labor relations on their reservations based on the values and priorities that best serve the needs of their community.

In general, there are four areas of concern for Indian tribes. One, a guaranteed right to strike threatens government revenues and the ability of tribes to deliver vital services. Two, the broad scope of collective bargaining will undermine federal and tribal policies requiring Indian preference in employment. Three, preemption of the tribal power to exclude diminishes the ability of tribes to place conditions on entry, on continued presence, and on reservation con-

duct. And four, the potential for substantial outside interference with tribal politics and elections.

Although there are several examples to choose from in my testimony, I provide summary of the *Navaho Preference and Employment Act of 1985*, and include as an attachment to my written testimony the collective bargaining regulations promulgated by the Office of Navaho Labor Relations.

It was the legislative intent of the Navaho Nation Council to incorporate the most basic protections of the NLRA to tribal employees whom the council acknowledged were otherwise exempt from the NLRA. Included as attachment C is the Model Tribal Labor Relations Ordinance, the result of the great experiment with the tribes in the State of California in their gaming compacts, resulting in labor relations being granted in that state.

So in closing, today, as a result of the successive Indian Gaming and the San Manuel decision, the NLRB no longer draws a distinction from whether the tribal business was located on or off reservation, but rather what it determines to be commercial activities of an Indian tribe versus what it deems to be traditional governmental functions.

I see my time has expired, so I will end my testimony there, willing to take questions.

Thank you.

[The testimony of Mr. Guest follows:]

UNITED STATES HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON HEALTH, EDUCATION, LABOR & PENSIONS

LEGISLATIVE HEARING ON H. 511
"TRIBAL LABOR SOVEREIGNTY ACT OF 2015"

WRITTEN TESTIMONTY OF
RICHARD GUEST
SENIOR STAFF ATTORNEY
NATIVE AMERICAN RIGHTS FUND

June 16, 2015

I. Introduction

Chairman Roe, Ranking Member Polis, and Distinguished Members of the Subcommittee:

The Native American Rights Fund (NARF) is a national, non-profit legal organization dedicated to securing justice on behalf of Native American tribes, organizations, and individuals. Since 1970, NARF has undertaken the most important and pressing issues facing Native Americans in courtrooms across this country, and here within the halls of Congress.

We are honored to be invited to provide testimony to the Subcommittee regarding H.R. 511, the "Tribal Labor Sovereignty Act of 2015" – a bill to clarify the rights of Indians and Indian tribes on Indian lands under the National Labor Relations Act (NLRA). The purpose of our testimony is to demonstrate that, in furtherance of its longstanding policies of Indian self-determination, tribal self-governance and tribal economic self-sufficiency, it is time for Congress to provide ***parity*** for tribal governments under the NLRA. In this context, ***parity***

encompasses the quality of being treated equally under the law alongside Federal, State and Local governments. Tribal governments are entitled to the same freedom to choose the appropriate time, place and manner for regulating union activity on Indian lands and collective bargaining for its employees.

II. Parity with the Federal, State and Local Governments

The National Labor Relations Act was enacted by Congress in 1935 to govern labor relations in the private commercial sector. Under section 2 of the NLRA, the term "employer" is defined to include "any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof. . . ." Therefore, workers in the public sector— employees of federal, state and local governments—were not afforded the rights and protections of the NLRA. Based on sound policy determinations, Congress provided those governments an opportunity to choose how to best regulate union organizing, collective bargaining and labor relations with their workers given the essential and, oftentimes, sensitive nature of their employment.

H.R. 511 recognizes that those same sound policy determinations apply with equal force to tribal governments.

A. Parity with the United States

In 1978, forty-three years after it passed the NLRA, Congress enacted the Federal Labor Relations Act ("FLRA)," 5 U.S.C. § 7101 *et seq.*, regulating labor relations for most federal workers. The FLRA specifically aims to "prescribe certain rights and obligations of the employees of the Federal Government and to establish procedures which are designed to meet the special requirements and needs of the Government." 5 U.S.C. § 7101(a)(2). Congress

determined that the rights of federal workers to organize, bargain collectively, and participate in labor organizations: "(1) safeguards the public interest, (2) contributes to the effective conduct of public business; and (3) facilitates and encourages the amicable settlement of disputes between employers and employees involving conditions of employment." 5 U.S.C. § 7101(a)(1).

However, the FLRA does not apply to all federal employers or employees. Coverage extends to individuals employed in an "agency," 5 U.S.C. § 7103(a)(2), but specifically excludes members of the military, noncitizens who work outside the United States, supervisory and management personnel, and various Foreign Service officers. 5 U.S.C. § 7103(a)(2)(B). It also excludes all employees of certain federal agencies, including the Federal Bureau of Investigation, the Central Intelligence Agency, and the United States Secret Service. 5 U.S.C. § 7103(a)(3).

Although patterned after the NLRA, based on the Federal government's unique public-service needs, obligations and vulnerabilities, the FLRA mandates certain proscriptions and prescriptions not contained in the NLRA. One important example is the scope of the authorized collective bargaining process. Under the NLRA, private-sector employees are entitled to collectively bargain with respect to wages, hours, benefits, and other working conditions. Under the FLRA, federal employees can only collectively bargain with respect to personnel practices. Under the FLRA, there is no right to negotiate working conditions such as wages, hours, employee benefits, and classifications of jobs.

A second important difference is the right of private sector employees to engage in "concerted action," like workplace strikes. Under the FLRA, there is no right to strike for federal workers. In fact, the FLRA specifically excludes any person who participates in a workplace strike from the definition of "employee," 5 U.S.C. § 7103(a)(2)(B)(v), and it specifies that it is an

unfair labor practice for labor unions to call or participate in a strike, a work stoppage, or picketing that interferes with the operation of a federal agency. 5 U.S.C. § 7116(b)(7)(A).

B. Parity with the States

According to a 2002 Report by the Government Accountability Office ("GAO"), about 26 states[1] and the District of Colombia had statutorily-protected collective bargaining rights for essentially all State and local government workers; 12 states[2] had collective bargaining only for specific groups of workers (e.g. teachers, firefighters); and 12 states[3] did not have laws providing rights to collective bargaining for any government worker. "Collective Bargaining Rights," GAO-02-835, p. 8-9 (September 2002). According to the Report, most State government workers who are entitled to collective bargaining rights under state law are prohibited from striking. Instead, those States provide compulsory binding interest arbitration (a procedure unavailable under the NLRA). *Id.* at p. 10.

In a January 2014 Report, *Regulation of Public Sector Collective Bargaining in the States,* the Center for Economic and Policy Research (CEPR) reviewed the rights and limitations on public-sector bargaining in the 50 states and the District of Colombia in order to answer three key questions: (1) whether workers have the right to bargain collectively; (2) whether unions can bargain over wages; and (3) whether workers have the right to strike (a copy of the Report is attached as Appendix A). The CEPR did not update the numbers provided by GAO, but it did

[1] Alaska, California, Connecticut, Delaware, Florida, Hawaii, Illinois, Iowa, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Vermont, Washington, and Wisconsin. As with the NLRA, the state laws that provide collective bargaining rights to public employees often exclude various groups of employees (e.g., many states expressly exclude management officials) from coverage. GAO 02-835, at note 12.

[2] Georgia, Indiana, Idaho, Kansas, Kentucky, Maryland, Missouri, Nevada, North Dakota, Oklahoma, Tennessee, and Wyoming. Three of these states, Indiana, Kentucky and Missouri, extend collective bargaining rights to certain public employees through an executive order from the governor. GAO 02-835, at note 14.

[3] Alabama, Arizona, Arkansas, Colorado, Louisiana, Mississippi, New Mexico, North Carolina, South Carolina, Texas, Virginia, and West Virginia. Texas prohibits collective bargaining for most groups of public employees, but firefighters and police may bargain in jurisdictions with approval from a majority of voters. GAO 02-835, at note 13.

provide helpful charts to better illustrate the types of policy choices State governments are making in regulating the rights of government workers: Chart 1, "Legality of Collective Bargaining for Select Public-Sector Workers" lists the states which regulate collective bargaining for specific workers is legal, illegal, or simply no ; Chart 2, "Legality of Collective Wage Negotiation for Select Public-Sector Workers"; and Chart 3, "Legality of Striking for Select Public-Sector Workers." As you review each chart, you can see that certain states make it illegal, or do not protect the rights of certain government workers, to engage in collective bargaining or wage negotiations, with most states making it illegal for these government workers to strike.

And of final note, according to the National Right to Work Legal Defense Foundation (http://www.nrtw.org/), 25 States have enacted right to work laws and 25 States do not have right to work laws.[4] Therefore, half of the State legislatures have determined that—as a matter of State labor relations policy—a worker in a Right to Work State not only has the right to refrain from becoming a union member, but cannot be required to pay anything to the union unless the worker chooses to join the union.

III. Regulating Labor Relations on Indian Lands

Before its 2004 decision in *San Manuel Indian Bingo and Casino*, the National Labor Relations Board did not exercise jurisdiction over tribal-owned businesses located on Indian lands. In *Fort Apache Timber Co.* (1976), and *Southern Indian Health Council* (1988), the NLRB held that tribal-owned businesses operating on tribal lands were exempt from federal

[4] The 25 states that have right to work laws are: Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Michigan, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Wisconsin, and Wyoming.

labor law jurisdiction as "governmental entities."[5] However, in *Sac & Fox Indus.* (1992), the NLRB held that the provisions of the NLRA would apply to a tribal-owned business operating outside the reservation. Thus, prior to 2004, the NLRB drew a distinction regarding its jurisdiction based on whether the tribal business was located on Indian lands (no jurisdiction) versus off-reservation (jurisdiction). In considering H.R 511, the Subcommittee should be mindful that the 566 federally-recognized Indian tribes enjoy demographic, cultural, political and economic diversity, and should not be subject to any one-size fits all approach.

A. The Navajo Nation Labor Code

Enacted by resolution in 1985, the Navajo Preference in Employment Act ("NPEA") serves as the Navajo Nation's general labor code. 15 N.N.C. Sec. 601 *et seq*; Resolution No. CAU-63-85 in 1985, and amended through Resolution No. CO-78-90 in 1990. Incorporated into the NPEA is a clause which enables unionization on the Navajo Nation. 15 N.N.C. Sec. 606 Union and Employment Agency Activities; Rights of Navajo Workers

> A. Subject to lawful provisions of applicable collective bargaining agreements, the basic rights of Navajo workers to organize, bargain collectively, strike, and peaceably picket to secure their legal rights shall not be abridged in any way by any person. The right to strike and picket does not apply to employees of the Navajo Nation, its agencies, or enterprises.
> B. It shall be unlawful for any labor organization, employer or employment agency to take any action, including action by contract, which directly or indirectly causes or attempts to cause the adoption or use of any employment practice, policy or decision which violates the Act.

It was the legislative intent of the council in 1985 to incorporate the most basic of those privileges of the National Labor Relations Act ("NLRA") to tribal employees, whom the council

[5] The NLRB did exercise jurisdiction over non-Indian enterprises operating. For example, in *Simplot Fertilizer Co.* (1952), the NLRB exercised jurisdiction over a union's attempt to organize a non-Indian phosphate mining company leasing Shoshone-Bannock tribal land in Idaho. Also *see Texas-Zinc Minerals Corp.* (1960), and *Devils Lake Sioux Mfg. Corp.* (1979).

acknowledged were otherwise exempt from the NLRA. The rights of Navajo Nation employees to collectively bargain were debated and CAU-63-85 ultimately passed. 14 NTC 8/1/1985. The 1990 Navajo Nation council debated whether to include in the amendments "closed shop" language, which would permit labor organizations to collect union dues from non-members. This sparked much debate in the council, which ultimately decided 34 to 33 to ensure the Navajo Nation is a "right to work" jurisdiction, and amended the Labor Investigative Task Force's proposed amendments to strike the "closed shop" language otherwise amending 15 N.N.C. Sec. 606. 28 NNC 10/25/90

The NPEA confers upon the Human Services Committee ("HSC") of the legislative council the authority to "promulgate rules and regulations necessary for the enforcement and implementation of the provisions of this Act." 15 N.N.C. Sec. 616. *See* Resolution No. HSCJY-63-94 Adopting the Navajo Preference in Employment Act Regulations to Provide Rules and Enforcement Procedures to Permit Collective Bargaining for Employees of the Navajo Nation, Its Agencies or Enterprises

These regulations provide additional guidance as to, for example, management's role of neutrality, prohibited employer practices, how to become an exclusive bargaining agent, the process for certification, an impasse resolution in the event of failed bargaining, and the process for decertification of a bargaining agent. A copy of the Collective Bargaining Regulations passed by the Office of Navajo Labor Relations is attached as Appendix B. The regulations state: "Like the Act, the goal of these regulations is to promote the harmonious and cooperative relations between the Navajo Nation, its agencies and enterprises and Navajo Nation employees through collective bargaining."

Collective bargaining is occurring on the Navajo Nation, with private enterprise as well as government. The United Mine Workers of America ("UMWA") represents employees at the Navajo Nation Head Start Program, a tribal government program. The Nal-Nishii Federation of Labor AFL-CIO includes 12 labor organizations that represent miners, power plant workers, construction workers, school employees and city employees working on or near the Navajo Nation.

B. California Tribal Labor Relations Ordinances

In negotiating tribal-state gaming compacts in 1999, Indian tribes in California agreed to adopt a process for addressing union organizing and collective bargaining rights of tribal gaming employees, or the compact is null and void. From these negotiations, a *Model Tribal Labor Relations Ordinance* ("Ordinance") was crafted, and tribes with 250 or more casino-related employees were required to adopt the Ordinance (a copy is attached as Appendix C). In its 2007 Report, *California Tribal State Gambling Compacts 1999-2006,* the California Research Bureau provided the following summary:

- Under the ***Model Tribal Labor Relations Ordinance*** ("Ordinance"), employees have the right to engage in employee organizations, bargain collectively, and join in concerted activities for the purpose of collective bargaining. The Ordinance defines unfair labor practices on the part of a tribe or a union, guarantees the right to free speech, and provides for union access to employees for bargaining purposes. (Excluded employees include supervisors, employees of the tribal gaming commission, employees of the security or surveillance departments, cash operations employees or any dealer.)

  Key Issues: Certification of union representation and dispute resolution

- Upon a showing of interest by 30 percent of the applicable employees, the tribe is to provide the union an election eligibility list of employee names and addresses. A secret ballot is to follow. An elections officer chosen by the tribe is to verify the authorization cards and conduct the election. If the labor organization receives a majority of votes, the election officer is to certify it as the exclusive collective bargaining representative for the unit of employees. Decisions may be appealed to a tribal labor panel.

- The Ordinance establishes procedures to address an impasse in collective bargaining, including the union's right to strike outside of Indian lands, and to decertify a certified union.

> It also creates three levels of binding dispute resolution mechanisms, beginning with a tribal forum, followed by an arbitration panel, and finally tribal court and federal court. Collective bargaining impasses may only proceed to the first level of binding dispute resolution, in which a designated tribal forum makes the decision.

California Tribal State Gambling Compacts 1996-2006, at p. 33-34 (a copy of the Labor Standards section, P. 33-39, of the Report is attached as Appendix D). In a presentation to the International Association of Gaming Attorneys in September 1999, the following observations were provided regarding the Ordinance as a product of compromise between powerful forces, including:

> 1. the public policy of providing economic support for Indians from non-tax sources through Indian gaming;
>
> 2. the drive by the State of California to reclaim some of the economic benefit it had forfeited to Nevada by blocking the expansion of gaming in California[3];
>
> 3. the expectation of employees working at Indian casinos that they will have the same rights as employees working at non-Indian enterprises;
>
> 4. the need and desire by many tribes to maintain and expand their gaming operations; and
>
> 5. the wish by other interested parties in the gaming business (most importantly, Nevada gaming companies and unions representing their employees) to create, at a minimum, a "level playing field" by eliminating the competitive advantage enjoyed as a result of the non-union status of California's Indian casinos.

The full written presentation is available at http://corporate.findlaw.com/litigation-disputes/the-california-tribal-labor-relations-ordinance-overview-and.html.

The Ordinance provides labor unions at tribal gaming facilities with a number of advantages not provided for under the NLRA. Most importantly, under the Ordinance unions at tribal casinos: (1) have the right to enter onto casino property at any time to talk to employees and post leaflets and posters there in order to facilitate the organizing of employees; and (2) may engage in secondary boycotts after an impasse is reached in negotiations without suffering any penalty under the Ordinance.

The Ordinance also provides tribes with certain advantages not enjoyed by employers under the NLRA. Most importantly, unions representing tribal casino employees may not strike, picket or engage in boycotts before an impasse is reached in negotiations. Since 1999, a number of new tribal-

state gaming compacts have been negotiated, or renegotiated, some with additional provisions regulating labor, but all requiring the adoption of the 1999 Model Tribal Labor Relations Ordinance.

The examples of the Navajo Nation and the California tribes exemplify the growing list of Indian tribes who are regulating labor relations with their employees. Mr. Chairman, we hope that you and each member of the Committee will recognize that each of the 566 tribes—as governments—must have the opportunity to make their own policy judgments regarding labor relations on their reservations based on the values and priorities which best serve the needs of their community. In general, there are four areas of concern for Indian tribes: (1) a guaranteed right to strike threatens tribal government revenues and the ability to deliver vital services; (2) the broad scope of collective bargaining for "other working conditions" will undermine federal and tribal policies requiring Indian preference in employment; (3) pre-emption of the power to exclude which is a fundamental power of tribal government diminishes the ability of tribes to "place conditions on entry, on conditioned presence, or on reservation conduct"; and (4) the potential for substantial outside interference with tribal politics and elections.

IV. Conclusion

In closing Mr. Chairman, NARF would simply remind you and members of the Subcommittee that under the Indian Gaming Regulatory Act ("IGRA"), Congress recognized "a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government," 25 U.S.C. § 2701, and declared its purpose was "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702.

Congress said that, and we believe Congress meant it! Tribal gaming is a part of the structure of tribal government—a means of generating much-needed revenues to support tribal programs and services. Within IGRA, Congress stated "net revenues from any tribal gaming are not to be used for purposes other than-- (i) to fund tribal government operations or programs; (ii) to provide for the general welfare of the Indian tribe and its members; (iii) to promote tribal economic development; (iv) to donate to charitable organizations; or (v) to help fund operations of local government agencies." 25 U.S.C. § 2710(b)(2)(B). Thus, Congress determined that tribal gaming is a governmental activity of Indian tribes. In spite of this fact, the NLRB, which by its own admission has no expertise in Indian affairs, has determined that tribal gaming is simply on par with non-Indian casinos as a private commercial activity.

Congress must act, and must act soon, to explicitly include "Indian tribes" within the exemption to the definition of "employer" in the NLRA.

Chairman ROE. Thank you, Mr. Guest.

Mr. Butler, you are recognized for five minutes.

TESTIMONY OF HON. RODNEY BUTLER, CHAIRMAN, MASHANTUCKET PEQUOT TRIBAL COUNCIL, MASHANTUCKET, CONNECTICUT

Mr. BUTLER. Thank you. Good afternoon, Chairman Roe, Ranking Member Polis, my good friend, Joe Courtney and distinguished members of the committee. I am Rodney Butler, the Chairman of the Mashantucket Pequot Tribal Nation in Connecticut.

I want to thank you for inviting me to testify in support of the *Tribal Labor Sovereignty Act* because it is critically important to protect the sovereign rights of tribal governments. First, I would like to thank Congressman Rokita for introducing this legislation, and the nearly 50 bipartisan cosponsors of this legislation. Indian country has always received bipartisan support in Congress, and I hope this bill will continue in that tradition.

H.R. 511, the *Tribal Labor Sovereignty Act*, is a very straightforward bill. The legislation expressly confirms that Indian tribes are on equal footing with state and local governments under the *National Labor Relations Act*. That is all that it does. It reaffirms the fact that tribes are sovereign governments, and should be treated that way under all federal laws.

The issue of tribal government parity has been a priority in Indian country for decades. We have successfully worked with Congress to reaffirm our tribal sovereignty under the *Violence Against Women Act*, federal unemployment taxation, general welfare, tax issues, and a host of other laws. Today, we continue to fight for tribal parity on issues relating to municipal bonds, pensions, the bankruptcy code, and the NLRA. I am pleased that all of these efforts have been supported in Congress, again, on a bipartisan basis.

However, I am concerned today that some people have tried to portray this legislation as being anti-union, and I wholeheartedly disagree with that assessment. I would like to share with the committee our experience with organized labor at our Foxwoods gaming facility.

In 2007, the United Auto Workers filed a petition with the NLRB to organize the dealers at Foxwoods. Applying its wrongly-decided San Manuel standards, the NLRB asserted jurisdiction over the Mashantucket Pequot Tribal Nation and our Foxwoods Casino. At that point, our tribal council had to make a decision: pursue this issue in the courts, which would have led to years of distracting and hurtful litigation, or work with the UAW to help them understand how they could organize and protect collective employee rights under our tribal labor laws.

Our government decided to reach out to the UAW, explain that this was an issue of tribal sovereignty, and encourage the use of tribal law to reach a solution that respected both tribal sovereignty and workers' rights to organize. These discussions gave the Tribal Nation an opportunity to educate the UAW regarding the importance of tribal sovereignty, the importance of tribal culture and tradition, and the significance of tribal laws and institutions that were in place.

At the same time, it gave the UAW an opportunity to educate the Tribal Nation on the importance to the union of protecting employee rights to organize and the UAW's efforts and successes over the years protecting those rights. Both the UAW and the Tribal Nation were open to listening and learning from each other.

Over a period of time, we reached an agreement with the UAW to pursue collective bargaining under tribal law, and entered into a collective bargaining agreement with the UAW.

I think both the tribe and the UAW believe this agreement has worked well for both sides. In fact, today three additional unions represent our government employees at Mashantucket. They include the International Union of Operating Engineers, the International Association of Firefighters, and United Food & Commercial Workers. All of these unions have collective bargaining agreements with our tribe.

The San Manuel decision was not only a complete reversal of the NLRB's recognition of the tribes as sovereigns, it is also an affront to Indian country. It suggests that Indian tribes are incapable of developing laws and institutions to protect the rights of employees who work on our reservations.

Our experience proves nothing could be further from the truth. The Mashantucket Pequot labor relations law protects the rights of employees to organize, to vote to select union representation in secret ballot election, and to bargain collectively with their employer. Elections are conducted and the law is enforced by the Mashantucket Employee Rights Office, a separate government agency headed up by a labor lawyer with over 25 years of experience, including eight years of experience as a field examiner and attorney for the National Labor Relations Board.

Similar to other public sector labor relations laws, our labor law requires the parties to negotiate in good faith. And when negotiations fail to result in a contract, the dispute may be submitted to a binding interest arbitration. The law provides for a dispute resolution by a three-member panel selected by the parties.

All of these developments have been praised by unions, labor lawyers, and even former NLRB officials alike. In addition to our labor law, the Tribal Nation has enacted legislation allowing employees the right to challenge terminations from employment and suspensions of five days or more. We adopted ERISA as tribal law, we have created remedies for denial of health benefits, and a tribal civil rights code allowing employee discrimination claims.

Our tribe made the sovereign decision to permit collective bargaining with unions when designated by the majority of the employees under our laws. It should be the right of any sovereign government to make decisions that are best for their people.

H.R. 511 simply allows tribal governments to make those decisions. Section 2 of the NLRA expressively excludes the U.S. government and state and local governments from the Act's jurisdiction, and that makes sense. Sovereign bodies have unique employment concerns, and the sovereign is best suited to address those concerns. We seek to be treated just like every other sovereign under the NLRA; nothing more, nothing less. That is why this legislation enjoys wide support in Indian country.

The National Congress of American Indians and organizations that represent all Indian tribes in the United States unanimously adopted a resolution supporting this legislation. In fact, we have not heard from any tribe opposing this bill. With over 560 fairly recognized Indian tribes, it is truly remarkable to have such unanimity in Indian country.

Mr. Chairman, the *Tribal Labor Sovereignty Act* simply reaffirms our sovereign rights, and we urge the committee to pass this legislation and move quickly to get the law enacted. Thank you.

[The testimony of Mr. Butler follows:]

Testimony of Rodney Butler

Chairman, Mashantucket Pequot Nation

Before the House Subcommittee on Health, Employment, Labor and Pensions

On H.R. 511, The Tribal Labor Sovereignty Act of 2015

June 16, 2015

Good Afternoon Chairman Roe, Ranking Member Polis, and distinguished members of the Committee. I am Rodney Butler and I am Chairman of the Mashantucket Pequot Tribal Nation in Connecticut. I want to thank you for inviting me to testify in support of the Tribal Labor Sovereignty Act, and ask that the entirety of my written testimony (and appendix) be submitted into the record of this hearing. This legislation is critically important to protect the sovereign rights of tribal governments.

First, I would like to thank Congressman Rokita for introducing this legislation and the nearly fifty bi-partisan co-sponsors of this legislation. Indian Country has always received bi-partisan support in Congress and I hope this bill will continue that tradition.

H.R. 511, the Tribal Labor Sovereignty Act is a very straightforward bill. The legislation expressly confirms that Indian Tribes are on equal footing with state and local governments under the National Labor Relations Act (NLRA).[1] That is all it does. It re-affirms the fact that Tribes are sovereign governments and should be treated that way under all federal laws. The issue of tribal government parity has been a priority in Indian Country for decades. We have successfully worked with Congress to re-affirm our tribal sovereignty under the Violence Against Women Act, Federal Unemployment Taxation, General Welfare tax issues and a host of other laws. Today, we continue to fight for tribal parity on issues relating to municipal bonds, pensions, the bankruptcy code and the NLRA. I am pleased that all of these efforts have been supported in Congress on a bi-partisan basis.

However, I am concerned that some people have tried to portray this legislation as being anti-union. I wholeheartedly disagree with that assessment. I would like to share with the Committee our experience with organized labor at our Foxwoods gaming facility. In 2007, the United Auto Workers (UAW) filed a petition with the NLRB to organize the dealers at Foxwoods. Applying its wrongly decided *San Manuel*

[1] While the Nation has maintained that the NLRA should be read to include Indian tribes in the exclusion from the definition of employer, this legislation will make that clear and stop the continued application of the wrongly decided *San Manuel* decision.

standards, the NLRB asserted jurisdiction over the Mashantucket Pequot Tribal Nation and our Foxwoods casino. At that point, our Tribal Council had to make a decision – pursue this issue in the courts which would have led to years of distracting and hurtful litigation – or try to work with the UAW to convince the union that it could organize and protect collective employee rights under our tribal labor laws. Our government decided to reach out to the UAW, explain that this was an issue of tribal sovereignty, and encourage the use of tribal law to reach a solution that respected both tribal sovereignty and workers' rights to organize. Over a period of time, we reached an agreement with the UAW to pursue collective bargaining under tribal law and entered a collective bargaining agreement with the UAW.

I think both the Tribe and the UAW believe this agreement has worked well for both sides. In fact, today three additional unions represent our government employees at Mashantucket. They include the International Union of Operating Engineers, the International Association of Firefighters and the United Food and Commercial Workers. All of these unions have collective bargaining agreements with our Tribe.

The *San Manuel* decision was not only a complete reversal of the NLRB's recognition of tribes as sovereigns, it is also an affront to Indian Country. It suggests that Indian tribes are incapable of developing laws and institutions to protect the rights of employees who work on our reservations. Our experience proves nothing could be further from the truth. The Mashantucket Pequot Labor Relations Law protects the right of employees to organize, to vote to select union representation in a secret ballot election, and to bargain collectively with their employer. Elections are conducted and the law is enforced by the Mashantucket Employment Rights Office (MERO) – a separate government agency, currently headed up by Ms. Ursula Haerter, a labor lawyer with over 25 years of experience, including 8 years as a field examiner and attorney at the National Labor Relations Board. MERO has also promulgated guidance, recommended amendments to the statute, and conducted regular meetings with all stakeholders, including representatives of various unions and tribal employers. Similar to other public sector labor relations laws, our labor law requires the parties to negotiate in good faith, and when negotiations fail to result in a contract, the dispute may be submitted to binding interest arbitration. The law provides for dispute resolution by a tripartite panel selected by the parties, headed by a designated neutral, and numerous charges filed by unions and individual employees have been resolved as a result of this process. All these developments have been praised by unions, labor lawyers, and even former NLRB officials alike.

Our Tribe made the sovereign decision to permit collective bargaining with unions when designated by a majority of employees under our laws. It should be the right of any sovereign government to make decisions that are best for their people. H.R. 511 simply allows tribal governments to make those decisions. Section 2 of the NLRA expressly excludes the United States government and State and local governments from the Act's jurisdiction. And that makes sense. Sovereign bodies have unique employment concerns, and the sovereign is best suited to address those concerns. We seek to be treated just like every other sovereign under the NLRA – nothing more – nothing less. That is why this legislation enjoys wide support in Indian Country. Resolutions have been passed in support of this legislation by the National Congress of American Indians and the National Indian Gaming Association.

Mr. Chairman, Indian Tribes have been recognized by the U.S. Constitution, the U.S. Congress and the Courts as being sovereign nations. The Tribal Labor Sovereignty Act simply re-affirms our sovereign rights. I urge the Committee to pass this legislation and move quickly to get it enacted into law.

Appendix to Testimony of Rodney Butler

Chairman, Mashantucket Pequot Tribal Nation

Before the House Subcommittee on Health, Employment, Labor and Pensions

On H.R. 511, The Tribal Labor Sovereignty Act of 2015

June 16, 2015

The following factual background information is intended to provide the Committee a better understanding of the Mashantucket Pequot Tribal Nation's existing legal and governmental infrastructure, which is undermined by the current misapplication of the NLRA to tribal governments.

I. Overview of the Mashantucket Pequot Tribal Nation's Government and Legal System

The Mashantucket (Western) Pequot Tribe, known today as the Mashantucket Pequot Tribal Nation, has existed on the North American continent as a self-governing sovereign for a millennium. The Nation continues to reside in the northeastern United States, and its Reservation ("Mashantucket") has approximately 1,600 acres of trust land within the exterior boundaries of the State of Connecticut. This land is held in trust by the United States for the benefit of the Tribe. *See* Mashantucket Indian Land Claims Settlement Act, 25 U.S.C. §§ 1751 et seq.

In the 1970s, the members of the Nation adopted a modern Constitution ("MPTN Const.")[2] that formally delineates the principles guiding the Nation's governance. This Constitution, along with laws enacted by the Mashantucket Pequot Tribal Council,[3] have created a comprehensive tribal government and legal infrastructure that includes a Tribal Council, an Elders Council, a complex judicial system, and numerous committees, departments, agencies, boards and programs that provide services directly to the tribal community.

The Nation's Constitution vests governing authority in an elected Tribal Council that is responsible for making and enforcing tribal laws and overseeing the expenditure of all tribal funds. MPTN Const. Art. VI. The Constitution also establishes an Elders Council that is vested with exclusive authority over questions of tribal membership and banishment or exclusion from tribal lands. MPTN Const. Art. XII. Pursuant to its constitutional authority, the Tribal Council has created numerous committees and departments that are charged with administering key governmental functions and delivering services directly to members of the Nation. Together, these administrative bodies comprise a comprehensive governmental infrastructure that provides invaluable governmental, legal, health, educational, cultural, economic, and social services to the Nation, its members and non-members and exercises jurisdiction over matters on tribal lands.

The Nation, through its Tribal Council and other governmental institutions, regularly engages in government-to-government dealings with the State of Connecticut, local Connecticut towns, the United States government and its agencies, and it is active internationally through its involvement with United Nations activities.

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[2] The Mashantucket Pequot Constitution is available on the Mashantucket Pequot Tribal Law website at http://www.mptnlaw.org.

[3] The Mashantucket Pequot Tribal Laws are published in bound volumes by West Publishing, available on Westlaw and accessible online at http://www.mptnlaw.org .

Apart from its legislative and executive functions, the Nation's government maintains a comprehensive, fully functioning and independent judicial system that is empowered to address legal disputes that arise in Mashantucket or that involve the Nation or its members. See 1 M.P.T.L. The Nation's judicial system includes a trial court that hears all types of civil and criminal matters, including contractual disputes arising between the Nation and non-tribal businesses. Proceedings in the Nation's trial court are governed by published Rules of Procedure and Evidence that are modeled after the federal rules as well as the procedural rules of other Indian tribes, and the court's judges serve in accordance with the Canons of Judicial Ethics. *See* Mashantucket Pequot Rules of Court.[4] The highest level tribal court is the Court of Appeals that utilizes procedural rules and standards of review substantially similar to those found in federal appellate courts. See 1 M.P.T.L. Ch. 1 § 3. The trial and appellate level decisions are published by West Publishing and are available on Westlaw.

The Nation's courts apply the comprehensive body of law set out in the Mashantucket Pequot Tribal Laws. The MPTL include, inter alia, criminal laws, gaming laws, a tort claims act, comprehensive child welfare and domestic relations codes, a tax code, probate laws, a civil rights law, a commercial code and, most importantly for present purposes, an employment code, a labor relations law, and a law establishing the Mashantucket Employment Rights Office ("MERO"), the Nation's employment rights office. See M.P.T.L. Titles 2-6, 8, & 31-32.

In sum, the Nation operates and funds a large, functioning government that is both an expression of and a key to the Nation's sovereignty.[5] This government has a proven record of successfully addressing the legal and other needs and concerns of the Nation, its members, employees, vendors and other third parties who interact with the Nation, including, organized labor.

II. MERO and the Mashantucket Pequot Labor Relations Law (MPLRL)

The Mashantucket Pequot Tribal Laws provide an extensive network of labor and employment laws that regulate employer-employee relations within Mashantucket and offer significant protections to all of the Nation's employees. A key component of this network is the Mashantucket Employment Rights Law, which the Tribal Council enacted to "promote responsible Tribal governance and self sufficiency ... by creating a centralized Mashantucket Employment Rights Office [("MERO")] to coordinate and regulate equitable employment" within Mashantucket. 31 M.P.T.L. Ch. 1 § 2(b)(1). The Nation created MERO to serve as a centralized office to "oversee, coordinate and enforce tribal employment laws and assist employees and employers in understanding the requirements of those laws." 31 M.P.T.L. Ch. 1 § 2(a)(4).

MERO is headed by a Director, who is charged with overseeing MERO's day-to-day administration and operations, adopting rules, regulations and procedures for the operation of MERO, and to accept and review claims and complaints that are filed with or referred to MERO. 31 M.P.T.L. Ch. 2 § 2. The Director also oversees MERO's website and the promulgation of procedural manuals, forms and instructions that are

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[4] The Rules of Court and Practice can also be found on the Nation's Tribal Law website, http://www.mptnlaw.org.

[5] The Gaming Enterprise is an arm of the Nation's government established to conduct the day-to-day operations of the Nation's gaming facilities at the various properties of Foxwoods Resort Casino ("Foxwoods"). 4 M.P.T.L. Ch. 1 § 1. The revenue generated from the Gaming Enterprise is the major funding source of the Tribal Government. In fact, revenue generated by the Gaming Enterprise historically has funded 98 to 99 percent of the tribal governmental services budget – including all of the Nation's commissions, services and programs. Any stoppage or significant diminishment of the cash flow from the Gaming Enterprise would therefore have a severe detrimental impact on the Nation's ability to operate a tribal government and function as a sovereign entity. Thus, as outlined herein, like other public sector labor laws, the Nation's law prohibits strikes and provides for binding arbitration to resolve impasse. This provision is critical to the continuing operation of the tribal government.

designed to assist parties in exercising the rights guaranteed by the MPLRL.[6] The current MERO Director is Ms. Ursula Haerter, a Connecticut licensed attorney who has over 25 years of experience in labor relations and law practice, including more than eight years as a Field Examiner and Field Attorney for the National Labor Relations Board.

MERO plays a primary role in implementing and enforcing the Nation's Labor Relations Law, which was enacted to guarantee the Nation's employees "the right to organize and bargain collectively with their employers." 32 M.P.T.L. Ch. 1 § 3. The MPLRL allows labor organizations to be designated as the exclusive collective bargaining representatives of employees and establishes procedures for petitions, hearings, secret ballot elections, verifying election results and evaluating the appropriateness of proposed bargaining units. 32 M.P.T.L. Ch. 1 §§ 9, 12. It likewise sets out procedures for the registration of labor organizations and the licensing of business agents. 32 M.P.T.L. Ch. 1 §§ 14-15.[7] The MPLRL also allows either party to collective bargaining negotiations to petition MERO for binding Impasse Resolution by a three member MERO Board, selected by the parties, in the event that the parties are at impasse 150 days after they commenced bargaining. 32 M.P.T.L. Ch. 1 § 10.

In sum, the MPLRL is modeled after other public sector labor laws, is similar to the NLRA in many aspects, and essentially furthers the policies and principles that are fundamental to federal labor policy as enforced by the Board. It provides employees of Tribal Employers with protections that are in many instances identical to or, in some respects, more effective than those provided to employees of private employers under the NLRA. At the same time, the Nation's labor law protects important tribal and federal objectives in preserving and enhancing the Nation's self-governance through the use and recognition of its institutions and the preservation of its sovereignty.

As discussed in more detail below, the record indicates that MERO is an effective, independent and fair institution that efficiently resolves employee-employer matters. Indeed, labor unions have come to understand MERO's effectiveness by using the tribal system. MERO has conducted at least six elections under the MPLRL. Four unions have been certified under tribal law as the exclusive bargaining representatives of appropriate units of employees,[8] and the Nation has entered into collective bargaining agreements with those unions: the UAW, the UFCW and the Operating Engineers related to employees at the Gaming Enterprise and with the IAFF related to the Nation's fire department. MERO Boards have conducted Impasse Resolution hearings and received and overseen several Prohibited Practice Charges. In short, MERO works; in fact, the record to date shows that it has been more effective for tribal employees seeking a first contract than the NLRA has been for private sector employees.[9]

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[6] All applicable statutory provisions and regulatory guidance issued by MERO are compiled on the agency's website, accessible at http://www.mptnlaw.com/MERO/MERO.htm.

[7] The United Food and Commercial Workers, United Auto Workers, International Association of Firefighters, and the Operating Engineers have registered with the Nation pursuant to 32 M.P.T.L. Ch. 1 § 14, and their representatives are licensed through MERO.

[8] A fifth union, an independent security guards union, was certified after a MERO election as the exclusive bargaining representative of a unit of the Nation's police officers. The union subsequently disclaimed interest.

[9] In 2008, the National Labor Relations Board certified the UAW as the representative of gaming employees at various Atlantic City, New Jersey casinos operated by Bally's, Trump and the Tropicana. It took approximately two-and-a-half years to reach first contracts at each, as opposed to the approximate fourteen months it took the UAW and Foxwoods to agree to a first contract under tribal law.

III. Additional Employment Laws Enacted by the Nation

The Nation's full regime of labor and employment laws has long provided substantial employee rights and protections in addition to those secured through MERO and the MPLRL. For example, the Nation's Employee Review Code provides administrative due process and the option of judicial review to the Nation's employees who wish to challenge the termination of their employment or any suspension from employment. 8 M.P.T.L. Ch. 1. This law recognizes the governmental nature of employment throughout the nation, including at the Gaming Enterprise, by insuring due process protections when an employee's property right in his or her employment is being affected. The Nation's laws also include a Workers' Compensation Code that defines rights, liabilities and remedies for work related injuries, sets out the insurance requirements for persons engaged in business on the Reservation, and establishes a Workers' Compensation Commission that handles claims arising under this law. See 13 M.P.T.L.

Additional employee protections are provided by the Nation's Tribal ERISA ("TERISA") law, which adopts the federal ERISA law as tribal law, provides rights and protections to tribal employees covered by employer-sponsored health, retirement and other benefit plans, and provides employees or other beneficiaries of covered plans with a cause of action against the Nation in Tribal Court to challenge denial of benefits. See 15 M.P.T.L.

The Nation's laws also include the Mashantucket Pequot Civil Rights Code, which guarantees certain protections, including prohibiting the Nation or any of its arms or agencies, including the Gaming Enterprise, from denying "any person within its jurisdiction the equal protection of its laws or deprivfing] any person of liberty or property without due process of law." 20 M.P.T.L. Ch. 1 § 1(a)(8). Under this law, a tribal employee can pursue a claim for discrimination in the workplace. *See, e.g., Barnes v. Mashantucket Pequot Tribal Nation*, 4 Mash. Rep. 477, 483-485 (2007) (addressing a Gaming Enterprise employee's racial discrimination claim, which was brought in the Mashantucket Pequot Tribal Court under Title 20 of the MPTL).

The Nation has also enacted a Tribal and Native American Preference Law that applies to all employers in Mashantucket, including the Gaming Enterprise. See 33 M.P.T.L. The Preference Law includes provisions for enforcement through MERO. 33 M.P.T.L. Ch. 1 §§ 5(a) & 9. Existing tribal law requires Tribal employers and non-tribal employers performing work on the Mashantucket Reservation, to give preference in employment opportunities regarding hiring, transfer, promotion and training to, inter alia, members of the Nation and other members of federally and state recognized Indian tribes who meet the minimum necessary requirements. 33 M.P.T.L. Ch. 1 §§ 2 & 5. Tribal law also expressly mandates that collective bargaining agreements covering employees within Mashantucket be in compliance with the preference law. 32 M.P.T.L. Ch. 1 § 9(c) & 33 M.P.T.L. Ch. 1 § 5(i).

In short, the Nation's laws and institutions provide employees of Tribal Employers with a wide array of protections and benefits comparable to those available to private employees under federal and state law while at the same time preserving the Nation's sovereign right and ability to govern its internal affairs.

Chairman ROE. Thank you, Mr. Butler, for your testimony.

Mr. Navarro, you are recognized for five minutes.

TESTIMONY OF MR. GARY NAVARRO, SLOT MACHINE ATTENDANT AND BARGAINING COMMITTEE MEMBER, UNITEHERE LOCAL 2850, THE GRATON CASINO AND RESORT, ROHNERT PARK, CALIFORNIA

Mr. NAVARRO. Congressman Roe, Ranking Member Polis, and the members of the Subcommittee. Thank you for inviting me to testify today. My name is Gary Navarro. I am from Santa Rosa, California. I am an enrolled member of the Pomo National and a worker at Graton Casino and Resort in northern California. While I am appearing here today as a Democrat witness, I am a registered as a Republican.

As a Native American, I am strongly opposed to the idea that in the name of my heritage, one of the most important rights Americans have—namely the right to form a union and collectively bargain—would be taken away from thousands of people like me who work in a Native business.

I have become active in my union because of unjust treatment of casino workers by the managers and how nothing could be done about even sexual harassment because of sovereignty. Exercising our rights to organize turned out to be the only way to protect ourselves and our coworkers. Please do not strip us of these rights.

My grandmother and her children grew up on the Round Valley Reservation in Covelo, California. My family has lived there many generations. People there were poor, they did not have an education. There is much crime there because of a lot of alcohol and drug abuse leading to violent crimes.

My grandmother left the reservation at a very young age to bring her family to Santa Rosa because she didn't want them to deal with the same life of poverty. My whole life, my grandma has taught us to hold our own and stand up for what is right.

As I grew up, she always would teach us our heritage and to be proud of who we are. But also to be hard-working and understanding towards others. Today, I am a slot attendant at Graton Casino. In total, there are about 2,500 employees at the casino, but only five are Native Americans and one of them from the Graton Rancheria. No managers are Native, the casino is managed by Station Casino on behalf of the tribe.

I have seen sexual harassment at the casino. A general manager going up to women telling them if they want promotions they had to sleep with him. The women were fired. We all complained. Managers at the Stations Casinos told us it was a sovereign nation. It was bad enough that Title VII of the *Civil Rights Act* doesn't apply to Native businesses.

Congress should not make the situation worse by taking away protections under the *National Labor Relations Act*. The NLRA enables workers who have been subjected to harassment and other forms of discrimination to get together and complain about it. Take away the NLRA, you don't only have sexual harassment but no ability to speak about it.

I was also part of an organizing effort to help collective bargaining at Graton. I have never been in the union before, but we

needed the union to help us organize ourselves so we could speak up about abuses without having to worry about our jobs being taken away from us. Even though Stations Casino's management was opposed to having a union, the Graton tribal leadership went and told them to back off.

The union is recognized now, and we are at the end of our negotiations for the first contract right now. The union and tribe worked together to help the tribe pass their compact in Sacramento.

I cannot sit back and watch and see legislation that would take the rights to organize and collective bargaining away from every worker at Tribal Enterprises in the name of Native heritage. It is especially troubling when I have family members who were all in the major wars: World War I and II, the Korean War, the Vietnam War. And I had relatives who died in that war. Spilling blood for an American flag has always been something my family has been proud of.

My family died for these rights and for everyone to have, not just for Native Americans to have but for all races to have. These are rights that they believed everyone should have. Even though casinos are on a piece of Native American land, it is still America. It is embarrassing as a Native American to think that this legislation could pass and my coworkers have no rights because my band of brothers, my family, my heritage took them away thinking it was okay, when it is not.

I would be pleased to answer any questions you have.

[The testimony of Mr. Navarro follows:]

Testimony of
Gary Navarro
Slot Machine Attendant and Bargaining Committee Member for UNITE HERE Local 2850 at the Graton Casino and Resort
before the
Health, Employment, Labor, and Pensions Subcommittee
of the Committee on Education and the Workforce
U.S. House of Representatives
regarding the
Legislative Hearing on H.R. 511, the *Tribal Labor Sovereignty Act of 2015*.
June 16, 2015

Chairman Roe, Ranking Member Polis, and Members of the Subcommittee, thank you for inviting me to testify today.

My name is Gary Navarro. I'm from Santa Rosa, California, and I'm an enrolled member of the Pomo Nation, one of the largest in California, and a worker at the Native-owned Graton Casino & Resort in northern California. I am here to testify about how my family has always stood for full American rights for everyone—fought and died for this principle—and how opposed I am to the idea that in the name of my heritage, some of the most important rights Americans have would be taken away from the thousands of people who work in Native businesses. I became active in my union because of unjust treatment of casino workers by their managers and how nothing could be done about even sexual harassment because of sovereignty. Exercising our right to organize turned out to be the only way to protect ourselves and our co-workers. Don't strip us of these rights.

My Native Heritage

The Pomo Nation is divided into several groups throughout Northern California. My grandmother and her children grew up on the Round Valley reservation in Covelo, California, which is about four hours north of Santa Rosa. I go back there and visit family as often as I can,

five or six times in a year. My family has lived there many generations, as far back as anyone can remember. People there were poor. Mostly they were basket weavers and farmers. They didn't have an education. School was just so far – three or four hours away from where they lived.

There is much crime there because there is a lot of alcohol and drug abuse. In my grandma's time, it was mostly alcohol abuse and now it's a lot of drug abuse.

My grandma left the reservation at a very young age to bring her family to Santa Rosa because she didn't want to have to deal with that same poverty life for them. My whole life, my grandma has taught us pretty much how to hold our own and stand up for what's right. And as I was growing up, she always would teach us our heritage and to be proud of who we were, but also to be hardworking and understanding towards others' rights.

Like my grandma, my father would push us to do our best – he didn't want us to be in poverty and he didn't want what she stood for to die off and us to slack off. He always encouraged us to find our voice and speak up when we needed to and not sit back and let people take advantage of other people. I can't sit back and watch and see these rights under the National Labor Relations Act be taken away from all the workers, especially when I have family members who were in all the major wars – World Wars I and II, the Korean War, the Vietnam War – and I had relatives who died in that war and them spilling their blood for an American flag has always been something my family was proud of. My family died for rights for everyone to have, not just for Native Americans to have or for other races to have. These are rights that they believed everyone should have. I have three young boys who are six, seven and four. I don't want my kids to open up history books and learn about the loss of NLRA rights and say, "Wow,

Dad, how come your generation didn't stand up and fight this; why is it falling on us?" and have them be looked upon and judged by everyone else because poverty issues came into play and took everyone's rights away. And knowing that as a parent, and knowing what my father and my grandmother and my grandfather and all my other ancestors would have done, I knew I had to take this stance and stand up and say something because it's not right.

We Formed a Union at Graton

I'm now a slot attendant at Graton Resort & Casino, which they call a Guest Service Ambassador. Graton is owned by a combination of Pomo, my Nation but another part of it, and Mi-Wok. There are five Natives working at Graton now, including my cousin and two other Pomo. There's one from Graton. There used to be more. In total there are about 2500 employees. No managers are Native. They are all Caucasian and one African-American, all the way to the General Manager. The casino is run by Station Casinos for the Federated Tribes of Graton Rancheria.

I have seen sexual harassment at the casino. A General Manager, who is no longer there, was going up to girls and telling them that if they want promotions that they had to sleep with him, or he would invite them over to his house to have drinks, and he would go up and grab girls from behind. The girls were fired. We all complained about it to my manager, who filed a complaint but we never heard back. We were only told by Station Casinos management that the casino was part of a sovereign nation and that Station would figure it out on their own. I thought it was completely wrong. I thought it was completely unfair that the women were fired for telling on the General Manager who did it.

I was part of the organizing effort to have collective bargaining at Graton. Union organizers came to my house. I wasn't really quite sure about unions because I have never been in a union and I had probably the same questions as everyone else, like what it was going to do for me and all that, but I gave the guys a chance to talk to me and listened to what they had to say. When we were talking, it just clicked to me what they were talking about because people were getting disciplined just because management didn't like them and how it wasn't fair, and then I realized that we didn't have a voice working at the casino and that we needed a voice. We needed the union to help us organize ourselves so we could actually sit back and tell them no, that we shouldn't be written up for things like complaining about sexual harassment and we should be able to speak out about abuses like that without having to worry about our job being taken away from us.

I actively started going to and talking to my workers and telling them why we needed this union, that it would be our voice and would help us so that we were no longer written up for petty things like the way your hair looked that day even though there was nothing wrong with it, or that the fact that management has favorites and wanted to write you up because their favorite did something wrong but needed to blame someone else. We went from two people supporting the union to 15 people to 64 people in the whole department finally agreeing that we needed this union. It was, to me, a win because we had been divided because management came in and started saying, look if you guys start doing the union, we're going to take action on you. They wanted to know who was organizing the union in the group and I had no problem saying it was myself that was standing up for my group. I've gotten dinged a few times for it. They put me in a corner and I stayed there the whole time and I've gotten off every trial that they've put me on, trying to fire me, because I worked hard and I showed that my work ethic was where it should be

and I would give them no reason to keep writing me up. Even though they would look for reasons, I would never give them a reason to. But even though management was opposed to us having a union, the Graton tribe was OK with it. The tribe went in and told Station management to back off and let it go – let it be the way it needed to be. That Graton had given permission for us to organize. After the tribe went to bat for us, Station Casinos management backed off and it went smoothly from there. The union is recognized, and we are in the end of our negotiations right now.

Job protection and fair treatment have been the main achievements in our negotiations. Now they have to have just cause to write us up, and we will have a chance to see if it actually makes sense. I will be recommending that my co-workers vote to ratify the agreement we have negotiated. The Graton Rancheria will also vote on it.

The Tribal Labor Sovereignty Act of 2015 (H.R. 511)

I don't think a bill to exempt all native-owned commercial enterprises from the National Labor Relations Act is right. If you exempt any of these businesses, you're also giving power to the companies that manage them, like Station Casinos in Las Vegas, that are hired to come in and manage their businesses. Under this proposed legislation, companies would be exempt from the NLRA at Native-owned casinos and other businesses, which means they can go ahead and say, now we're sovereign, so we're going to go ahead and take everyone else's rights and do what we want to do and if we feel like doing it, we can because there's nothing you can do about it. It honestly isn't fair to the worker because everyone has rights. Even though it's a piece of Native American land, it's still America and everyone should still have the same rights. It shouldn't be like we're taking this from you because we can. It's embarrassing as a Native

American to have to sit back and think maybe, just maybe this could happen and have to go to work every day trying to smile, looking at all my co-workers knowing deep down inside that I'm upset because they have no rights because my band of brothers, my family, my heritage took them away thinking it was OK when it's not.

My opinion would still be the same if the casino was actually run by the Graton Rancheria itself instead of an outside contractor. It's not fair to take anyone's rights away from them. To say just because it's a Native American land that we have and they work on it, that they don't have those rights, that's wrong. It should still go by federal law, no matter what. I think that they should be treated just like any other company. They're no different than anyone else. They're a company. They've got to go by every law. Even though you have your own sovereignty and your own nation, your native land, but still, it is a company that is being run, they are paying taxes on, therefore you should still follow the same rules that any other company follows including consumer and environmental laws. You wouldn't build a power plant on a Native American land and then say, OK, we're sovereign, we don't have to worry about dumping waste in violation of environmental laws – it's sovereign so we can do it. No, you still have to follow the law.

Without NLRA coverage, employees in Native-owned businesses are at the mercy of changes in tribal government or philosophy. For instance, things are going smoothly now at Graton. The tribe has leadership that supports employees' right to organize and have collective bargaining. We are close to finishing our collective bargaining agreement, which gives us a decent standard of living and the guarantee that comes with an employment contract. This could change. If a new tribal government came in that did not have the respect for non-Native workers – or members of other tribes, like me – or if simple greed took over its decisions, the tribe might

walk away from the contract when it expires. This cannot happen under the NLRA because the employer is obligated to continue bargaining with the union after the contract expires. The Graton Tribal Labor Relations Ordinance does not require this, but federal law does. A new tribal government could not only refuse to bargain with us again, but could take away everything we have after expiration of our contract. We would then be the mercy of the tribe and their management company. Only the NLRA would help us protect what we have gained. To be clear, what we have gained is the ability to work hard and in exchange, get wages and benefits that enable us to have self-sufficiency. The success of tribal businesses should work for both the tribe's members and for the workers. These businesses are a route to tribal self-sufficiency and workers' self-sufficiency. As a Native American and as a worker, I do not want to be in poverty or on welfare. I can avoid that through my union and collective bargaining, as long as those things are protected by federal law.

Under federal law, if the tribe refused to bargain after the expiration of our contract, this would violate its bargaining duty. We could file charges with the National Labor Relations Board, which would issue a complaint or seek injunctive relief to force the tribe back to the bargaining table. If the tribe took away our wages or benefits, again we could file charges with the NLRB and get the remedy of reinstatement of what we had and a make-whole for what we lost. Without the NLRA, there is very little we could do. We could complain to the tribe itself, but there is very little chance that would be successful if they had a change of heart. We could complain to the state, but there is little the state can do short of threatening to terminate the gaming compact, which is even more unlikely, even if the tribe's actions gave the state legal grounds for termination. We could not go to either federal or state court, the doctrine of

"sovereign immunity" means that we cannot sue the tribe even when it clearly violates our rights. We would be like people who live under dictatorship with no rights.

What could happen to us in the future at Graton without the NLRA is what would be true right now for employees of Native enterprises in other parts of the country. If Congress repealed the NLRA for tribal businesses, these employees would have no way to organize for collective bargaining unless a tribe decided to allow it. They would have no ability to protect their jobs if they even said a word about wanting to act together in their dealings with management. They would not even be able to speak in favor of collective bargaining, wear a union button, circulate a petition about their terms and conditions of employment, etc. They have none of these rights except through the NLRA and whatever a tribe decides to allow them -- and only for so long as it chooses to do so.

The states cannot help. The states cannot prosecute the tribes for violating our rights under state law, because of the doctrine of "sovereign immunity". So even though we are covered by things like state laws against discrimination, the states cannot enforce them unless the tribe agrees to waive its sovereign immunity. We are the only American workers in this precarious situation.

A comparison between tribal businesses and state and local governments does not wash. First of all, we are talking about tribal businesses, not governments. These are not just casinos, but enterprises engaged in retail, hotels, forest products, and many other types of businesses in both Native country and outside. Naturally, Native-owned businesses want to grow and diversify just like any others. These are not government functions in what they do or how they behave.

Second, workers and their organizations have political rights in state and local government. They have none in Native tribal government. In fact, attempting to influence tribal government

is usually grounds for termination. Because tribal government is not considered government for the purposes of the Bill of Rights, we have no First Amendment protections. We have no right of free speech. We have no right to petition the tribal government. Yes, we have these political rights in the state and local governments, but because of "sovereign immunity", these governments cannot do anything for us. And because we are not protected by the First Amendment, tribal employers can fire us for complaining even to state and local governments about how we are treated. But under the NLRA, we become Americans again with the right to speak and act to improve our conditions. The NLRA allows us to talk to the government, customers and anyone else who will listen. Take away our NLRA rights, and we are like people in countries with the most repressive dictatorships.

I think this is why Native country has not been treated under other laws like it was foreign country. Many important federal laws apply to Native businesses. These include environmental and consumer-protection laws. For example, Native businesses are just as much subject to regulation by the Federal Trade Commission as the same businesses owned by non-Natives. Who can really argue with the justice of that? That is the problem with the sovereignty argument when it is applied to ordinary businesses. Where does it end? The courts have held that OSHA applies to Native businesses. Should it be repealed so that in addition to having no right to speak, workers in these businesses may be subjected to working conditions that will maim and kill them? The same is true of the Fair Labor Standards Act. Does sovereignty mean that it should be repealed, so that Native businesses can use child labor?

It is bad enough that Title VII of the 1964 Civil Rights Act does not apply to these businesses. Yes, that is right, the courts have interpreted the exemption in Title VII for Native tribes to include Native businesses, even ones that are staffed by non-Natives and cater to non-Natives,

like casinos. That means that all forms of discrimination, including sexual harassment, are fair game. I have personally been told that nothing can be done about sexual harassment because of this. Once again, the state and local governments cannot help. Even though they have their own anti-discrimination laws, "sovereign immunity" prevents them from being enforced against tribal businesses. Congress should not make a bad situation worse by also taking NLRA protections. The NLRA enables workers who have been subjected to harassment and other forms of discrimination to get together to complain about it. This is concerted activity that is protected by the NLRA. Take away the NLRA, and you have not only sexual harassment but no ability to speak out about it. No one can think this is right.

Conclusion

I am proud to be Pomo and I believe deeply in our sovereignty to determine our own laws and customs to govern ourselves. But we are also Americans who should treat others as equals, just as we wish to be treated. Taking away workers' rights under the NLRA to act together to improve themselves puts all Americans, Native and not, in a much worse condition.

Chairman ROE. Thank you, Mr. Navarro, for your testimony. Now Lieutenant Governor, Mr. Keel, you are recognized for five minutes.

TESTIMONY OF THE HON. JEFFERSON KEEL, LIEUTENANT GOVERNOR, CHICKASAW NATION, ADA, OKLAHOMA

Mr. KEEL. Thank you, Mr. Chairman and other members for the opportunity to speak before you today. To us, today's discussion is solely about sovereignty. It is about our government-to-government relationship with the United States, and it is about the Federal Government living up to the principles that have shaped successful self-determination policies for the past 40 years.

All governments must be afforded the respect all governments are due. We accordingly call on Congress to correct this understanding that arises from the NLRA not expressly including tribal governments in its list of those that are already exempt from the NLRA. As recognized since the earliest days of this republic, the Chickasaw Nation is a sovereign government. Acting under our constitution and laws, our leaders provide citizens with a broad range of government services, including health care, housing, and education.

And our government's direct operation of economic development initiatives and the revenues we raise from them are critical to those programs. Fundamental principles of federal law provided American Indian tribal governments should be treated as other governments are under federal law, including treatment with respect to the right to government-employee labor relations.

When Congress enacted the *National Labor Relations Act*, or "the Act," in 1934 it expressly exempted government employers. For seven decades the National Labor Relations Board, or the Board, properly construed the act as exempting the American Indian tribal governments. In 2004 however, the Board moved away from that settled practice and began to assert jurisdiction over tribal governments based on a case-by-case determination that focused not on the sovereign status of tribal governments but on an inquiry as to whether the tribal government's actions were sufficiently governmental in nature.

This is an inquiry for which neither the Act nor other common law provide any meaningful criteria and is applied to no other government. The Board applies this test to not federal, not state, not municipal; only tribal.

In 2011, it was alleged that the Chickasaw Nation violated the NLRA at our WinStar World Casino. We contested those charges, asserting both our fundamental status as sovereign nations and our treaties with the United States. Earlier this month, we won a ruling from the Board that recognized our treaties as barring NRLA jurisdiction over our workplaces. Our win is a long overdue victory for sovereignty, but it remains incomplete.

First, it rests on treaty provisions that are unique to us and our sister sovereign, the Choctaw Nation of Oklahoma. Instead of relying on broader federal law principles, the Board appears to instead have found the narrowest path possible for coming to the right conclusion.

Second, the test that the Board applied is only 10 years old. More to the point, that test reversed 70 years of the Board's prior understanding of the law. What assurances do we have, today, that the Board will stay with this understanding? The governments of Indian country deserve stability and certainty under federal law.

Tribes have demonstrated their ability, as you have heard, to address these issues on their own. For example, the tribal governments in California have negotiated compacts that address tribal workplace unionization. That may have been a sound decision by those tribal sovereigns. It may not be one that all tribal governments or even state governments might make. Certainly, it is not a decision that the Board should make for tribal governments.

Franklin Roosevelt himself argued for not subjecting governments to the NLRA, which he emphasized, was developed for purposes of regulating private enterprise labor relations. His caution was well founded and should apply with respect to all governments, including tribal governments and their sovereign rights to regulate their own government labor relations.

The *Tribal Labor Sovereignty Act* would provide Indian country with the stability and certainty it deserves, and the Chickasaw Nation accordingly calls on Congress to correct its prior error by adding tribal governments to the list of those already exempt from the NLRA.

Thank you again for inviting me to appear. I urge you to do everything you can to ensure swift passage of the *Tribal Labor Sovereignty Act.*

Thank you.

[The testimony of the Hon. Keel follows:]

TESTIMONY OF JEFFERSON KEEL,
LIEUTENANT GOVERNOR FOR THE CHICKASAW NATION
IN SUPPORT OF H.R. 511
THE TRIBAL LABOR SOVEREIGNTY ACT OF 2015

BEFORE THE HOUSE EDUCATION AND THE WORKFORCE COMMITTEE
SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR AND PENSIONS

JUNE 16, 2015

I am Jefferson Keel, Lieutenant Governor of the Chickasaw Nation, and we are honored to submit this testimony on behalf of our Nation in support of H.R. 511, the Tribal Labor Sovereignty Act.

The Chickasaw Nation is a federally-recognized Indian Tribe with a government-to-government relationship with the United States, holding rights guaranteed under treaties dating to the earliest days of the republic. Under those treaties, our Nation exercises rights of self-government and the power to regulate affairs within our treaty territory in southcentral Oklahoma. The Nation also has the inherent right, as recognized by federal law, to engage in and regulate economic development and to raise government revenues from tribal economic activities. In exercising these rights the Nation raises revenues that are critical to our ability to provide essential government services to our citizens and many other community members. For the last four years these rights were challenged by the National Labor Relations Board's current interpretation of the National Labor Relations Act. While we finally secured a favorable outcome from the Board on exceptionally narrow grounds, other tribal nations have not been so fortunate. What we have seen over the years is an increasingly aggressive approach to enforcement by the Board, which creates unacceptable risks and uncertainties for all tribal nation rights under federal law and to their dignity as sovereigns.

Although Congress did not expressly name tribal governments in the National Labor Relations Act's comprehensive list of exempt government actors, this is because Indian tribes were long considered instrumentalities of the federal government, which *was* listed. For seventy years the Board agreed that the Act's government exemption included tribal governments, and only did an about-face in 2004. But the Board's new approach is wrong, and we submit that the administrative imposition of a private labor model on any government, including a tribal government, is incompatible with the very nature of sovereignty and self-government. *All* governments are entitled to equal respect under the law, precisely as Congress in 1935 intended. We accordingly call upon Congress to take swift action to correct the Board's error and pass the Tribal Labor Sovereignty Act.

The Chickasaw Nation has approximately 53,000 members, making it one of the largest tribes in the country. Our headquarters are located in Ada, Oklahoma, and we exercise government authority throughout a treaty territory covering all or parts of 13 counties in southcentral Oklahoma. We exercise our government authority pursuant to solemn treaty promises made by the United States and which have been repeatedly affirmed and upheld by the federal courts. By these treaties we agreed that, in exchange for removing from our historic

homelands east of the Mississippi, we would receive new homelands in what is now Oklahoma, where we would forever reside and exercise our protected rights of self-government. The Nation settled in these new homelands only after surviving removal from our ancestral lands and the horrors of the Trail of Tears.

Our rights as a sovereign Nation are critically important to us – these rights, held under treaties that are the law of the land, secure our future. Under the 1830 Treaty of Dancing Rabbit Creek, as extended to the Chickasaw Nation through the 1837 Treaty of Doakville, the Chickasaw Nation enjoys a right to self-government for so long as it "shall exist as a Nation." As extended to the Chickasaw Nation, Article 4 of that Treaty (which was originally between the United States and the Choctaw Nation) guarantees that we will not be subject to any laws other than our own, except those federal laws that Congress might enact to govern "Indian affairs," and it further secures to the Chickasaw Nation jurisdiction over "all the persons and property" within our territory. Article 12 of the 1830 Treaty secures to the Chickasaw Nation the authority to exclude intruders from our territory and obligates the United States to remove intruders and keep them from entering Chickasaw Nation lands. And importantly, Article 7 of the 1866 Chickasaw Nation Treaty provides that the Chickasaw Nation will only be subject to such federal laws as Congress and the President deem necessary for the "Indian territory," while Article 45 reaffirms all of the Nation's rights held under its earlier Treaties and not inconsistent with the terms of the 1866 Treaty itself.

Pursuant to and consistent with these protected powers of self-government, the Chickasaw Nation exercises its sovereign rights to govern its territory and to provide essential programs and services to our tribal citizens. We operate our government under a Constitution adopted by our citizens and approved by the United States. Like the United States Constitution, our Constitution provides for three branches of government: Executive, Legislative and Judicial. The Nation's government programs and services include law enforcement, healthcare provided through hospitals, out-patient clinics, wellness centers and nutrition centers, and education services as diverse as the needs of our people, including Headstart and childcare programs, early childhood development services, adult education programs, scholarship programs, and vocational training programs. Our government also maintains family service programs that provide family counseling, investigate and prosecute child neglect or abuse, address domestic violence, and assist in compliance with child support orders, and we operate extensive cultural, language and historical research and preservation programs. We distribute no revenues on a per capita basis to tribal citizens or others, and all gaming revenues go to support these government activities. We are able to provide these programs and services only because of our status as a sovereign tribal government.

We do not have a meaningful tax base. Therefore the overwhelming majority of the funding for our government programming comes from revenues generated through gaming facilities that the tribal government owns and operates through its Commerce Department, an Executive Branch agency. Chickasaw Nation government employees conduct gaming activities under tribal and federal law, as provided in our Indian Gaming Regulatory Act compact with the

State of Oklahoma. We operate at several locations within our treaty territory, and the net revenues from these and other economic development activities, less revenue sharing payments to the State of Oklahoma, go to the Chickasaw Nation Treasury for expenditure in support of Nation programs and operations and to run our core government.

Nation law governs all major aspects of our Commerce Department, from how the Department is organized to how our employees are compensated. All governments must seek to balance broad public government interests in the security of stable, predictable, and continuing government operations with government employees' interests in having their voices heard. That balance is struck differently by the federal government and individual state governments, and the variation across tribal governments is just as diverse. It is our strongly held position that *all* governments should be afforded the right to determine their own government labor relations policies, and that position is well supported by Congress's express decision *not* to apply the private-sector oriented National Labor Relations Act to governments of any kind, including wholly-owned government corporations. The fact is that the Act, which protects a right to strike or to force negotiations on the composition and structure of bargaining units, subordinates managerial prerogatives in a manner entirely appropriate for private enterprise but diametrically opposed to the role of government in the public sector context. Congress made its view on avoiding such dangers clear in 1935, and nothing has changed since then to warrant a different rule today. Instead, federal law has consistently provided that government labor relations matters are to remain the regulatory province of the governments themselves, based on the needs of each government's constituent communities and workforce.

In 2011, however, the Board took action that would have displaced the Chickasaw Nation's right to govern itself when the Board filed an unfair labor practice charge relating to our gaming activities in Thackerville, Oklahoma. Because of the direct threat that Board jurisdiction would pose to our sovereignty, we immediately sought a preliminary injunction against the Board in the United States District Court for the Western District of Oklahoma.

In the district court, we argued that the Board could not exercise jurisdiction over the Nation because the Act does not apply to Indian tribes and does not authorize the Board to take actions that violate tribal sovereignty or tribal treaty rights. The federal court agreed and enjoined the Board from proceeding. After that decision issued, the Chickasaw Nation and the Board came to a procedural accommodation through settlement discussions. Under the settlement, the Chickasaw Nation agreed to provide the Board with an opportunity to take full and final administrative action with respect to the merits of the Nation's arguments that the Board lacked jurisdiction over the Nation, doing so under a stipulated record and on an expedited basis. After this settlement was finalized, the federal district court modified its injunction to allow the Board to hear the case on these agreed-upon terms. This was in June 2012.

On remand, a Board panel initially concluded in July 2013 that it had jurisdiction over the Chickasaw Nation, and we immediately appealed to the Tenth Circuit. But before this appeal was decided, the Supreme Court issued its June 2014 *Noel Canning* ruling, which held that the

Board lacked a lawful quorum at the time its July 2013 Chickasaw Nation decision was issued. On remand a second time, a new Board panel reversed course and issued a decision on June 4, 2015, that upheld our Treaties as exempting the Chickasaw Nation from the National Labor Relations Act.

The Board's new decision adheres to its recently revamped position that – contrary to controlling Supreme Court precedent – tribal governments are presumed to be subject to all generally applicable federal statutes and that the NLRA is one such generally applicable statute. The Board first announced this legal position in its 2004 *San Manuel* ruling, which reversed seventy years of settled administrative practice and signaled an effort to expand federal administrative jurisdiction over tribal sovereigns. Under its *San Manuel* reasoning, the Board declared its jurisdiction under the National Labor Relations Act would be barred only if application of the Act would "touch exclusive rights of [tribal] self-government in purely intramural matters," "would abrogate treaty rights," or would be contrary to "'proof' in the statutory language or legislative history that Congress did not intend the Act to apply to Indian Tribes." This approach has been widely criticized as contrary to established federal law which presumes a statute does *not* apply to abridge tribal sovereignty in the absence of express evidence that Congress intended such a result. Turning this settled rule of Indian law upside-down, the Board's newly-fashioned analysis shifts the burden to the tribal sovereign to show either that Congress intended to exempt the tribe from the statutory scheme, or that a tribe-specific element (such as intramural affairs or a controlling treaty provision) limits the Act's jurisdictional reach.

Despite applying its erroneous standard to our case, this time new Board members ruled in our favor and concluded that language in our 1830 and 1866 Treaties subjected the Chickasaw Nation only to those federal laws that Congress enacted pursuant to its specific Article I constitutional power "over Indian affairs." Since Congress did not enact the Act pursuant to Article I's Indian Commerce Clause, the Board ruled that the Act does not apply to the Chickasaw Nation and its employees. Notably, this decision is the first time since the Board adopted its *San Manuel* test a decade ago that the Board has held it lacks jurisdiction as a matter of law over a tribal government.

While the new Board ruling establishes an important precedent in recognizing the Chickasaw Nation's tribal rights as a government, it also creates enormous uncertainty for other American Indian tribes across the country whose treaty language (if any) may well differ from the Chickasaw Nation's treaty language. Further it has the consequence of making the NLRB the arbiter of tribal treaty rights, instead of Congress and the Courts – even though the NLRB itself has repeatedly acknowledged it possesses no expertise whatsoever in Indian law or matters of tribal sovereignty. The arbitrary risk that arises from shifting control over tribal sovereignty to a quasi-independent federal agency is evidenced by last week's decision from the Sixth Circuit involving the Little River Band of Ottawa Indians. There, the Board had concluded that the Act *does* apply to a tribal government and, by a sharply divided vote, the Court of Appeals *upheld* that decision and invalidated the Little River Tribe's employment ordinances. The Board has

taken similar action against the Saginaw Chippewa Tribe, even though that Tribe is a party to strong treaty protections setting aside its lands for the exclusive use and benefit of the Tribe. The Saginaw Chippewa Tribe's case remains pending decision before the Sixth Circuit.

Every Congress and every President since President Kennedy has concluded that supporting tribal sovereignty and strengthening tribal governing institutions is the *best* policy for ensuring a *secure* future for Indian country. In carrying forward that policy, Congress, the Administration and the Courts have sought to facilitate parity between tribal governments and state and local governments in such diverse arenas as environmental protection, tax policy, and disaster mitigation, just to name three. Congress enacted the National Labor Relations Act for the private sector alone, *not* to regulate the employment relations of government employers. Its exemption for governments of every kind could not be clearer, and the exemption for the federal government was long understood to embrace tribal governments too (which in the 1930s were still considered to be federal instrumentalities under the special protection of the federal government).

The policy question of whether tribal sovereignty is to be supported by the United States or, instead, whether tribal governments are to be treated essentially as little more than local businesses is a profound issue of national importance that cannot be left in the hands of an admittedly inexpert federal agency so that it might decide the matter on a case-by-case basis under a shifting and contested standard that varies as frequently as the composition of the Board.

This is why H.R. 511 is absolutely necessary. H.R. 511 makes clear that the Board's interpretation of the National Labor Relations Act is contrary to Congress's intent, longstanding federal policy, and the rule of law as announced by the Supreme Court. H.R. 511 *clarifies* tribal governments' rightful place in America as coordinate sovereigns that are just as capable of regulating public employment relations as any State or local government.

Thank you for the opportunity to offer this testimony on the proposed Tribal Labor Sovereignty Act, and for the reasons outlined above, we respectfully urge the Committee to swiftly and favorably report this bipartisan bill so that it can be promptly signed by the President.

Chairman ROE. Thank you, Lieutenant Governor. And again, thank you for your service to our country.

I am going to yield myself five minutes and get started. And really, I think this is about as clear an issue as I have ever seen. And I am amazed that you can get 566 Indian tribes. I was at the doctors meeting this morning, with 13 of us and we couldn't agree on anything. So I am astonished that you have that. If you have watched the Congress operate, we will never agree 100 percent. So it is pretty amazing. Look, I think this is fairly simple. Let me just show you how I see it.

One is, either you are sovereign or you are not. You can either make your decisions or you cannot. The NLRA—and I want to read this—does not cover all employees and employers in the United States. For example, public sector employers—that is state, local, and Federal Government employers—are covered by the *Railway Labor Act*; that is airlines and railroads. Agriculture labor and supervisors are not covered under the Act, 29 United States Code.

So, it is clear, you are correct, Mr. Keel, you made the point that it was just left out. And then, 70 years of basically what we thought was law, changed in 2004.

So, I see this very clearly. We should clear it up with one small bill—it is a very simple bill—and it would then allow you to make those decisions. I am for making those on a local basis. And I think Mr. Butler made a great point in his testimony, and I will turn it over to you: this is not anti-union. If you want to unionize where you are, that is perfectly okay to do. And people have, clearly, and you have worked with the unions.

I have said this since I have been on this committee and the time I have been in Congress. It is a right in this country; if you want to do it, you can. If you are fully informed, you want to vote for a union, you can do that. I grew up in a union household. I absolutely understand how that works.

But you also have a right not to unionize if you don't want to. And I think your point was well taken, Mr. Butler, and if you would like to comment on that I would like to hear your—

Mr. BUTLER. First, my condolences to UT. I apologize for being a Husky. But no, absolutely. I mean, look, we have a tremendous relationship with our unions. We work hand-in-hand on many things. In fact, we just worked on an expansion of the gaming bill in the state of Connecticut that was, you know, in concert with union support. And so, those are union jobs, they are going to get impacted. And we realized that because of the way that we care about our employees. We worked with them together to get that legislation passed. And so, we work together throughout the community in charitable organizations, and it has been a very successful partnership, again that we chose to enter into.

Chairman ROE. And I think, Mr. Keel, I want you to comment. I think you made a point a minute ago about—at least the way I understand it—the NLRB made this ruling was that if you are using the profits, some of the profits, of your casinos for travel, for services in the tribe. Am I correct on that?

Mr. KEEL. That is correct, yes, sir.

Chairman ROE. And when you do that, that would seem to me like if you are a sovereign nation you need those revenues to be

able to provide the services that your constituents expect from you. Am I correct?

Mr. KEEL. Yes, that is correct. Yes, sir.

Chairman ROE. And have I missed the point at all in this? It is a fairly simple, straightforward—I don't see how there could be much discussion. Either we have—in these treaties that we did with 566 tribes in this country—allowed you to be a sovereign nation or we have not. And I think we have. Any comments?

Mr. Guest?

Mr. GUEST. I am sorry, Mr. Chairman—

Chairman ROE. I said the point is, what we have done is, in this country we have either said to these treaties that we have had with the nations, the Native American Nations—that you are a sovereign piece of property or you are not. And I think clearly you are, and are able to make your own decisions. Am I interpreting that wrong?

Mr. GUEST. No, sir. I mean, that is exactly the point that tribal leaders are bringing to you today is that they are no different than states, than the United States. The challenge is that Congress was silent with respect to the language in the NLRA, and due to that silence it has created the opportunity for a lot of confusion in this area of the law.

Chairman ROE. Mr. Polis, you are recognized for five minutes.

Mr. POLIS. Thank you, Mr. Chairman. My first question, for Mr. Guest. And what is the implication of this bill, if passed, on the applicability or the precedent that is set with the applicability of the *Americans with Disabilities Act*, OSHA, FLSA?

Mr. GUEST. Well, H.R. 511 only addresses Congress' silence in the NLRA in including tribes in the exemption to the definition of employer, along with state and local governments in the Federal Government. It doesn't have any impact on any other federal law.

Mr. POLIS. So how does one differentiate, for instance, among the right of those with disabilities to have reasonable accommodations at work versus the right of workers to organize? I mean, why this particular set of rights as opposed to some of the other national protections that exist even in tribal nations?

Mr. GUEST. If my recollection serves me, Indian tribes are exempted from the definition of employer in the *Americans with Disabilities Act*. However, in other employment legislation, Congress again has been silent with respect to Indian tribes. The courts have interpreted that silence to create the rule regarding laws of general application apply to Indian tribes, in the employment context, saying that those laws like FLSA and OSHA do apply.

Mr. POLIS. And in your opinion, should those laws not apply to our sovereign nations, OSHA and FLSA?

Mr. GUEST. Well, I think the difference here is that with respect to the NLRA and its impact on tribal sovereignty is vastly different than the impact with respect to OSHA or the *Fair Labor Standards Act*. It really is about safety and health regulations, wages and overtime, which is a very different set of rules versus union organizing on the reservations. Inviting third parties to come on to the reservation and the tribes having no ability, no authority, to regulate their presence.

Mr. POLIS. Reclaiming my time, Mr. Navarro, do you, as a general principle, do you support the sovereignty of our Native American nations?

Mr. NAVARRO. Yes, I support sovereignty.

Mr. POLIS. And so how would you view that this bill would impact both workers' rights, and how do you reconcile your support and the support of many of us of Native American sovereignty with your support of workers' rights?

Mr. NAVARRO. The workers' rights, they are just given rights that people have. You can't really go and take them away and say this is a sovereign nation. This is America. Honestly, it is America. You can't just say I am taking your rights today because it is a sovereign nation. You can't use that against people. Those are hard-working Americans who are busting their butts in their workplace for these tribes. And to come in and say we are going to use sovereignty against you to take rights away isn't fair to them.

Mr. POLIS. Mr. Butler, with regard to employees of Native American nations' enterprises that are not affiliated with a tribe— either members of other tribes or non-Native Americans—they clearly don't have the same rights under tribal governance. And my question is: is there any mechanism under this bill where non-tribal employees could somehow influence the process around the conditions of their employment if they are not enrolled members of the tribe?

Mr. BUTLER. If they are not enrolled members of the tribe? So we treat all of our employees—

Mr. POLIS. About 75 percent, I think, of the employees, I understand across the industry are not members of the tribe.

Mr. BUTLER. We have non-native employees, we have native employees, who aren't enrolled members of our tribe, as well, and we treat them all the same, right? And again we have chosen, as Richard spoke to, the other laws that don't necessarily apply to Indian country, you know. That is our sovereign right to accept those and apply those. And we have chosen to do so. In this case, again, we have put in place our own labor law. We have a disability law; we have a civil rights code. And so those all, on our sovereign actions, have been applied to all of our employees.

Mr. POLIS. And if it was a tribe that didn't have those protections, would you then argue that those protections simply shouldn't be afforded to the employees? Or should there be some federal or national backstop on that?

Mr. BUTLER. Well again, in our case as an independent sovereign, just as each state is independent we have chosen to afford those opportunities to our employees. Now, same thing with states. Not every state has afforded those opportunities, as well, under the NLRA. But we have, so we look at it in the same fashion.

Mr. POLIS. Yield back the balance of my time. Thank you.

Chairman ROE. I thank the gentleman for yielding.

Dr. Foxx, you are recognized for five minutes.

Ms. FOXX. Thank you, Mr. Chairman. And I thank our guests for being here today.

Mr. Guest, just last week, in *NLRB v. Little River Band of Ottawa Indian Tribal Government*, a divided U.S. court of appeals for the 6th Circuit ruled the NLRB may apply the NLRA to a Michi-

gan casino run by the Little River Band of Ottawa Indians on tribal land. How does a treaty with the Little River Band of Ottawa Indians differ from the Chickasaw treaty?

Mr. GUEST. Well, in the Little River Band case they did not make the treaty argument directly, although they have a treaty with the United States. And the language in their treaty and the language in the Saginaw Chippewa, which is the next case up in front of the 6th Circuit Court of Appeals, the distinction is that there is much more general language. They don't have the same language as in the Chickasaw treaty that basically precludes any laws enacted by Congress unless it is made specific to the tribe.

I mean, it is very narrow language for the Chickasaws and the Choctaws that the board recognized. And the impact is going to be felt because not all federally recognized Indian tribes have treaties with the United States. Indian tribes entered into relationships with the United States in a variety of ways.

And so, not every tribe is going to have the benefit—even those with treaties, as my friend Jefferson Keel indicated—have that good of language. It is just the exception, not the rule.

Ms. FOXX. Thank you. Let me follow up, if I could. If the NLRB determines it has jurisdiction over an Indian tribe, then what will become of the tribal labor laws?

Mr. GUEST. Well, that is a good question. And in the San Manuel case it came up, as well. Initially, with the model tribal labor relations ordinance in California, now with the assertion of jurisdiction by the NLRB in Little River Band, there are existing tribal laws. And what the NLRB has said is, well, those that conflict with the NLRA are no longer applicable.

So now there is going to be litigation over, well, what conflicts with the NLRA and what doesn't, creating more litigation and more uncertainty. The decision by the NLRB in Chickasaw and the decision by the 6th Circuit in the Little River Band case again illustrate for us why Congress needs to act and act quickly with respect to H.R. 511.

Ms. FOXX. Thank you.

Lieutenant Governor Keel, the NLRA includes the right to strike. Would a strike at your casino affect government operations in the Chickasaw Nation?

Mr. KEEL. Absolutely. I would liken it to what happened with the air traffic controllers strike a number of years ago to this country, where a group of individuals basically crippled the transportation system of this whole country. We obviously are not on as large a scale, but that is the type of activity that would interfere with what we are doing.

We depend on the revenues to make sure that we provide services, whether it be housing, health care, or emergency assistance to our citizens. And we could not stand for that.

Ms. FOXX. Thank you. Let me go to one more question. I believe I have time. In July 2013, a Board panel concluded that it had jurisdiction over the Chickasaw Nation. Can you tell us what was the basis for that holding? And have the treaties between the Chickasaw Nation and the United States changed since 2013?

Mr. KEEL. No, ma'am. They have not changed. The treaties have not changed and will not change. But thank you for that question.

The specific language that applies to the Chickasaw is that no laws—as Mr. Guest has stated—would ever be passed that would be contrary to the Chickasaw Nation, or unless it was passed specifically for and to the Chickasaw Nation.

Ms. FOXX. Thank you, Mr. Chairman.

I yield back.

Chairman ROE. I thank the gentlelady for yielding.

I now recognize our ranking member, Mr. Scott, for five minutes.

Mr. SCOTT. Thank you, Mr. Chairman.

Lieutenant Governor Keel, apparently some federal laws apply to tribal activities and some don't. If you believe in sovereignty, why shouldn't they all apply or none of them apply?

Mr. KEEL. Thank you. The Chickasaw Nation, we have adopted laws, ordinances, and employee relations that cover all of our employees. And we treat, as you have heard, all of our employees the same. We go through a process every year at a master planning session, where we sit down and we look at what our needs of our employees are in terms of benefits. They—

Mr. SCOTT. We are talking about, in this hearing, we are just talking about NLRB. What about other laws of general application? Why shouldn't they all apply on tribal lands or none of them apply? How do you tell what applies and what doesn't?

Mr. KEEL. Well, the federal laws that we operate under, many of our programs are federally funded so we operate by those rules. Many of the benefits that are afforded to our citizens are the derivative of that. The *Fair Labor Standards Act*, we operate under those rules and regulations and those laws, so—

Mr. SCOTT. Should you have to?

Mr. KEEL. We don't feel that we should have to, but we do.

Mr. SCOTT. So I guess the question, again, is why should some apply and some not? What would happen if the business involved hires a vet. The vast majority of employees are not Indians. Should the NLRB apply to that kind of business?

Mr. KEEL. If it is a tribal business operated by the tribal government, by the Chickasaw Nation, the fact is the answer is no, the NLRB should not be. We are capable of developing our own laws and rules and regulations that would far exceed those needs. In fact, the wages of our employees meet or exceed any of the standards. The benefits of our employees are better. They have better health care, better benefit packages than anywhere around. So we don't feel that the NLRB has any say at all in our affairs.

Mr. SCOTT. What about other laws? OSHA, should that apply? *Occupational Safety and Health Act*?

Mr. KEEL. Again, sir, as many of our programs that we operate are covered under those federal laws we operate under those rules. And we do make sure that we are within the law.

Mr. SCOTT. Why should you have to operate under that and not NLRB law?

Mr. KEEL. As I have said, sir, I believe that we are capable of developing our own rules, laws, and tribal ordinances that would actually improve on those conditions.

Mr. SCOTT. The discussion involves businesses on Indian land. There have been occasional land swaps, where you take some Indian land and trade it with some downtown land so that the hotel

is actually on Indian-owned land. Should these exemptions apply to a downtown casino?

Mr. KEEL. Once again, the Chickasaw Nation is a sovereign nation and we operate our businesses as a sovereign nation. So our laws apply to all of our businesses regardless of where they are located as long as they are within—on trust lands, as you would refer to.

Mr. SCOTT. Well, I mean, if you swapped land and had trust land and really downtown, and had a downtown casino, should that be considered exempt from the various laws that we are talking about?

Mr. KEEL. Sir, there is a process by which the lands are taken into trust that we go through a lengthy process to determine whether or not these lands are placed into trust. Once that process is completed, then yes, we operate those businesses just as any of the other business we operate as a sovereign nation.

Mr. SCOTT. And you would be—you would expect to be exempt from the NLRB in that situation, where you have what is essentially a downtown casino that you own?

Mr. KEEL. If it is on our lands, yes, sir.

Mr. SCOTT. Thank you, Mr. Chairman.

Chairman ROE. I thank the gentleman for yielding.

Mr. Salmon, you are recognized for five minutes.

Mr. SALMON. Thank you. Mr. Guest, my first question is going to be for you. Is it your understanding that state and federal governments, that their employees have to operate under OSHA?

Mr. GUEST. I am not an employment or a labor law attorney.

Mr. SALMON. My understanding is that they are. In fact, if anybody can dispute that—in fact, the ADOT folks, as they are building highways—they have to comply with OSHA regulations. And so this isn't really about whether or not you guys want to pick and choose the laws. You want to be treated the same as the other carve-outs, whether it is the Federal Government or the state governments. In fact, you had mentioned in your testimony that Section 2 of the NLRA states that the term "employer" is defined to include any person acting as an agent of an employer directly or indirectly, but shall not include the United States or any wholly-owned government corporation or any Federal Reserve bank, any state of political division thereof.

And so, they are okay with not having those guys comply with the NLRB rules and regulations, but they have kind of singled you out. I hear some of the argument on the other side, asking you if you should be exempt from OSHA. Well, the states aren't exempt from OSHA, the Federal Government is not exempt from OSHA. And so all you are asking for is to stop being treated like some second class government entity. Isn't that what we are saying?

Mr. GUEST. I think that you have brought an argument to the table that we have not directly thought of, Mr. Salmon. I think that is exactly right, is that the fact that federal and state employees, or governments, are not exempted from OSHA, from the *Fair Labor Standards Act*, and others—again, brings the parity issue right back into focus: tribes should not be second-class governments.

And again, the difference between those laws and the NLRA is the fact that over the course of time tribes are working directly

with folks at the Department of Labor who enforce the employment laws. They are dealing directly with OSHA, and enacting statutes that reflect OSHA. That, as Mr. Butler said, they have enacted ERISA, they have adopted ERISA as tribal law. That is the act of a sovereign, that they are enacting their own laws. Some tribes actually increase the protections for their workers over and above what the federal minimum requirements are. So, again, it is allowing tribes to act in that sovereign capacity.

Mr. SALMON. I guess I just resent you being singled out as the one government entity that has to either—you know, has to accept this or somehow you are not caring about the tribal members that you have purview over. I don't buy that. In fact, I think that either—I think this is very, very consistent with the other laws that are on the books. And that, you know, these other government entities are exempted; then if they are exempted, you should be exempted. That, to me, is pretty cut and dry and the way it ought to be.

Lieutenant Governor Keel, in your testimony you did an excellent job emphasizing the basis for, and the importance of, tribal sovereignty. And I am a proud co-sponsor of the bill for the reasons you stated. And Todd Rokita is a great American. So thanks for introducing this bill. Do you anticipate much opposition to the bill? And then if so, what interests do you believe are going to be interested in restricting the rights of sovereign tribes to handle their own affairs in this area?

Mr. KEEL. Thank you, Mr. Chairman. And thank you for being a co-sponsor of the bill. I am not sure of the opposition. I am not sure what level of opposition we would receive. I am not sure why they would oppose tribal governments being treated as every other government in this country, as it has been recognized. Our inherent sovereignty is recognized in the Constitution of the United States in Article 1. I am not sure why there would be any opposition to this. This simply clarifies misunderstandings that have arisen with the NLRB over the past 70 years. So—

Mr. SALMON. Well, if the NLRB is going to be consistent then it ought to go after the state and the federal governments, as well, if it is going to be consistent. All we are asking for is to quit having this darn double standard. Isn't that right?

Mr. KEEL. Yes, sir. Yes, sir, absolutely.

Mr. SALMON. Okay.

I yield back the balance of my time.

Chairman ROE. I thank the gentleman for yielding.

Mr. Pocan, you are recognized for five minutes.

Mr. POCAN. Thank you, Mr. Chairman, and thank you to our witnesses.

So let me try to follow up on Mr. Salmon and Mr. Polis' question, and even the chairman when he said you are either sovereign or you are not. And as I hear some of this discussion, it sounds like there is more than one inconsistency with how the law is applied and, Mr. Guest, I think specifically the questions that were asked by Mr. Salmon and Mr. Polis. So it sounds like it is not just this one law where you are treated differently, but it sounds like there is other labor, consumer protection, and environmental laws that are treated differently.

So if I understand right, the *Fair Labor Standards Act* has been applied to tribes. Correct?

Mr. GUEST. Correct.

Mr. POCAN. And I believe the OSHA we were talking about has been applied to tribes?

Mr. GUEST. Correct.

Mr. POCAN. Okay. ERISA, the federal pension law?

Mr. GUEST. Correct.

Mr. POCAN. *Age Discrimination in Employment Act*?

Mr. GUEST. I believe there is an exemption for tribes. Not under the age discrimination, the Americans with Disabilities—

Mr. POCAN. Yes, not the ADA but specifically that. So I guess when I look at that, and when we asked before about that we said, well, courts have made this determination. So I guess my question is, are you looking for a legislative fix to all of these areas? Because clearly, you are either sovereign or you are not is the argument, then there are some other things that need fixing. So are you looking for a legislative fix across the board on these issues?

Mr. GUEST. I don't believe so. I think that what we are looking for is exactly what the testimony is; is about parity with respect to the way Congress is treating tribes with respect to labor relations. It allows state governments, local governments, and the Federal Government to enact their own labor relations laws for their employees, but does not allow tribal governments to do that.

Mr. POCAN. But if understand it right, local governments aren't under some of the same things that you are under and some of these other laws. So I mean if you really want the parity shouldn't we address each of these areas? Or are we just going after labor unions as an issue? I mean, that is I am just trying to understand—

Mr. GUEST. I think it is—

Mr. POCAN.—the consistency, I think, it would be all these areas.

Mr. GUEST. I think it is a policy decision that is considered by tribal leaders with respect to where the challenges are. As a result of treaty-making, Indian tribes ceded much of the land in this country over to the United States and also ceded much of their authority—

Mr. POCAN. Sure.

Mr. GUEST.—outside of their own lands. And as a result, they have this unique relationship with the United States. It is the same principle that applies under federalism with the state governments and United States government.

Mr. POCAN. Sure.

Mr. GUEST. You know that certain powers were ceded to the central government, and those—

Mr. POCAN. Yes, but perhaps I am misunderstanding it. But wouldn't all of these issues that I mention that you said apply to you that aren't applying to local units of government? Wouldn't that also be then something that needs to be fixed. I mean, it seems like we are picking one little area, but it sounds like we found about five or six areas at least that there is some inconsistency on.

Mr. GUEST. Well, again, I don't think anyone would argue that there is a need for safety and health regulations in the workplace

across the board or that there is a need for a minimum standard with respect to the *Fair Labor Standards Act*. That there are minimums, and the tribes and tribal leaders are looking at those and determining for themselves, no, that federal law works for us. We are going to enact it as tribal law.

Mr. POCAN. But then doesn't that make you pick and choose which laws? Because I understand you could have, under your sovereignty, labor laws. You have got unions in your facilities, you do not have unions in your facilities. Great example, but all these other things you are now saying there are minimum standards, that is why you comply with them. But there is still a direct inconsistency with some of these other laws.

I mean, so I guess, you know, if we make it you are sovereign or not we should fix things across the board and not just pick on the labor relations. Because I understand, Lieutenant Governor Keel, your argument was that if the blackjack dealers struck it would be a—what was the exact term?—it would cripple government operations.

I might argue with that a bit. I think, you know, that may not cripple your government operations. But you are picking and choosing this is the one law you want to fix on, but not all the other laws.

You just said there are certain minimum standards you have to have for safety, therefore you are complying with OSHA. But really, you probably shouldn't be under OSHA, by the argument you are making today. So I am just wondering how we come across the board to fix it, or why we are picking and choosing which ones we want to attack and which ones we don't want to attack. Because I think it is kind of a holistic approach. You are sovereign or you are not, then we should really have everything included or else we are really not doing our jobs.

Mr. GUEST. Well, again, there is the limited nature of sovereignty with respect to the states themselves. They have chosen to limit their sovereignty, as the tribes have chosen to limit their sovereignty in their relationship with the United States.

Again, I just would stress the fact that the NLRA is fundamentally different with respect to what it provides and authorizes: third parties coming on to Indian lands, organizing employees, the ability to interact in such ways that could interfere with political elections. And that is the concern that tribal leaders have brought to Congress, that concern. Not concerns about safety standards, not concerns about wages and overtime. It is about unions coming on to reservations.

Chairman ROE. I thank the gentleman for yielding.

Mr. Allen, you are recognized for five minutes.

Mr. ALLEN. Thank you, Mr. Chairman, and thank you to our panelists for appearing here today. I think we all agree today that tribal sovereignty is a long-standing treaty between tribal nations and the United States. And, you know, I will remind our colleagues today that we are talking about the NLRB infringing on the rights of Native Americans and our concern for that. And that is the subject of the day. We can take up the rest of these issues, and we will be glad to offer bills to take up those issues when they apply.

Today, we are talking about labor. We need to ensure that Native Americans are protected from NLRB interference. And with that, Lieutenant Governor Keel, it is my understanding that Indian nations use the profits from the casinos to support tribal community and self-government. How are the profits from your casino used by the Chickasaw Nation?

Mr. KEEL. Thank you, sir. The revenues that are derived from our casinos are used to meet the shortfalls where the Federal Government does not provide services or enough funding for many of our services. These include elder care. Many of our senior nutrition sites are completely, totally tribally funded. We have youth camps, and we have scholarships, education. We have a number of other services that are provided for our veterans, and our health care, housing, emergency services, and other types of services that are provided to our citizens that are outside the purview of federal funding.

We operate programs, for instance, for daycare for our employees, Head Start, and other types of assistance to our employees so that they can come to work and earn a living so that they can provide for their families.

Mr. ALLEN. How do your employee wages and benefits compare to, say, local averages? And have the unions attempted to unionize the Chickasaw Nation casino?

Mr. KEEL. Our wages and benefits either meet or exceed—in most cases exceed—the local averages anywhere in our area. We do comparisons to even the metropolitan areas of Dallas-Fort Worth, which is usually a higher standard than where we are located.

Mr. ALLEN. Better than Georgia. It is better than the state of Georgia.

Mr. KEEL. Yes. So our benefit packages are designed to at least meet or exceed in most cases, any of those, comparatively.

Mr. ALLEN. Have the unions attempted to unionize your casino?

Mr. KEEL. At WinStar World Casino, yes, there was a situation where an individual disagreed with our Indian preference, and that led to some other issues.

Mr. ALLEN. And that is why it failed, do you think?

Mr. KEEL. Yes.

Mr. ALLEN. Okay. You know, I believe that some federal laws do apply to tribal lands. In what federal laws apply, is there an application explicit in the law, and how has the Supreme Court determined whether federal laws apply in the event of ambiguity? Is there any mention of Indian tribes in either the NLRA or its legislative history? Anyone care to take that question?

Mr. GUEST. No. The NLRA, in its legislative history, is absolutely silent with respect to Indian tribes.

Mr. ALLEN. Okay.

Mr. GUEST. The Supreme Court has not yet addressed the issue other than through its Tuscarora ruling back in the 1960's that established that under the *Federal Power Act*, which had a provision specific to Indian lands, Indian tribes, and Indian individuals. It nonetheless still went back and answered an argument, saying that federal laws of general application would apply to Indians.

And from that decision, the lower courts have built up a framework that the NLRB now follows the Tuscarora-Cour d'Alene

Framework. Not all the circuits are in agreement with that framework. The D.C. Circuit in San Manuel went another way. The 6th Circuit appears to have adopted that framework.

And other circuits, the 10th Circuit is still noncommittal on that question. So the courts are all over the place with respect to what is the test. To sort of clarify, the rule that was established by the U.S. Supreme Court early in its Indian law jurisprudence basically said that unless Congress spoke specifically and applied a law to an Indian tribe it would not apply. That is what has now been reversed. There was an understanding that if that law was going to impact tribal sovereignty, Congress had to be explicit that it intended that law to do just that. And Congress has.

Mr. ALLEN. Thank you.

I yield back—

Chairman ROE. I thank the gentleman for yielding.

Ms. Bonamici, you are recognized for five minutes.

Ms. BONAMICI. Thank you very much, Mr. Chairman. And Mr. Chairman, you said at the beginning of the hearing that was a clear issue, and with all due respect I don't see it that way. I don't see it clear at all.

It is clear that we all respect tribal sovereignty. I don't think there is a question about that. But I submit that there is also no question that tribal members and non-tribal members who work at tribal casinos deserve the protections and rights that are provided by the *National Labor Relations Act*.

So we have, it is my understanding right now, 566 legally recognized tribes. And I know Chair Butler talked about the employees at Foxwood and how they were able to organize because your tribe has a labor relations law.

And, Mr. Guest, you mentioned in your testimony something about the Navaho Nation labor code, California has a tribal labor relations ordinance. Lieutenant Governor Keel didn't say whether the Chickasaw Nation has a tribal labor relations law that would allow workers to form a union. I do know there were troubles a few years ago when the employees tried to form a union. And to further complicate the issue, there are many employees who are not tribal members who work in casinos, and this issue tends to come up at tribal casinos.

So, Mr. Guest, in your testimony you encourage the Committee to support this legislation because, you said, tribes should not be subject to a one-size-fits-all approach. But the NLRB's current test for invoking jurisdiction over tribal enterprises involves a case-by-case analysis that accounts for the different legal, political, and economic circumstances of each enterprise.

And it looks like really there are differences among the 566 tribes. And so different tribal members have different protections. So the legislation simply eliminates the jurisdiction without considering any of the tribal diversity you cite.

So isn't it fair to say that it is the bill that is the one-size-fits-all approach, and that the current jurisdictional consideration would analyze whether those protections are there for tribal members.

Mr. GUEST. Thank you, Congresswoman. I can see how you, and how others, might misinterpret what my intended meaning was

there. With respect to what it intends to address is no amendment to H.R. 511, which tries to impose additional restrictions on tribes because tribes are diverse. It wasn't intended to address the fact that H.R. 511, what it would do is, allow each individual tribe to decide for itself what its labor policy is going to be on the reservation, on Indian land. I apologize for that confusion there.

Ms. BONAMICI. And I am going to go to Mr. Navarro. Thank you very much for your testimony. You mentioned that one of the things that motivated you to be part of an organizing effort at your casino is because you saw your colleagues face penalties for raising sexual harassment grievances. So tribal employees are exempt from the protections of Title VII. So as a result, employees who are subjected to forms of employment discrimination at tribally-owned workplaces don't have any recourse.

I read a story about a woman who worked at a swamp safari in Florida. And she filed a suit against her employer after he allegedly sexually harassed her, and the court dismissed her case because of sovereign immunity.

So, Mr. Navarro, how does your membership in a union help you and your coworkers address things like harassment and employment discrimination issues? What difference does that make?

Mr. NAVARRO. It gives us protection from everything, like for example from this harassment case as it happened. We had members from Stations Casino who represents Graton Rancheria Tribe. And I would like to thank them also for letting me be here today because they have been very supportive of our union. They have been absolutely wonderful.

They let us go ahead and negotiate at the casino with them there.

But this actually helps us because these women literally—I witnessed this—I watched the manager who was running this department would go up to them and tell them if you want a raise, let us go and have sex at my house. Or he would text them and tell them, hey, let us go to my house, we are going to have a party, the game is on, let us get in the pool afterwards.

And when we took it up with our management, which is Stations, we were told that it was a sovereign nation and that they would deal with it how they would do it. And we sat back and watched these girls the next day get escorted out by security because they were fired for all the allegations they made.

And it wasn't until Chairman Sarris stepped up and said hey, you guys need to step back, you know, and be diligent when you fire people. And he said you guys need to let them go ahead and organize their casino. It helped us because we finally had a voice. And those women that were fired, I felt like there was some kind of repercussion because we were given the choice to stand and have voice.

Unfortunately, they are no longer there. A couple months after Chairman Sarris came in the supervisor was removed from Stations Casino and moved to another casino in Minnesota.

Ms. BONAMICI. Thank you very much for being here, and your testimony. And my time has expired.

I yield back, thank you.

Chairman ROE. I thank the gentlelady for yielding.

Mr. Pocan?

Mr. POCAN. Yes, thank you, Mr. Chairman. I just have five letters I would like to ask unanimous consent to have entered into the record.

[The information follows:]

INTERNATIONAL UNION OF OPERATING ENGINEERS
LOCAL NO. 953
AFL - CIO

LOCAL 953

Phone: (505) 598-6634 Fax: (505) 598-6636

4260 Highway 64
P.O. Box 2127
Kirtland, NM
87417

June 15, 2015

Chairman John Kline
2439 Rayburn House Office Building
Washington, DC 20515

Ranking Member Robert C. Scott
1201 Longworth House Office Building
Washington, DC 20515

Re: Tribal Labor Sovereignty Act

Dear Chairman Kline, Ranking Member Scott and Leaders of the Committee;

As a member and an employee of the International Union of Operating Engineers Local 953 here in New Mexico, I oppose the Trial Labor Sovereignty Act (H.R. 511), a bill that would eliminate the labor protections currently guaranteed to Native American workers as well as non-native workers. The bill changes current law by exempting the National Labor Relations Act (NLRA) from tribal enterprises on tribal lands.

As an enrolled member of the Navajo Nation and seeing firsthand the negative impacts of sovereignty issues, i.e. 4 Corners Power Plant waiving sovereignty, this is not good for the Navajo workforce. Employees of private and tribal operations should not have their right to form unions and bargain collectively taken away.

Not only would this affect the Navajo Nation which has ownership in Navajo Mine that supplies coal to the 4 Corners Power Plant but also the many Pueblo and Apache Tribes that have tribal gaming operations in existence that employ thousands of native and non-native workers here in New Mexico.

I find it unacceptable that our elected leaders in Washington would attempt to take away our rights to bargain collectively for the betterment of ourselves and our families as Americans, even our rights as Native Americans on our own Tribal lands. I oppose this bill and urge you to oppose it as well.

Thank you for your consideration.

Sincerely,

Clayton D. Benally
Business Agent
IUOE Local 953

Teamsters
Local Union No. 886

General Drivers, Chauffeurs and Helpers, Local Union No. 886

Ron Cobb
President
Business Manager

Affiliated with the International Brotherhood of Teamsters

Hon. Phil Roe
Chairman
HELP Subcommittee
Committee on Education and the Workforce
U.S. House of Representative
Washington, DC 20515

Hon. Jared Polis
Ranking Member
HELP Subcommittee
Committee on Education and the Workforce
U.S. House of Representative
Washington, DC 20515

June 15, 2015

Dear Sirs,

In approximately September 2010 we, Teamsters Local 886, were contacted from an employee at WinStar World Casino in Thackerville, Oklahoma. On the employees request we held several discreet meetings concerning their desire to organize under the NLRA. The majority of the employees that we met with were not tribal members; they were simply employees of WinStar. Their complaints ranged from hours of work, pay, supervision and the manner in which management distributed their tips and their lack of ability to have any say concerning any portion of their employment.

Sometime around late September 2010 WinStar Management became aware of a possible organizing campaign. WinStar Management immediately began giving their employees the impression that their Union Activities were under surveillance. From October through December 2010 multiple levels of management aggressively violated the NLRA including interrogation, threats, discipline, and prohibiting the employee's freedom to talk to the media or in public forum.

I filed several charges with the NLRB for violations that WinStar World Casino Managers had blatantly committed against their employees. As you know those charges and obvious violations of the employees rights to have a say so to organize were ruled that in this instance the tribes 1830 Treaty trumped the Congressional NLRA of 1935.

Teamsters
Local Union No. 886
General Drivers, Chauffeurs and Helpers, Local Union No. 886

Ron Cobb
President
Business Manager

Affiliated with the International Brotherhood of Teamsters

1-Will the Committee determine how many employees of the various Indian Casinos operators are actually members of the Tribe for whom they are working and how many employees are not members of the Tribe?
2-Will the Committee order the creation of a report from the supporters of the Bill in question which shows the number of employees of each Casino, the number of employees who are actually enrolled members of the Tribe involved , and the number of employees who are not members of the Tribe , or any other Tribe. The term "member" should include only those individuals who are actually on the rolls as member of the Tribe in question?
3-Do the supporters of the Bill agree that:
(a) Indian members who work for Tribal Casinos are generally American citizens?
(b) Since 1935, the US Government has recognized that it is beneficial for American citizens to have the right to bargain collectively with their employers concerning their wages, hours, and other terms and conditions of employment?
(c) Shouldn't American citizens who are also members of an Indian Tribe have the same rights as enjoyed by other American citizens since 1935?
4-Should Indian Tribes have the right pay their employees less than the minimum wage, or refuse to pay them overtime, or to employ under age children, or ignore OSHA Regulations?
If not, why should Indian Tribes have the right to deny their members the fruits of collective bargaining?
5-If the supporters of this Bill claim to have the backing of the citizens (members) of the various tribes (not just the leadership) , why not require a vote of the Indian members of the Tribe to decide if they want this Bill to govern their rights as a Tribal/American citizen? In other words, should the enrolled members of the various Tribes be given the right to vote on whether this Bill should govern their rights as American and Tribal citizens?

It also seems to me that if the tribes are excluded and excused from the laws of the land they will certainly have an unfair advantage over their competitors in the same industries.
Thank you for allowing me to express my experience and questions on this matter.

Sincerely,

Ron Cobb

Ron Cobb
President/Business Manager

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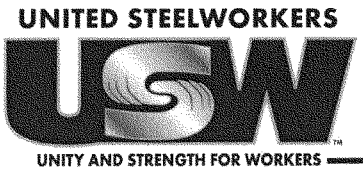

June 9, 2015

VIA EMAIL
U.S. House of Representatives
Washington, D.C. 20515

Dear Representative:

The United Steelworkers (USW) represents hundreds of workers in the gambling industry in Nevada and Ohio, and has recently filed a petition with the National Labor Relations Board (NLRB) to represent over 100 workers at the Saganing Eagles Landing Resort and Casino in Sandish, MI. Saganing Eagles Landing Resort and Casino is owned and operated by the Saginaw Chippewa Indian Tribe. The Tribal Labor Sovereignty Act (HR 511), if passed, would exempt Indian-owned and operated interstate commercial enterprises operated on Indian lands from the National Labor Relations Act (NLRA). The USW supports Tribal Sovereignty; however, we believe workers should be afforded federal labor law protections where no other protections exist.

Indian Tribes own and operate many different interstate commercial enterprises on Indian lands - not just casinos. Tribes operate mines, smoke shops, power plants, saw mills, construction companies, ski resorts, hotels and spas, gift and farmers markets. The vast majority of these businesses are not exclusively Tribal in nature, because they market to the general public while providing a source of revenue for Tribal governments and members.

Since the 1980s, as Tribes have expanded their business interests, they have also sought exemptions from federal labor laws. The courts have consistently ruled Tribal Sovereignty extends to, *"only that power needed to control internal relations, preserve their own unique customs and social order, and prescribe and enforce rules of conduct for their own members. Toward this end, the Supreme Court has recognized that a tribe may regulate any internal conduct which threatens the political integrity, the economic security, or the health or welfare of the tribe." Reich v. Mashantucket Sand & Gravel, 95 F.3d 174, 178-79 (2nd Cir. 1996)* [Emphasis added].

Also, Courts have ruled on numerous occasions that commercial tribal enterprises should not be excluded from the ADA, FLSA, OSHA, ERISA and other Federal labor law protections. *See, Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113 (9th Cir. 1985).*

HR 511, if passed, would overturn the NLRB decision that workers at Tribal owned and operated casino enterprises should receive the benefits of collective bargaining, just like other casino employees, see San Manuel Indian Bingo and Casino, 341 NLRB No. 138 (2004).

In 2011 before the Senate Indian Affairs Committee, the National Indian Gaming Commission testified that of 566 federally-recognized tribes, 246 operate 460 gaming facilities in 28 states, ***and that the vast majority of employees (up to 75 percent) were non-Tribal members***. That same testimony reported in 2009 that tribal casinos generated gross gaming revenue of $27.2 billion, only a fraction of the estimated $100 billion U.S. gambling industry revenue. As of September 2014 the Federal Gaming Commission estimated there were 733,930 people directly employed by the gambling industry in the United States.

HR 511 would rob the NLRB of exercising jurisdiction on a case-by-case basis. Just last week the NLRB declined to take jurisdiction citing the 1830 Treaty of Dancing Rabbit Creek and 1866 Treaty of Washington stating, *"We have no doubt that asserting jurisdiction over the Casino and the Nation would effectuate the policies of the Act. However, because we find that asserting jurisdiction would abrogate treaty rights specific to the Nation."* Chickasaw Nation Windstar World Casino, 362 NLRB 109 92015). Similarly the NLRB declined jurisdiction, *"when an Indian tribe is fulfilling a traditionally tribal or governmental function that is unique to its status,.. fulfilling just such a unique governmental function* [providing free health care services to Indians]," Yukon Kuskokwim Health Corporation, 341 NLRB 139 (2004). [Emphasis added].

Finally, the Tribes assert that, if passed, HR 511 would grant the same exemption as state and local governments under the NLRA. This argument is inaccurate because the NLRA **only exempts actual government employees**, and not private sector employees working for commercial enterprises within the boundaries of state or local governments. Casinos are not inherently governmental operations and their employees may not work directly for a Tribe.

Casinos and other Tribal enterprises should be reviewed on a case-by-case basis, as was done in Chickasaw and Yukon Kuskokwim.

HR 511 would take a meat cleaver to the Act and deny thousands of workers protection under the guise of Tribal Sovereignty. HR 511 would deny Indian and non-Indian workers alike their ability to collectively negotiate their wages, hours and working conditions and improve their lives and that of their families. Please do not support or co-sponsor HR 511, and vote NO should it reach the House floor.

Thank you for your consideration and please contact Alison Reardon, USW Legislative Representative at 202-778-3301 or areardon@usw.org for additional information.

Sincerely,

Holly R. Hart

Holly R. Hart
Assistant to the International President
Legislative Director

HRH/ar

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA – UAW

DENNIS WILLIAMS, President GARY CASTEEL, Secretary-Treasurer

VICE PRESIDENTS: CINDY ESTRADA • JIMMY SETTLES • NORWOOD JEWELL

June 15, 2015

IN REPLY REFER TO

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For the Record

House Subcommittee on Employment and Workplace Safety
"Legislative hearing on H.R. 511, *The Tribal Labor Sovereignty Act of 2015"*

Testimony by Josh Nassar, Legislative Director, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW).

Chairman Phil Roe, Ranking Member Jared Polis and Members of the Committee; thank you for the opportunity to submit testimony today. On behalf of the more than one million active and retired members of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), I urge you to vote against the Tribal Labor Sovereignty Act. This misguided bill would deny protection under the National Labor Relations Act (NLRA) to over 628,000 workers employed by tribal casinos alone.

UAW deeply believes in tribal sovereignty and has a strong record in supporting civil rights throughout our history. This bill, however, is quite misleading. It is an attack on fundamental collective bargaining rights and would strip all workers in these many commercial enterprises of their rights and protections under the NLRA.

In 2013, there were 449 tribal gaming facilities, which made $28 billion in revenues. Seventy five percent of the workforce is non-tribal members. At Foxwoods, where the UAW represents workers, well over 95% percent of employees and patrons are not tribal members. These employees are working for a tribal enterprise which is simply a commercial operation competing with non-tribal businesses.

The Mashantucket Pequot Tribal Nation (MPTN) owns Foxwoods Resort and Casino in Southeastern, Connecticut. Foxwoods Resort Casino opened in 1992.

In 2009, after an extended labor dispute, MPTN amended its Tribal Labor Laws to provide protections for employee rights. If those laws are repealed, the union has the right to return to federal law to seek protections for the employees. These changes in tribal law would never have evolved without protections already offered workers under U.S. Labor Law.

Having a union and a legally binding contract has made a real difference in the lives of UAW members who work as dealers and assistant floor supervisors. Hundreds of dealers have been promoted to benefited and supervisory positions because of provisions in the contract that maintain minimum percentages of full-time, part-time and supervisory positions. Work rules, wages, and benefits have all improved because of the right to collectively bargain.

The UAW has had a very good and constructive relationship with MPTN. The UAW understands the importance of successful business for our members and is working with MPTN to expand gaming and employment opportunities. This partnership would not exist without the NLRA.

H.R 511seeks to overturn a decision by the National Labor Relations Board (NLRB) in San Manuel Indian Bingo and Casino, 341 NLRB No. 138 (2004). In that decision the Board concluded that applying the NLRA would not interfere with the tribe's autonomy and the effects of the NLRA would not "extend beyond the tribe's business enterprise and regulate intramural matters." The ruling does not apply in instances where its application would "touch exclusive rights of self-governance in purely intramural matters" or "abrogate Indian treaty rights." The NLRB has taken a nuanced view on this matter and has ruled on a case-by- case basis. Earlier this month, the NLRB declined to take jurisdiction on case citing the 1830 Treaty of Dancing Rabbit Creek and 1866 Treaty of Washington. Congressional interference is not justified.

This legislation could also impact dozens of other businesses, including power plants, mining operations, and hotels. It would create a loophole that would likely be abused by unscrupulous employers in the future. Finally, it would create a dangerous precedent that could be used to weaken hard fought worker and civil right protections.

At a time of growing wealth inequality and shrinking middle class, the last thing Congress should do is deprive workers of their legally enforceable right to form unions and bargain collectively. Please oppose H.R. 511, the *Tribal Labor Sovereignty Act of 2015.* Thank you for the opportunity to submit testimony.

JN:tg
opeiu494

International Union of Operating Engineers
AFFILIATED WITH THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS

June 15, 2015

The Honorable John Kline
2439 Rayburn Office Building
Washington, DC 20510

The Honorable Robert C. Scott
1201 Longworth Office Building
Washington, DC 20515

Dear Chairman Kline and Ranking Member Scott:

The International Union of Operating Engineers opposes the Tribal Labor Sovereignty Act (H.R. 511), a bill that would eliminate the labor protections currently guaranteed to hundreds of thousands of American workers. Its reach extends to thousands of members of the Operating Engineers. The bill, introduced by Representative Rokita, changes current law by exempting the National Labor Relations Act (NLRA) from tribal enterprises on tribal lands.

While much of the case law and legislative testimony around the issue focuses on gaming operations, the scope of the legislation extends further to energy facilities owned and operated by tribes on their lands. These operations, too, would be exempted from the nation's fundamental labor-management framework, eliminating more members of the Operating Engineers' labor rights in the process.

Employees of tribal operations should not have their right to form unions and bargain collectively taken away. Without the National Labor Relations Act, there is no guarantee that employees of tribal enterprises will be able to secure protection of these fundamental rights. It is worth pointing out that the overwhelming majority of the current workforce at tribal gaming operations is not Native American. Consequently, no new rights to self-governance are afforded to them. Instead, their fundamental rights in the workplace will be eliminated.

The International Union of Operating Engineers opposes the selective exemption of labor law from the suite of federal laws with which tribal enterprises must comply. It would immediately eliminate the rights of Operating Engineers in a variety of locations around the country and we simply find that outcome unacceptable.

Thank you for your consideration.

Sincerely,

James T. Callahan
General President

Chairman ROE. Without objection, so ordered.

Mr. Grothman, you are recognized for five minutes.

Mr. GROTHMAN. Okay, couple questions. First question, just in general, we have covered this before. I think the appropriate parallel is not any other business, but local units of government. Because if I had to say, you know, traditionally I think we pass laws around here. We exempt state governments or exempt local units of government. How does it make you feel that compared to other locals of government you seem to be treated less important or less capable of self-governance?

Mr. BUTLER. Congressman, we have been dealing with that for centuries, right? And it is unfortunate. And going back to Congressman Pocan's point, I mean, an excellent point about why aren't we addressing all these at one time. There are a lot of issues that, as in Indian country, we want to address at one time, right? And whether it is tax parity, whether it is, again, the bankruptcy code that I mentioned earlier, whether it is fair access to health care. And there are so many things that we would absolutely want to address at one time and would have liked to have addressed 150 years ago.

But, that is just not the way the legislative process works. And so, clearly, we have felt like we have been dealt an unfair hand. And as these issues and the opportunities to address them come up, we want to address them.

Mr. GROTHMAN. Okay. Under San Manuel, the Board will not assert jurisdiction if the application of law would abrogate treaty rights. Under this standard, who determines whether the application of law would abrogate treaty rights? Does the board have any special knowledge of Indian or treaty law? And what level of deference should the courts give this determination by the board?

Mr. GUEST. Well, Mr. Grothman, the NLRB itself admits, in the Chickasaw decision, that it has no expertise in this area. The 6th Circuit, in its decision in the Little River Band case, says NLRB you have no expertise in this area so no Chevron deference for you.

I mean, there is no question by the NLRB or anyone else that they have no expertise in Indian affairs, and yet they are calling upon themselves to interpret treaties, to determine what interferes with affairs on the reservation with the tribe that they simply have no expertise in whatsoever.

Mr. GROTHMAN. Thanks. Did the NLRB engage with the public prior to deciding this? Did they request briefs, for example?

Mr. GUEST. Yes. They followed their administrative process through the proceedings, yes, sir.

Mr. GROTHMAN. Okay.

I will yield the rest of my time.

Chairman ROE. I thank the gentleman for yielding.

Mr. Rokita, you are recognized for five minutes.

Mr. ROKITA. I thank the Chairman, not only for the time as I am not a member of the Subcommittee, but for your leadership in bringing this bill forward; it says you can tell it is greatly appreciated. I also thank Chairman Kline for his leadership in getting this bill to the stage it is in today. I thank all the witnesses for your testimony. I think it has been very enlightening and very

helpful to many of us who are honestly trying to learn more about this situation and get to an equitable and proper resolution.

I am a little concerned, if not dismayed, about some of my colleagues who want to get themselves wrapped around the axle about why the NLRB and not OSHA and not some of these other things. And I would simply like to remind them of the title of today's hearing: legislative hearing on H.R. 511, *Tribal Labor Sovereignty Act of 2015*.

Now, this bill is certainly not my idea. I am carrying, and I love the idea. It has been around for quite a while now. But it focuses on the NLRB. Who knows? Maybe tomorrow, Lieutenant Governor, I will file a bill on OSHA for something else.

Mr. KEEL. Could be.

Mr. ROKITA. But I want to have Mr. Guest reiterate what I believe to be two points here about the differences. First of all, this is a bill about parity. If the tribal communities have a government, why shouldn't it be treated just like the other governments in these United States, whether it be federal, state, or local level?

And the second issue has to do with this third party you talk about, because I think that is also very important. OSHA doesn't invite third parties into a situation and take away the rights of an otherwise sovereign nation. The NLRB does, and, in fact, is trying to do that. Mr. Guest, can you reiterate for the record these two points, just so we are crystal clear: parity and third parties.

Mr. GUEST. Yes, thank you, Mr. Rokita. And I think that it clearly demonstrates in terms of IGRA itself, the *Indian Gaming Regulatory Act*, where Congress spoke. And Congress spoke about tribal gaming as a governmental activity that Congress itself says that gaming revenues are to be used for these limited purposes, particularly for supporting tribal programs and services, and not for anything else.

When we were at the 6th Circuit in the Little River Band case, one of the judges said, well, aren't those Indian casinos just like every other casino? Don't those Indians just stick that money in their pocket? I mean, this is the challenge we have in the courts today with respect to a lack of real clarity on why it is that these are tribal governmental employees working at a casino.

And so when we come in and we say you need to treat them the same, you need to treat tribes the same as all other governments, as the state and local governments, as the Federal Government. It is difficult for others to see it because they say, well, that is just like any other commercial enterprise, isn't it? It is not. It is a governmental enterprise that generates revenues because tribes don't have solid tax bases the way state and local governments may. And so there is no other source for revenues and why the concern with the NLRA applying on the reservation and allowing strikes to occur, which can cripple tribal government. That is where the concern—

Mr. ROKITA. And, in fact, not in parity with other governments.

Mr. GUEST. Right.

Mr. ROKITA. Correct.

Mr. GUEST. Exactly.

Mr. ROKITA. Thank you, Mr. Guest. Now, I also was concerned about some of the questions being asked—and I think it was driven

by some of Mr. Navarro's testimony—regarding crimes or other occurrences on reservations. And I want to give Chairman Butler and Lieutenant Governor Keel a chance to clear these things up. So I am going to ask questions, I want both of you to answer, okay?

Do you have, as government leaders, an interest in keeping your government workers safe?

Mr. BUTLER. Absolutely.

Mr. KEEL. Absolutely.

Mr. ROKITA. All right. Do you, in fact, have laws regarding this?

Mr. BUTLER. Absolutely.

Mr. KEEL. Yes.

Mr. ROKITA. Yes, you both answered yes. Do you know of any tribal community that doesn't address this issue?

Mr. BUTLER. No.

Mr. ROKITA. Okay, second question. Do you tolerate sexual assault or any other kind of misconduct in any of your enterprises?

Mr. KEEL. Not at all.

Mr. BUTLER. No.

Mr. ROKITA. You have, both have answered no to that question. Do you have laws regarding this kind of conduct, criminal or otherwise?

Mr. BUTLER. Yes.

Mr. ROKITA. Regarding sexual assault or any other—

Mr. BUTLER. Yes.

Mr. KEEL. We have special—

Mr. ROKITA. On a worker, right. Do you know of any tribal community that doesn't?

Mr. KEEL. No.

Mr. ROKITA. Right. Final question. Do you mistreat enrolled members who happen to have disabilities?

Mr. BUTLER. Not at all. We actually have special programs for them.

Mr. ROKITA. Mr. Butler says no and has special programs for them. Lieutenant Governor?

Mr. KEEL. We have special programs for all of our people.

Mr. ROKITA. Right. I think Mr. Butler answered that. And one final question. Do you know of any tribe that mistreats their members who have disabilities?

Mr. BUTLER. No.

Mr. KEEL. No.

Mr. ROKITA. You take care of your own.

Mr. KEEL. Absolutely.

Mr. ROKITA. Mr. Chairman, I yield back.

Chairman ROE. The gentleman's time has expired. I would like to take this time again to thank each and every one of you for taking your time in preparation and in testifying before the Subcommittee today. I think all of you made excellent witnesses, and I appreciate you being here. I know you spent a lot of time and effort to get here, so thank you for doing that.

I will now recognize my colleague, Mr. Polis, for his closing remarks.

Mr. POLIS. Well, I want to thank everyone for your impassioned and honest testimony and answers. I truly hope that everyone on our committee will analyze this issue objectively and try to take

the effort to understand what has been said here. And as we consider this issue, it is very important to keep in mind the nexus between balancing our domestic sovereign nations' rights with the protections that are due to all American workers regardless of whether they are white, black, Hispanic, or Native American. Without the right to self-governance, including additional rights that have often been afforded through treaty, we wouldn't have the strong Native American communities and nations that are present across our country today.

But so, too, without the right to collectively bargain we would not have the strong and growing economy that offers a pathway to the middle class for so many American families. I look forward to continuing this discussion with individuals and experts on both sides of the issue, as we seek to reconcile these two principles that many of us on this committee hold dear.

And I yield back the balance of my time.

Chairman ROE. I thank the gentleman for yielding. And I, again, thank the excellent committee we have had here and the witnesses we have had. And I am going to just finish by saying this: to me, is fairly clear and fairly simple. You either are a sovereign nation or you are not. That is pretty simple. And I don't know whether we can go to the British embassy, which is sovereign property here, and require them to do these things. I don't think you can.

So the *National Labor Relations Act* very specifically says the NLRA does not cover all employees and employers in the United States. For example, public sector employees—state, local, and federal –- and employees covered by the *Railway Labor Act*, airlines and railroads, agricultural laborers, and supervisors are not covered by the Act.

Basically, what you are doing is to clarify this. That a sovereign Native American nation also is not covered by this Act. And we are not talking about the other things that were brought up, all very valid things. But, you should be able to make your own decisions on your own land.

We have a 10th Amendment in the United States Constitution, which we have been fighting about who has the power in this government. Whether the state does—and I am a former mayor—I am always going to lean on the best government you have is local government. The further it gets from you, the worse, the least responsive, it is for you.

So, I think this is very simple, and I would urge support; and full disclosure, I am a co-sponsor of this bill. And, once again, I appreciate each one of you coming. And with no further business, the Subcommittee stands adjourned.

[Additional submissions by Mr. Guest follows:]

Appendix A

Center for Economic and Policy Research

Regulation of Public Sector

Collective Bargaining in the States

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CENTER FOR ECONOMIC AND POLICY RESEARCH
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Regulation of Public Sector Collective Bargaining in the States

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Introduction

While the unionization of most private-sector workers is governed by the National Labor Relations Act (NLRA), the legal scope of collective bargaining for state and local public-sector workers is the domain of states and, where states allow it, local authorities. This hodge-podge of state-and-local legal frameworks is complicated enough, but recent efforts in Wisconsin, Michigan, Ohio, and other states have left the legal rights of public-sector workers even less transparent.

In this report, we review the legal rights and limitations on public-sector bargaining in the 50 states and the District of Columbia, as of January 2014. Given the legal complexities, we focus on three sets of workers who make up almost half of all unionized public-sector workers: teachers, police, and firefighters, with some observations, where possible, on other state-and-local workers.[1] For each group of workers, we examine whether public-sector workers have the right to bargain collectively;[2] whether that right includes the ability to bargain over wages; and whether public-sector workers have the right to strike.

Our work updates, in part, a 1988 study by Robert Valletta and Richard Freeman, who conducted a comprehensive review of collective-bargaining laws for state employees, local police, local firefighters, non-college teachers, and other local employees. Much of the attention to public-sector bargaining since Valletta and Freeman has concentrated on public school teachers and we have relied heavily on a statutes database compiled by the National Council on Teacher Quality for an important part of the information presented here.

At the state-and-local level, the right to bargain collectively, the scope of collective bargaining, and the right to strike in connection with union activity is determined by a combination of state laws and case law. The interpretations of the relevant laws and court interpretations, and the frequent silences of both legislators and the courts with respect to specific types of public-sector workers in particular legal jurisdictions, makes it difficult to summarize the legal state of play across 50 states, Washington, DC, and thousands of local jurisdictions. In the rest of this report, we offer our best interpretation of how the relevant state statutes and case law answer our three key questions – whether workers have the right to bargain collectively, whether unions can bargain over wages, and whether workers have the right to strike – for the three groups of workers we focus on (teachers, police, firefighters). The detailed appendix also includes, where available, information on the law as it applies to public-sector workers in general. Our approach is to look first at state statutes. Where

1 In 2013, according to Current Population Survey data, the United States had 16.9 million state and local public-sector workers. Of these, 4.5 million (26.6 percent) were teachers; about 700,000 (4.3 percent) were police officers; and about 350,000 (2.1 percent) were fire fighters. In the same year, 40 percent of all state-and-local workers were unionized. The unionization rate for teachers was 55 percent; police, 60 percent; and firefighters, 67 percent.

2 "Collective bargaining" is the term most used in statutes across the states. In some instances other terms such as "conferencing," the term used for teachers' collective bargaining in Tennessee, are used in regulations for the same principle.

state statutes have left ambiguities or do not address public-employee collective bargaining or related issues of interest, we have looked to case law and executive orders.

Given the complexities involved – and current efforts in many states to restructure the legal framework regulating public-sector unionization – we see the work here as an ongoing effort. We will revise our interpretations, and this document, as new information comes to our attention and as states implement important changes to existing laws.

Right to Collective Bargaining

Chart 1 shows the legality of collective bargaining for public-sector firefighters, police and teachers in each state. We have divided states into three categories: Illegal, Legal, and No Statute/Case Law. States labeled "Illegal" have specific statutes – or case law in the absence of a statute – that bars public employees from collectively bargaining (and, by extension, negotiating over wages or striking). In these cases, statutes or court cases directly address – and prohibit – collective bargaining. For states labeled "Legal," definitive laws or case law exist that actively protect or promote collective bargaining (or negotiating wages or the right to strike). States labeled "No Statute/Case Law" are ones where statutes and case law are ambiguous. In these cases, we were not able to identify any explicit state-level regulation of public-sector employees' collective bargaining (or right to negotiate wages or strike). In some of these cases, a lack of relevant state-level statutes means that a combination of historical practice and local laws ends up determining workers' rights. The leeway involved appears to vary across states. Details on the specific statutes or case law we used to assign states to the three categories appear in the appendix.

In four states –North Carolina, South Carolina, Tennessee, and Virginia– it is illegal for firefighters to bargain collectively. In these same states and Georgia, it is also illegal for police officers to bargain collectively. Five, mostly overlapping, states –Georgia, North Carolina, South Carolina, Virginia, plus Texas– do not allow collective bargaining for teachers. North Carolina, South Carolina, and Virginia have blanket statutes that prohibit collective bargaining for all public-sector employees and do not make exceptions. Texas and Georgia have state statutes banning collective bargaining in the public sector, but explicitly carve out exceptions for police and firefighters in the case of Texas (Tex. Gov't Code Ann. § 174.002) and fire fighters in the case of Georgia (Ga. Code Ann §25-5-4). Georgia is the only state that singles out teachers in legislation in order to prevent them from bargaining collectively (Ga. Code Ann. § 20-2-989.10).[3] In Tennessee, case law has ruled public-sector collective bargaining to be illegal, but the state legislature passed a law that specifically permits collective bargaining for teachers.

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3 Ga. Code Ann. § 20-2-989.10 – *"Nothing in this part shall be construed to permit or foster collective bargaining as part of the state rules or local unit of administration policies."*

CHART 1

Legality of Collective Bargaining for Select Public-Sector Workers

	Firefighters	Police	Teachers
Illegal	North Carolina South Carolina Tennessee Virginia	Georgia North Carolina South Carolina Tennessee Virginia	Georgia North Carolina South Carolina Texas Virginia
Legal	Alaska Arizona Arkansas California Colorado Connecticut Delaware District of Columbia Florida Georgia Hawaii Idaho Illinois Indiana Iowa Kansas Kentucky Louisiana Maine Maryland Massachusetts Michigan Minnesota Missouri Montana Nebraska Nevada New Hampshire New Jersey New Mexico New York North Dakota Ohio Oklahoma Oregon Pennsylvania Rhode Island South Dakota Texas Utah Vermont Washington West Virginia Wisconsin Wyoming	Alaska Arizona Arkansas California Connecticut Delaware District of Columbia Florida Hawaii Idaho Illinois Indiana Iowa Kansas Kentucky Louisiana Maine Maryland Massachusetts Michigan Minnesota Missouri Montana Nebraska Nevada New Hampshire New Jersey New Mexico New York North Dakota Ohio Oklahoma Oregon Pennsylvania Rhode Island South Dakota Texas Utah Vermont Washington West Virginia Wisconsin	Alabama Alaska Arkansas California Colorado Connecticut Delaware District of Columbia Florida Hawaii Idaho Illinois Indiana Iowa Kansas Kentucky Louisiana Maine Maryland Massachusetts Michigan Minnesota Mississippi Missouri Montana Nebraska Nevada New Hampshire New Jersey New Mexico New York North Dakota Ohio Oklahoma Oregon Pennsylvania Rhode Island South Dakota Tennessee Utah Vermont Washington West Virginia Wisconsin Wyoming
No Statute/ Case Law	Alabama Mississippi	Alabama Colorado Mississippi Wyoming	Arizona

Source: Authors' analysis. See Appendix for details.
Note: See text for discussion of Colorado, Idaho, Tennessee, and Wisconsin.

In almost all of the remaining states, firefighters, police, and teachers have the legal right (but not the requirement) to bargain collectively. Many states have legislation that covers all public employees in the state and establishes both the right to organize and to bargain collectively.

In a small number of states, neither legal statutes nor case law clearly establish or prohibit collective bargaining (see the third row of the chart). Firefighters in Alabama and Mississippi, police in Alabama, Colorado, Mississippi, and Wyoming, and teachers in Arizona all find themselves in a legal environment where no set statutes or existing case law governs collective bargaining at the state level. As a result, collective bargaining is permissible at the state level, but the actual legality of collective bargaining depends on local laws.

The case of Colorado provides a useful example of some of the challenges involved in categorizing state collective bargaining regimes. For firefighters, rights are spelled out in a state statute giving firefighters the right to form unions, meet and confer, and bargain collectively. However, for police (or peace officers), Colorado has no state-level laws specifically addressing these rights. The Colorado Firefighter Safety Act, however, does mention other public employees:

> C.R.S. 29-5-212 (1) – *The collective bargaining provisions of this part 2 do not apply to any home rule city that has language in its charter on June 5, 2013, that provides for a collective bargaining process for firefighters employed by the home rule city. This part 2 applies to all other public employers, including home rule cities without language in their charters that address a collective bargaining process for firefighters.*

Based on this language and the home rule regulations, some police officers have the right to bargain collectively depending on local determination. The Colorado State Lodge Fraternal Order of Police has several member lodges that represent these bargaining units. Meanwhile, teachers in Colorado have taken a different approach to their apparent exclusion from state law and have secured their collective bargaining through case law:

> Littleton Educ. Ass'n v. Arapahoe County Sch. Dist., 191 Colo. 411, 553 P.2d 793 (1976) – *School boards have the authority to enter into collective bargaining agreements with representatives of their employees provided that the agreements do not conflict with existing laws governing the conduct of the state school system.*

Other state employees that don't fall into one of the three categories have their collective bargaining rights granted through an executive order, Executive Order Authorizing Partnership Agreements with State Employees (12/28/2007).

Recent state actions in Idaho, Tennessee, and Wisconsin, and under consideration in other states have not eliminated public-sector bargaining, but have sought to limit significantly its scope. These recent actions do not change the status of these states in Chart 1 (or their status in Chart 2 where new limitations do not prohibit bargaining over compensation). However, these new legislative actions have reduced public-sector workers bargaining rights. In Idaho, SB 1108 (2011), restricted the scope of many teachers' collective bargaining. For teachers in Tennessee, a 2011 law changed the way bargaining is done to allow non-union professional organizations to represent employees with the effect that union representation is no longer a requirement for bargaining.[4] Wisconsin's Act 10, which has received extensive media attention, limits bargaining for public employees by imposing raise caps, limiting contracts to one year with salary freezes during the contract term, and requiring annual recertification of unions.[5]

4 Winkler, et al (2012), p. 315.

5 Greenhouse (2014).

Wage Negotiations

Fewer state statutes address the specific legality of wage negotiations than address the general right to bargain collectively. The only states where it is specifically illegal to negotiate over wages are those where collective bargaining is already illegal and therefore wage negotiations aren't allowed by default (see **Chart 2**). Of the remaining states, most protect the bargaining of wages and benefits through legislative definitions and as part of more broad-reaching statutes that cover general labor policy. In general, negotiations over wages and benefits are legal where collective bargaining is allowed for public employees.

CHART 2

Legality of Collective Wage Negotiation for Select Public-Sector Workers

	Firefighters	Police	Teachers
Illegal (Collective bargaining is also illegal in these states)	North Carolina South Carolina Tennessee Virginia	Georgia North Carolina South Carolina Tennessee Virginia	Georgia North Carolina South Carolina Texas Virginia
Legal	Alaska Arizona California Colorado Connecticut Delaware District of Columbia Florida Georgia Hawaii Idaho Illinois Indiana Iowa Kansas Kentucky Maine Maryland Massachusetts Michigan Minnesota Missouri Montana Nebraska Nevada New Hampshire New Jersey New Mexico New York Ohio Oklahoma Oregon Pennsylvania Rhode Island South Dakota Texas Utah Vermont Washington Wisconsin Wyoming	Alaska Arizona California Connecticut Delaware District of Columbia Florida Hawaii Illinois Indiana Iowa Kansas Kentucky Maine Maryland Massachusetts Michigan Minnesota Missouri Montana Nebraska Nevada New Hampshire New Jersey New Mexico New York Ohio Oklahoma Oregon Pennsylvania Rhode Island South Dakota Texas Utah Vermont Washington Wisconsin	Alaska Arkansas California Connecticut Delaware District of Columbia Florida Hawaii Idaho Illinois Indiana Iowa Kansas Maine Maryland Massachusetts Michigan Minnesota Missouri Montana Nebraska Nevada New Hampshire New Jersey New Mexico New York Ohio Oklahoma Oregon Pennsylvania Rhode Island South Dakota Tennessee Utah Vermont Washington West Virginia Wisconsin Wyoming
No Statute/ Case Law	Alabama Arkansas Louisiana Mississippi North Dakota West Virginia	Alabama Arkansas Colorado Idaho Louisiana Mississippi North Dakota West Virginia Wyoming	Alabama Arizona Colorado Kentucky Louisiana Mississippi North Dakota

Source: Authors' analysis. See Appendix for details.

A sizeable number of states have no state law or administrative code that addresses the issue of negotiations over wages and benefits. Where there is no regulation, the practice can be deemed "permissible," determined on a more case-by-case basis, or regulated at local levels.

Right to Strike

CHART 3
Legality of Striking for Select Public-Sector Workers

	Firefighters		Police		Teachers	
Illegal	Alabama	Missouri	Alabama	Mississippi	Alabama	Nebraska
	Alaska	Montana	Alaska	Missouri	Arizona	Nevada
	Arizona	Nebraska	Arizona	Montana	Arkansas	New Hampshire
	Arkansas	Nevada	Vermont	Nebraska	Connecticut	New Jersey
	California	New Hampshire	Arkansas	Nevada	Delaware	New Mexico
	Colorado	New Jersey	California	New Hampshire	District of	New York
	Connecticut	New Mexico	Connecticut	New Jersey	Columbia	North Carolina
	Delaware	New York	Delaware	New Mexico	Florida	North Dakota
	District of	North Carolina	District of	New York	Georgia	Oklahoma
	Columbia	North Dakota	Columbia	North Carolina	Idaho	Rhode Island
	Florida	Oklahoma	Florida	North Dakota	Indiana	South Dakota
	Georgia	Oregon	Georgia	Oklahoma	Iowa	Tennessee
	Idaho	Pennsylvania	Illinois	Oregon	Kansas	Texas
	Illinois	Rhode Island	Indiana	Pennsylvania	Kentucky	Virginia
	Indiana	South Dakota	Iowa	Rhode Island	Maine	Washington
	Iowa	Tennessee	Kansas	South Dakota	Maryland	West Virginia
	Kansas	Texas	Kentucky	Tennessee	Massachusetts	Wisconsin
	Kentucky	Utah	Louisiana	Texas	Michigan	
	Louisiana	Vermont	Maine	Virginia	Mississippi	
	Maine	Virginia	Maryland	Washington	Missouri	
	Maryland	Washington	Massachusetts	Wisconsin		
	Massachusetts	Wisconsin	Michigan			
	Michigan		Minnesota			
	Minnesota					
	Mississippi					
Legal	Hawaii		Hawaii		Alaska	Minnesota
	Ohio		Ohio		California	Montana
					Colorado	Ohio
					Hawaii	Oregon
					Illinois	Pennsylvania
					Louisiana	Vermont
No Statute/ Case Law	South Carolina		Colorado		South Carolina	
	West Virginia		Idaho		Utah	
	Wyoming		South Carolina		Wyoming	
			Utah			
			West Virginia			
			Wyoming			

Source: Authors' analysis. See Appendix for details.

While the majority of states allows collective bargaining and wage negotiations for public-sector workers, the opposite is the case when it comes to the right to strike (**Chart 3**). Only two states (Hawaii and Ohio) grant firefighters and police the right to strike, and only twelve states (Alaska, California, Colorado, Hawaii, Illinois, Louisiana, Minnesota, Montana, Ohio, Oregon, Pennsylvania, and Vermont) allow teachers to strike. Even in states that have statutes protecting the right to strike for public-sector workers in general, specific exceptions are created for public safety employees. In Ohio, while strikes are permissible, "the public employer may seek an injunction against the strike in the court of common pleas of the county in which the strike is located" (Ohio Rev. Code Ann. § 4117.15). In all of the states where teachers can strike, the right to strike has been extended to public-sector workers in general (with the exception of firefighters and police officers).

As with the right to bargain collectively over wages and benefits, a few states don't address the issue of strikes directly in state laws. Strictly speaking, South Carolina has no state statute that addresses public-sector workers' right to strike, but we have included South Carolina with those where strikes are illegal because the state prohibits collective bargaining. In other states without statutes speaking to strikes, the right to strike depends on local law or the terms of the collective-bargaining agreement itself.

Observations, Anomalies, and Ambiguities

The majority of states have clear legal statutes that lay out the rights of public-sector workers. Nevertheless, the legal framework in a number of states is less clear.

For example, the Arizona statute that governs public-safety employee rights, includes the ambiguous language: "shall not be construed to compel or prohibit in any manner any employee wage and benefit negotiations" (Arizona Revised Statutes: Chap 8, Art 6, § 23-1411). This type of language, neither requiring nor prohibiting collective bargaining or other areas of worker rights, occurs in several others states as well.

In recognition of this ambiguity, the National Council on Teacher Quality (NCTQ) classifies collective bargaining laws as falling into three categories:[6]

Collective bargaining required – Districts must collectively bargain if employees request to do so.

Collective bargaining permissible – Districts may choose whether or not to collectively bargain if employees request to do so.

Collective bargaining prohibited – It is illegal for districts to collectively bargain with employees.

In our analysis, we only distinguish between legal frameworks where collective bargaining, negotiations over wages and benefits, and public-sector strikes are "legal" or "illegal." Some states

6 See NCTQ.

classified here as having a legal right to bargain collectively, would be categorized as only "permissible" by NCTQ.

A separate issue involves barriers put in place in some states to prevent union organizing or to make it more difficult. This report looks only at the legality of collective bargaining, wage negotiation, and striking; there are many other issues surrounding public-sector employees' ability to negotiate and organize that are affected by state and local regulations that are not discussed here. For example, earlier we mentioned specific cases of Idaho, Tennessee, and Wisconsin. In addition, some states are applying "right-to-work" laws specifically to public employees as well (Alabama, Florida, Idaho, Iowa, Kansas, Michigan, Nebraska, Nevada, North Dakota, Oklahoma, South Dakota, Tennessee, and Utah).

In some cases, employee associations represent the interests of employees even when collective bargaining is illegal. For example the Fraternal Order of Police (FOP) has "lodges" in all states, including Virginia, North Carolina, and South Carolina where collective bargaining is prohibited. While the FOP is the umbrella for many bargaining units in states that allow collective bargaining, in states where collective bargaining is illegal, the organization provides other services (that a union might) without being able to represent police officers in negotiations over employment conditions. Similar associations exist for teachers and firefighters in other states The presence of a "union" is not indicative of collective bargaining rights in these localities. These non-union employee associations may negotiate on behalf of workers in some circumstances where formal collective bargaining is illegal.

While about one third of all state-and-local public-sector workers fall under the three main categories discussed above – firefighters, police, and teachers – over 11 million employees work in other state- and local-government jobs. There are fewer clear statutes that cover these other public-sector workers. Some states are like Vermont, which has both a State Employees Labor Relations Act and a Vermont Municipal Labor Relations Act that govern public employees and their collective bargaining from the state level. North Carolina, South Carolina, and Virginia have state laws that ban all collective bargaining. In others, such as Arizona, the legality of collective bargaining is determined for other public-sector workers through a range of executive orders, state law, and case law.

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Appendix

The following table draws on data compiled by American Federation of State, County & Municipal Employees (AFSCME); International Association of Fire Fighters (1998); National Council on Teacher Quality; National Right to Work Legal Defense Foundation; Winkler, Scull, and Zechandelaar (2012); and Valletta, and Freeman (1988).

Alabama	Collective Bargaining	Wage Negotiation	Striking
All/Other			
Police	Collective bargaining is not addressed No state statute regarding collective bargaining. Collective bargaining rights for police are determined on the local level.	Wage negotiation not addressed No state statute regarding collective bargaining	Striking is illegal Case Law: Cherokee County Hosp. Bd. v. Retail, Wholesale, & Dept. Store Union, AFL-CIO, 294 Ala. 151, 153, 313 So. 2d 514, 516 (1975) "Public strikes are illegal and public lockouts are improper, if not illegal."
Firefighters	Collective bargaining is not addressed No state statute regarding collective bargaining. Collective bargaining rights for firefighters are determined on the local level.	Wage negotiation not addressed No state statute regarding collective bargaining	Striking is illegal Case Law: Cherokee County Hosp. Bd. v. Retail, Wholesale, & Dept. Store Union, AFL-CIO, 294 Ala. 151, 153, 313 So. 2d 514, 516 (1975) "Public strikes are illegal and public lockouts are improper, if not illegal."
Teachers	Collective bargaining is legal Statute: Ala. Code § 16-1-30 "Before adopting the written policies, the board shall, directly or indirectly through the chief executive officer, consult with the applicable local employees' professional organization." Case Law: Walker County Bd. of Educ. v. Walker County Educ. Ass'n, 431 So. 2d 948, 954 (Ala. 1983) "Section 16-8-10 only obligates the Board to meet and consult with those persons set out in the statute; it does not obligate the Board to reach any agreement, accept any proposals or negotiate any matter if it does not wish to do so."	Wage negotiation not addressed No state statute regarding collective bargaining	Striking is illegal Case Law: Cherokee County Hosp. Bd. v. Retail, Wholesale, & Dept. Store Union, AFL-CIO, 294 Ala. 151, 153, 313 So. 2d 514, 516 (1975) "Public strikes are illegal and public lockouts are improper, if not illegal."

Alaska	Collective Bargaining	Wage Negotiation	Striking

Appendix B

Office of Navajo Labor Relations

Collective Bargaining Regulations

EXHIBIT A

Pursuant to its authority under 2 N.T.C., Section 604 (b) (1) to adopt regulations for the enforcement and implementation of the labor laws and policies of the Navajo Nation, the Human Services Committee of the Navajo Nation Council adopts the following regulation implementing Section 6 of the Navajo Tribal Code, to provide rules and enforcement procedures to permit collective bargaining for employees of the Navajo Nation, its agencies or enterprises:

Section 1 PURPOSE

The purpose of these regulations is to implement Section 6 of the Navajo Preference in Employment Act, Title 15, Chapter 7 with respect to the employees of the Navajo Nation, its agencies and enterprises. Like the Act, the goal of these regulations is to promote harmonious and cooperative relations between the Navajo Nation, its agencies and enterprises and Navajo Nation employees through collective bargaining.

Section 2 DEFINITIONS

For the purposes of this regulation - -

a. Confidential employee means an employee who acts in a confidential capacity with respect to a supervisor or management official who formulates or implements management policies in the field of labor-management relations.

b. Labor organization means an organization which seeks to represent employees for purposes of collective bargaining and in otherwise conferring with public employers on matters pertaining to employment relations.

c. Management official means an employee in a job position that requires the employees to formulate or determine the policies of the public employer.

d. Navajo Nation employees means an employee of the Navajo Nation, as well as employees political subdivisions, agencies, enterprises, educational institutions and other entities created by the Navajo Nation, but does not include managers, supervisors or confidential employees.

e. Office or ONLR means the Office of Navajo Labor Relations.

f. Public employer means the Navajo Nation, as well as its political subdivisions, agencies, enterprises, educational institutions and other entities created by the Navajo Nation.

g. Supervisor means an employee who spends a preponderance of his or her work time exercising the authority to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, or adjusting their grievances; however, the exercise of this authority must not merely be routine or clerical in nature, but shall require the exercise of independent judgment.

Section 3 RIGHT TO ORGANIZE AND BARGAIN COLLECTIVELY

a. Pursuant to Section 6 of the Navajo Preference in Employment Act, Navajo nation employees have the right to organize and bargain collectively, but do not have the right to strike or picket. Navajo Nation employees shall have the right to form, join or assist any labor organization for the purpose of collective bargaining without interference, restraint or coercion by a public employer or any other person.

b. Management of public employers shall maintain neutrality with regard to organizing efforts of employees, and therefore shall make no statements or expressions that threaten reprisal or promise benefits in connection with the exercise of rights guaranteed under Section 6 of the Navajo Preference in Employment Act. Management's obligation to remain neutral does not prevent expressions or statements that - -

(i) Publicize the fact of a representational election, and encourage employees to exercise their right to vote in such an election;

(ii) Correct the record with regard to any false or misleading statement made by any person; or

(iii) Inform employees of the Navajo Nation's policy relating to labor-management relations and representation by labor organizations.

Section 4 PROHIBITED EMPLOYER PRACTICES

No public employer, or representative of a public employer, shall - -

a. Interfere with, restrain or coerce any Navajo Nation employee in the exercise of rights under Section 6 of the Navajo Preference in Employment Act;

b. Discriminate against a Navajo nation employee with hiring or tenure of employment, or any term or condition of employment, to discourage or encourage membership in any labor organization, however, it shall not be a violation of these regulations for a public employer to make an agreement with a labor organization to require membership in the

labor organization as a condition of employment on or after the fifth day following employment;

c. Dominate or interfere with the formation or administration of any labor organization;

d. Refuse to bargain collectively and in good faith with labor organizations certified pursuant to Section 6 of these regulations;

e. Discharge or otherwise discriminate against any Navajo Nation employee because the employee has filed charges or given testimony in connection with a proceeding under these regulations; or

f. Refuse or fail to comply with any collective bargaining agreement.

Section 5 EXCLUSIVE BARGAINING AGENT

A labor organization selected for the purposes of collective bargaining by the majority of the employees in an appropriate bargaining unit, and certified pursuant to Section 6 of these regulations, shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay or other terms and conditions of employment.

Section 6 CERTIFICATION

a. A labor organization seeking certification as the bargaining representative shall submit a petition for certification to ONLR. The petition either shall be signed by current employees in the bargaining unit, or shall be accompanied by authorization cards signed by employees in the bargaining unit.

b. (i) Upon receiving a petition for certification, ONLR shall determine the appropriateness of the bargaining unit within 10 days of the filing of the position.

(ii) If the bargaining unit identified in the position is appropriate, ONLR shall ascertain the number of employees in the bargaining unit at the time the petition was made and shall determine the number of employees who have selected the labor organization as their representative at the time of the application.

(iii) If ONLR determines that more than 55% of the employees in the bargaining unit have selected the labor organization as their representative at the time the position is filed, ONLR shall certify the labor organization as the exclusive bargaining agent of the employees without an election.

(iv) If ONLR determines that not less than 35% and not more than 55% of the employees in the bargaining unit have selected the labor organization as their representative at the time the petition is filed, ONLR shall conduct a representation vote among the employees in the bargaining unit no later than 45 days following the filing of the petition. Notice of the election shall be posted at the public employer's facility.

(v) Other labor organizations submitting petitions with the signatures of more than 20 percent of the employees in the bargaining unit also shall be included on the ballot.

(vi) The labor organization(s) on the ballot shall be supplied with a complete list of current employees in the proposed bargaining unit a reasonable time prior to the representation vote. In elections where only one labor organization is listed on the ballot, ONLR shall certify the labor organization as the exclusive bargaining agent of the employees if more than 50% of the employees vote in favor of representation by the labor organization. Where more than one labor organization is included on the ballot, a labor organization receiving a plurality of votes shall be certified as the exclusive bargaining agent.

Section 7 IMPASSE RESOLUTION

a. If a public employer and labor organization are unable to reach collective agreement following good faith bargaining, either side may request that Chief Justice of the Navajo Nation to designate an impartial mediator to the negotiations, or the parties may themselves designate a mutually-acceptable mediator. The cost of mediator's expenses and fees shall be paid equally by the parties.

b. The mediator shall provide services to the parties until either the parties reach agreement, the mediator believes that mediation services are no longer helpful, or sixty days have passed since the mediator was appointed, whichever occurs first.

c. If the services of the mediator cease without the parties reaching agreement, either party may declare an impasse. The parties shall meet and exchange final offers. If no agreement can be reached, either party may request that the negotiation be resolved through interest arbitration. If the parties are unable to designate a mutually-agreeable arbitrator, either party may request that Chief Justice of the Navajo nation designate the arbitrator, who shall be an impartial pursuant to this section. The cost of the arbitrator's expenses and fees shall be paid equally by the parties.

d. Unless the parties mutually agree to other arbitration procedures, the arbitrator shall decide between the final offers made by the parties.

Section 8 DECERTIFICATION OF BARGAINING AGENT

a. Upon the filing with ONLR of a petition signed by 35 percent or more of the public employees in a bargaining unit seeking the decertification of a certified bargaining agent, ONLR shall conduct a secret ballot election to determine whether the certified bargaining agent continues to enjoy the support of a majority of employees participating in an election.
b. A petition for decertification of a certified bargaining agent shall not be considered timely - -

(i) during the first 12 months following the certification of the bargaining agent; or

(ii) when there is a collective bargaining agreement, except that a request for a decertification election may be made no earlier than 180 days and no later than 60 days prior to the end of the agreement; provided, however, than a request for an election may be filed at any time after the expiration of the third year of a collective bargaining agreement.

Section 10 MONITORING AND ENFORCEMENT

Monitoring and enforcement of these regulations shall be pursuant to the provisions of Section 10 of the Navajo Preference in Employment Act.

Appendix C

1999 California Model

Tribal Labor Relations Ordinance

Model Tribal Labor Relations Ordinance

Addendum B
In compliance with Section 10.7 of the Compact, the Tribe agrees to adopt an ordinance identical to the Model Tribal Labor Relations Ordinance attached hereto, and to notify the State of that adoption no later than October 12, 1999. If such notice has not been received by the State by October 13, 1999, this Compact shall be null and void. Failure of the Tribe to maintain the Ordinance in effect during the term of this Compact shall constitute a material breach entitling the State to terminate this Compact. No amendment of the Ordinance shall be effective unless approved by the State.

Model Tribal Labor Relations Ordinance

Section 1: Threshold of applicability

(a) Any tribe with 250 or more persons employed in a tribal casino and related facility shall adopt this Tribal Labor Relations Ordinance (TLRO or Ordinance). For purposes of this Ordinance, a "tribal casino" is one in which class III gaming is conducted pursuant to the tribal-state compact. A "related facility" is one for which the only significant purpose is to facilitate patronage of the class III gaming operations.

(b) Any tribe which does not operate such a tribal casino as of September 10, 1999, but which subsequently opens a tribal casino, may delay adoption of this ordinance until one year from the date the number of employees in the tribal casino or related facility as defined in 1(a) above exceeds 250.

(c) Upon the request of a labor union, the Tribal Gaming Commission shall certify the number of employees in a tribal casino or other related facility as defined in 1(a) above. Either party may dispute the certification of the Tribal Gaming Commission to the Tribal Labor Panel.

Section 2: Definition of Eligible Employees

(a) The provisions of this ordinance shall apply to any person (hereinafter "Eligible Employee") who is employed within a tribal casino in which Class III gaming is conducted pursuant to a tribal-state compact or other related facility, the only significant purpose of which is to facilitate patronage of the Class III gaming operations, except for any of the following:

(1) any employee who is a supervisor, defined as any individual having authority, in the interest of the tribe and/or employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment;

(2) any employee of the Tribal Gaming Commission;

(3) any employee of the security or surveillance department, other than those who are responsible for the technical repair and maintenance of equipment;

(4) any cash operations employee who is a "cage" employee or money counter; or

(5) any dealer.

Section 3: Non-interference with regulatory or security activities

Operation of this Ordinance shall not interfere in any way with the duty of the Tribal Gaming Commission to regulate the gaming operation in accordance with the Tribe's National Indian Gaming Commission-approved gaming ordinance. Furthermore, the exercise of rights hereunder shall in no way interfere with the tribal casino's surveillance/security systems, or any other internal controls system designed to protect the integrity of the Tribe's gaming operations. The Tribal Gaming Commission is specifically excluded from the definition of tribe and its agents.

Section 4: Eligible Employees free to engage in or refrain from concerted activity

Eligible Employees shall have the right to self-organization, to form, to join, or assist employee organizations, to bargain collectively through representatives of their own choosing, to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities.

Section 5: Unfair labor practices for the Tribe

It shall be an unfair labor practice for the tribe and/or employer or their agents:

(1) to interfere with, restrain or coerce Eligible Employees in the exercise of the rights guaranteed herein;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it, but this does not restrict the tribe and/or employer and a certified union from agreeing to union security or dues check off;

(3) to discharge or otherwise discriminate against an Eligible Employee because s/he has filed charges or given testimony under this Ordinance;

(4) to refuse to bargain collectively with the representatives of Eligible Employees.

Section 6: Unfair labor practices for the union

It shall be an unfair labor practice for a labor organization or its agents:

(1) to interfere, restrain or coerce Eligible Employees in the exercise of the rights guaranteed herein;

(2) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a primary or secondary boycott or a refusal in the course of his employment to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce or other terms and conditions of employment. This section does not apply to section 11;

(3) to force or require the tribe and/or employer to recognize or bargain with a particular labor organization as the representative of Eligible Employees if another labor organization has been certified as the representative of such Eligible Employees under the provisions of this TLRO;

(4) to refuse to bargain collectively with the tribe and/or employer, provided it is the representative of Eligible Employees subject to the provisions herein;

(5) to attempt to influence the outcome of a tribal governmental election, provided, however, that this section does not apply to tribal members.

Section 7: Tribe and union right to free speech

The tribe's and union's expression of any view, argument or opinion or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be evidence of interference with, restraint, or coercion if such expression contains no threat of reprisal or force or promise of benefit.

Section 8: Access to Eligible Employees

(a) Access shall be granted to the union for the purposes of organizing Eligible Employees, provided that such organizing activity shall not interfere with patronage of the casino or related facility or with the normal work routine of the Eligible Employees and shall be done on non-work time in non-work areas that are designated as employee break rooms or locker rooms that are not open to the public. The Tribe may require the union and or union organizers to be subject to the same licensing rules applied to individuals or entities with similar levels of access to the casino or related facility, provided that such licensing shall not be unreasonable, discriminatory, or designed to impede access.

(b) The Tribe, in its discretion, may also designate additional voluntary access to the Union in such areas as employee parking lots and non-Casino facilities located on tribal lands.

(c) In determining whether organizing activities potentially interfere with normal tribal work routines, the union's activities shall not be permitted if the Tribal Labor Panel determines that they compromise the operation of the casino:

(1) security and surveillance systems throughout the casino, and reservation;

(2) access limitations designed to ensure security;

(3) internal controls designed to ensure security;

(4) other systems designed to protect the integrity of the tribe's gaming operations, tribal property and/or safety of casino personnel, patrons, employees or tribal members, residents, guests or invitees.

(d) The tribe shall provide to the union, upon a thirty percent (30%) showing of interest to the Tribal Labor Panel, an election eligibility list containing the full first and last name of the Eligible Employees within the sought after bargaining unit and the Eligible Employees' last known address within ten (10) working days. Nothing herein shall

preclude a tribe from voluntarily providing an election eligibility list at an earlier point of a union organizing campaign.

(e) The tribe agrees to facilitate the dissemination of information from the union to Eligible Employees at the tribal casino by allowing posters, leaflets and other written materials to be posted in non-public employee break areas where the tribe already posts announcements pertaining to Eligible Employees. Actual posting of such posters, notices, and other materials shall be by employees desiring to post such materials.

Section 9: Indian preference explicitly permitted

Nothing herein shall preclude the tribe from giving Indian preference in employment, promotion, seniority, lay-offs or retention to members of any federally recognized Indian tribe or shall in any way affect the tribe's right to follow tribal law, ordinances, personnel policies or the tribe's customs or traditions regarding Indian preference in employment, promotion, seniority, lay-offs or retention. Moreover, in the event of a conflict between tribal law, tribal ordinance or the tribe's customs and traditions regarding Indian preference and this Ordinance, the tribal law, tribal ordinance, or the tribe's customs and traditions shall govern.

Section 10: Secret ballot elections required

(a) Dated and signed authorized cards from thirty percent (30%) or more of the Eligible Employees within the bargaining unit verified by the elections officer will result in a secret ballot election to be held within 30 days from presentation to the elections officer.

(b) The election shall be conducted by the election officer. The election officer shall be a member of the Tribal Labor Panel chosen pursuant to the dispute resolution provisions herein. All questions concerning representation of the tribe and/or Employer's Eligible Employees by a labor organization shall be resolved by the election officer. The election officer shall be chosen upon notification by the labor organization to the tribe of its intention to present authorization cards, and the same election officer shall preside thereafter for all proceedings under the request for recognition; provided, however, that if the election officer resigns, dies, or is incapacitated for any other reason from performing the functions of this office, a substitute election officer shall be selected in accordance with the dispute resolution provisions herein.

(c) The election officer shall certify the labor organization as the exclusive collective bargaining representative of a unit of employees if the labor organization has received the majority of votes by Eligible Employees voting in a secret ballot election that the election officer determines to have been conducted fairly. If the election officer determines that the election was conducted unfairly due to misconduct by the tribe and/or employer or union, the election officer may order a re-run election. If the election officer determines that there was the commission of serious Unfair Labor Practices by the tribe that interfere with the election process and preclude the holding of a fair election, and the labor organization is able to demonstrate that it had the support of a majority of the employees in the unit at any point before or during the course of the tribe's misconduct, the election officer shall certify the labor organization.

(d) The tribe or the union may appeal any decision rendered after the date of the election by the election officer to a three (3) member panel of the Tribal Labor Panel mutually chosen by both parties.

(e) A union which loses an election and has exhausted all dispute remedies related to the election may not invoke any provisions of this labor ordinance at that particular casino or related facility until one year after the election was lost.

Section 11: Collective bargaining impasse

Upon recognition, the tribe and the union will negotiate in good faith for a collective bargaining agreement covering bargaining unit employees represented by the union. If collective bargaining negotiations result in impasse, and the matter has not been resolved by the tribal forum procedures set forth in Section 13(b) governing resolution of impasse within sixty (60) working days or such other time as mutually agreed to by the parties, the union shall have the right to strike. Strike-related picketing shall not be conducted on Indian lands as defined in 25 U.S.C. § 2703(4).

Section 12: Decertification of bargaining agent

(a) The filing of a petition signed by thirty percent (30%) or more of the Eligible Employees in a bargaining unit seeking the decertification of a certified union, will result in a secret ballot election to be held 30 days from the presentation of the petition.

(b) The election shall be conducted by an election officer. The election officer shall be a member of the Tribal Labor Panel chosen pursuant to the dispute resolution provisions herein. All questions concerning the decertification of the union shall be resolved by an election officer. The election officer shall be chosen upon notification to the tribe and the union of the intent of the employees to present a decertification petition, and the same election officer shall preside thereafter for all proceedings under the request for decertification; provided however that if the election officer resigns, dies or is incapacitated for any other reason from performing the functions of this office, a substitute election officer shall be selected in accordance with the dispute resolution provisions herein.

(c) The election officer shall order the labor organization decertified as the exclusive collective bargaining representative if a majority of the employees voting in a secret ballot election that the election officer determines to have been conducted fairly vote to decertify the labor organization. If the election officer determines that the election was conducted unfairly due to misconduct by the tribe and/or employer or the union the election officer may order a re-run election or dismiss the decertification petition.

(d) A decertification proceeding may not begin until one (1) year after the certification of a labor union if there is no collective bargaining agreement. Where there is a collective bargaining agreement, a decertification petition may only be filed no more than 90 days and no less than 60 days prior to the expiration of a collective bargaining agreement. A decertification petition may be filed anytime after the expiration of a collective bargaining agreement.

(e) The tribe or the union may appeal any decision rendered after the date of the election by the election officer to a three (3) member panel of the Tribal Labor Panel mutually chosen by both parties.

Section 13: Binding dispute resolution mechanism

(a) All issues shall be resolved exclusively through the binding dispute resolution mechanisms herein, with the exception of a collective bargaining impasse, which shall only go through the first level of binding dispute resolution.

(b) The first level of binding dispute resolution for all matters related to organizing, election procedures, alleged unfair labor practices, and discharge of Eligible Employees shall be an appeal to a designated tribal forum such as a Tribal Council, Business Committee, or Grievance Board. The parties agree to pursue in good faith the expeditious resolution of these matters within strict time limits. The time limits may not be extended without the agreement of both parties. In the absence of a mutually satisfactory resolution, either party may proceed to the independent binding dispute resolution set forth below. The agreed upon time limits are set forth as follows:

(1) All matters related to organizing, election procedures and alleged unfair labor practices prior to the union becoming certified as the collective bargaining representative of bargaining unit employees, shall be resolved by the designated tribal forum within thirty (30) working days.

(2) All matters after the union has become certified as the collective bargaining representative and relate specifically to impasse during negotiations, shall be resolved by the designated tribal forum within sixty (60) working days;

(c) The second level of binding dispute resolution shall be a resolution by the Tribal Labor Panel, consisting of ten (10) arbitrators appointed by mutual selection of the parties which panel shall serve all tribes that have adopted this ordinance. The Tribal Labor Panel shall have authority to hire staff and take other actions necessary to conduct elections, determine units, determine scope of negotiations, hold hearings, subpoena witnesses, take testimony, and conduct all other activities needed to fulfill its obligations under this Tribal Labor Relations Ordinance.

(1) Each member of the Tribal Labor Panel shall have relevant experience in federal labor law and/or federal Indian law with preference given to those with experience in both. Names of individuals may be provided by such sources as, but not limited to, Indian Dispute Services, Federal Mediation and Conciliation Service, and the American Academy of Arbitrators.

(2) Unless either party objects, one arbitrator from the Tribal Labor Panel will render a binding decision on the dispute under the Ordinance. If either party objects, the dispute will be decided by a three (3) member panel of the Tribal Labor Panel, which will render a binding decision. In the event there is one arbitrator, five (5) Tribal Labor Panel names shall be submitted to the parties and each party may strike no more than two (2) names. In the event there is a three (3) member panel, seven (7) TLP names shall be submitted to the parties and each party may strike no more than two (2) names. A coin toss shall determine which party may strike the first name. The arbitrator will generally follow the American Arbitration Association's procedural rules relating to labor dispute resolution. The arbitrator or panel must render a written, binding decision that complies in all respects with the provisions of this Ordinance.

(d) Under the third level of binding dispute resolution, either party may seek a motion to compel arbitration or a motion to confirm an arbitration award in Tribal Court, which may be appealed to federal court. If the Tribal Court does not render its decision within 90 days, or in the event there is no Tribal Court, the matter may proceed directly to federal court. In the event the federal court declines jurisdiction, the tribe agrees to a limited waiver of its sovereign immunity for the sole purpose of compelling arbitration or confirming an arbitration award issued pursuant to the Ordinance in the appropriate state superior court. The parties are free to put at issue whether or not the arbitration award exceeds the authority of the Tribal Labor Panel.

Appendix D

California Research Bureau

California Tribal-State Gambling Compacts

1999-2006

Labor Standards

CRB

California Tribal-State Gambling Compacts, 1999-2006

By Charlene Wear Simmons, Ph.D.
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CALIFORNIA RESEARCH BUREAU

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LABOR STANDARDS

RATIFIED COMPACTS

1999 Tribal-State Compact

- The tribe agrees to adopt standards no less stringent than federal workplace and occupational health and safety standards. The state may inspect for compliance unless a federal agency regularly inspects for compliance with the federal standards. Violations of the applicable standards are violations of the compact.
- The tribe agrees to adopt and comply with state and federal anti-discrimination laws. However the tribe may provide employment preference to Native Americans.
- The tribe may create its own workers compensation system provided there is specified coverage including the right to notice, an independent medical examination, a hearing before an independent tribunal, a means of enforcement, and benefits comparable to those afforded under state law. Independent contractors doing business with the tribe must comply with state workers' compensation laws.
- The tribe agrees to participate in state unemployment compensation and disability programs for employees of the gaming facility, and consents to the jurisdiction of state agencies and courts charged with enforcement.

Model Tribal Labor Relations Ordinance (Optional Addendum B)

The 1999 tribal-state compact requires a tribe to adopt an agreement or other procedure acceptable to the state for addressing the organization and representational rights of Class III gaming employees and employees in related enterprises, or the compact is null and void. Attached to the compact, as "Optional Addendum B" is a ***Model Tribal Labor Relations Ordinance.*** Tribes with 250 or more casino-related employees are required to adopt an identical ordinance. (The tribal ordinances were reviewed for conformity by the governor's legal affairs advisor.)

- Under the ***Model Tribal Labor Relations Ordinance*** ("Ordinance"), employees have the right to engage in employee organizations, bargain collectively, and join in concerted activities for the purpose of collective bargaining. The Ordinance defines unfair labor practices on the part of a tribe or a union, guarantees the right to free speech, and provides for union access to employees for bargaining purposes. (Excluded employees include supervisors, employees of the tribal gaming commission, employees of the security or surveillance departments, cash operations employees or any dealer.)

Key Issues: Certification of union representation and dispute resolution

- Upon a showing of interest by 30 percent of the applicable employees, the tribe is to provide the union an election eligibility list of employee names and addresses. A secret ballot is to follow. An elections officer chosen by the tribe is to verify the authorization cards and conduct the election. If the labor organization receives a majority of votes, the election officer is to certify it as the exclusive collective bargaining representative for the unit of employees. Decisions may be appealed to a tribal labor panel.

- The Ordinance establishes procedures to address an impasse in collective bargaining, including the union's right to strike outside of Indian lands, and to decertify a certified union. It also creates three levels of binding dispute resolution mechanisms, beginning with a tribal forum, followed by an arbitration panel, and finally tribal court and federal court. Collective bargaining impasses may only proceed to the first level of binding dispute resolution, in which a designated tribal forum makes the decision.

2003 Tribal-State Compacts

The three new compacts negotiated by Governor Davis in 2003 are similar to the 1999 tribal-state compact. They were with the Torres-Martinez Desert Cahuilla Indians, the La Posta Band of Mission Indians and the Santa Ysabel Band of Diegueño Indians.

- No apparent change from the 1999 compact's ***Model Tribal Labor Relations Ordinance.***

2004 Tribal-State Compacts

Governor Schwarzenegger signed new compacts with three tribes (the Coyote Valley Band of Pomo Indians, the Fort Mojave Indian Tribe and the Lytton Rancheria). The Lytton compact was not ratified by the legislature; the Coyote Valley and Fort Mojave compacts were ratified. The governor also negotiated amended 1999 compacts with seven tribes, all of which were ratified. Key changes are summarized below.

Coyote Valley Band of Pomo Indians and Fort Mojave Indian Tribe

- The tribes agree to adopt and comply with federal and state workplace and occupational health and safety standards. State inspectors may assess compliance unless regular inspections are made by a federal agency with the federal standards. Violations of the applicable standards are violations of the compact and may be the basis to prohibit employee entry into the gaming facility.
- The tribes agree to participate in the state's workers' compensation program for employees of the gaming facility and consent to the jurisdiction of the Worker's Compensation Appeals Board and state courts for purposes of enforcement. The tribes also agree to participate in the state unemployment compensation benefits

program and withhold the appropriate taxes, and consent to state agency jurisdiction and the jurisdiction of state courts for enforcement.

Model labor relations ordinance

The tribes agree to repeal their existing tribal labor relations ordinances and adopt the labor relations ordinance appended to the compact, which differs in important respects from the model ordinance appended to the 1999 and 2003 compacts.

- As in the 1999 compact, a labor organization is granted access in order to organize eligible employees in non-work areas on non-work time. The tribe agrees to provide the labor organization with a list of eligible employees and their last known addresses upon a showing of interest from 30 percent of the employees. The tribe also agrees to facilitate the dissemination of information from the labor organization to eligible employees.

Key Issues: union certification and dispute resolution

- ***"Card check neutrality"***--A new Section 7 on "tribe and union neutrality" provides that if a labor organization offers in writing to not engage in strikes or disparage the tribe, and to resolve all issues through binding dispute mechanisms, the tribe agrees to recognize and certify the labor organization if it provides dated and signed authorization cards from at least 50 percent plus one of the eligible employees without a formal election. The tribe agrees to not express any opposition to that labor organization or preference for another labor organization.
- If a labor organization agrees to accept the conditions specified for "tribe and union neutrality" in Section 7(a), the labor organization is deemed to have accepted the entire Ordinance and waives any right to file any form of action or proceeding with the National Labor Relations Board.*
- If a labor organization has agreed in writing to accept the conditions for "tribe and union neutrality" specified in Section 7(a), and the union engages in a strike, boycott or other economic activity, the tribe may withdraw from its obligation to resolve the impasse through a binding dispute mechanism. If the labor organization has not agreed to the conditions in Section 7(a), it may engage in a strike in the event the impasse is not solved through binding dispute resolution mechanisms.
- The model ordinance creates three levels of binding dispute resolution mechanisms in the event of an impasse: first, a designated tribal forum, and second, a Tribal Labor Panel composed of arbitrators. The panel is to serve all the tribes that have adopted this ordinance and its decisions are binding. Finally, either party may seek to compel

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* The National Labor Relations Board has asserted jurisdiction over labor relations in tribal casinos, finding in a 2004 *Decision and Order* that operating a commercial business such as a casino "...is not an expression of sovereignty in the same way that running a tribal court system is." The San Manuel Band of Mission Indians has appealed the decision to the U.S. Supreme Court. See Charlene Wear Simmons, *Gambling in the Golden State*, California Research Bureau, May 2006, pp. 76-77 for a brief discussion of this issue.

arbitration or confirm an arbitration award in Tribal Court, and the decision may be appealed to federal court. Unlike the 1999 compact, a collective bargaining impasse may proceed through all levels of dispute resolution, not just the first level.

- The model ordinance specifies factors for an arbitrator to consider if collective bargaining negotiations result in an impasse. These include wages, hours and other terms and conditions of employment at other Indian gaming operations in Mendocino County, the cost of living, regional and local market conditions, the tribe's financial capacity (if the issues is raised by the tribe), the size and type of casino or related facility, and the competitive nature of the business environment.

Rumsey Band of Wintun Indians--amended 1999 compact

- The section on labor relations in the 1999 compact is repealed, replaced by the tribe's labor relations ordinance since the tribe has recognized a union as the exclusive collective bargaining representative for its employees and entered into a collective bargaining agreement. As in the Coyote Valley compact, the tribe agrees to adopt and comply with federal and state workplace and occupational health and safety standards.

Buena Vista Rancheria of Me-Wuk Indians of California, Ewiiaapaayp Band of Kumeyaay Indians, Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation, United Auburn Community –amended 1999 compacts

- Within 30 days of the effective date of the amendment, the tribes are to amend their labor relations ordinances (described in the 1999 tribal-state compact) to incorporate a revised tribal labor relations ordinance similar to the ordinance described in the Coyote Valley compact, including card check neutrality. The local labor market is to be considered in case of an impasse. Buena Vista and Ewiiaapaayp agree to adopt and comply with federal and state workplace and occupational health and safety standards.

Viejas Band of Kumeyaay Indians—amended 1999 compact

- Since the tribe entered into a collective bargaining agreement with a labor organization before the enactment of its tribal labor relations ordinance, and that agreement has since been renewed, no change in the ordinance is necessary to address employee rights. The tribe agrees to adopt and comply with federal and state workplace and occupational health and safety standards.

Pala Band of Mission Indians—amended 1999 compact

- The tribe has entered into a Memorandum of Understanding with a labor union providing for employer neutrality, arbitrator-verified authorizations that a majority of eligible employees have authorized the union, a no strike clause and binding arbitration. The tribe has recognized the union as its exclusive bargaining representative. For this reason, the parties agree that no change in the tribal labor relations ordinance is necessary. The tribe agrees to adopt and comply with federal and state workplace and occupational health and safety standards.

2006 Tribal-State Compact

The governor negotiated an amended 1999 tribal-state compact with the Quechan Tribe in 2005. The amended compact was ratified by the legislature in August 2006 and signed by the governor on September 28, 2006.

Quechan Tribe of the Fort Yuma Indian Reservation—amended 1999 compact

- The tribe agrees to adopt and comply with federal and state workplace and occupational health and safety standards and consents to the state's jurisdiction to inspect and enforce those standards.
- The model labor relations ordinance is similar to that in the 1999 tribal-state compact, with some changes. These include deletion of the provision that tribal law, ordinances, customs, and traditions prevail over the model labor relations ordinance in the event of conflict. The provison that strike-related picketing shall not be conducted on Indian lands is also deleted.
- Notably, this compact does not provide for card check neutrality. The selection of a collective bargaining agency is by secret ballot in an election conducted by the tribe.

UNRATIFIED COMPACTS

2004 Unratified Tribal-State Compact

Lytton Rancheria of California

- The tribe agrees to withhold earnings of persons employed at the gaming facility to comply with child and spousal support orders.
- The initial provisions of the model labor relations ordinance are somewhat similar to those in the Coyote Valley tribal-state compact. A major difference is the lack of "card check neutrality." The union is not afforded the option of presenting authorization cards signed by 50 percent of the eligible employees, requiring the tribe to enter into an agreement to certify and authorize the union as the employees' bargaining agent without a secret ballot. The provisions of the 1999 tribal-state compact requiring a secret ballot election apply, although the tribe and the union may agree to a different arrangement.
- Provisions regarding dispute resolution mechanisms and requiring binding arbitration are similar to those in the Coyote Valley tribal-state compact.

2005 Unratified Tribal-State Compacts

In 2005, Governor Schwarzenegger negotiated new tribal-state compacts with the Yurok Tribe of the Yurok Reservation, the Big Lagoon Rancheria and the Los Coyotes Band of Cahuilla and Cupeño Indians that were not ratified by the legislature.

Yurok Tribe of the Yurok Reservation

- The model labor relations ordinance appended to the compact (Exhibit B) is similar to that in the Lytton Rancheria compact and, as in other 1999 compacts, the tribe agrees to adopt it. There is no provision for "card check neutrality" as in six of the 2004 compacts. The union is not afforded the option of presenting authorization cards signed by 50 percent of the eligible employees, thereby requiring the tribe to enter into an agreement to certify and authorize the union as the employees' collective bargaining agent. Instead the provisions of the 1999 compact requiring a secret ballot election apply, although the tribe and the union may agree to a different arrangement.
- An employment preference for members of the tribe is not explicitly stated as in the previous compacts.

Los Coyotes Band of Cahuilla and Cupeño Indians and the Big Lagoon Rancheria

- The tribes agree to adopt and comply with federal and state workplace and occupational health and safety standards, allow inspection by state inspectors, and consent to the jurisdiction of state enforcement agencies including the Division of Occupational Safety and Health, the Occupational Safety and Health Standards Board and the Occupational Safety and Health Appeals Board, and of state courts.
- The tribes may elect to finance their liability for unemployment compensation benefits, instead of participating in the California Unemployment Fund, by any method specified in California Unemployment Insurance Code § 803.
- The tribes agree to participate in the state's workers' compensation program.
- The tribes agree to adopt the Model Tribal Labor Relations Ordinance appended to the compact. This model ordinance contains a section on "Tribe and union neutrality" similar to that in the Coyote Valley compact.
- ***Card check neutrality:*** If a labor organization offers in writing to not engage in strikes or disparage the tribe, and to resolve all issues through binding dispute mechanisms, the tribes agree to recognize and certify the labor organization if it provides dated and signed authorization cards from at least 50 percent plus one of the eligible employees, without a formal election.
- Although similar in other respects to the Coyote Valley tribal-state compact, the appended model labor relations ordinance does not explicitly mention the union's right to strike, providing instead that the tribe and labor organization will negotiate in good faith for a collective bargaining agreement.

2006 Unratified Tribal-State Compacts

In August 2006, the governor submitted six tribal-state compacts to the legislature for ratification. An amended compact with the Quechan Tribe of the Fort Yuma Reservation, which had been negotiated in 2005, was ratified. Five newly negotiated amended 1999 compacts were not ratified. These were with the Morongo Band of Mission Indians, the Pechanga Band of Luiseño Indians, the San Manuel Band of

Mission Indians, the Agua Caliente Band of Cahuilla Indians, and the Sycuan Band of the Kumeyaay Nation.

Morongo Band of Mission Indians, Pechanga Band of Luiseño Indians, Agua Caliente Band of Cahuilla Indians, San Manuel Band of Mission Indians, Sycuan Band of the Kumeyaay Nation—amended 1999 compacts

- The tribes agree to comply with standards no less stringent than those in the federal Fair Labor Standards Act and implementing regulations.
- The tribes agree to participate in the state's workers' compensation program for their employees and to ensure that independent contractors doing business with the tribe comply with state workers' compensation laws. Alternatively, the tribe may establish its own system of insuring gaming facility employees' work-related injuries, with specified standards.
- The ***Model Tribal Labor Relations Ordinance*** appended to the 1999 tribal-state compact remains in force. Notably, it does not contain the provision for card check neutrality found in eight of the 2004 –2005 compacts (six of which have been ratified), or the revised dispute resolution process found in those compacts.

[Additional submission by Mr. Navarro follows:]

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June 29, 2015

Honorable Phil Roe, Chairman
Honorable Jared Polis, Ranking Member
Subcommittee on Health, Employment, Labor and Pensions
House Committee on Education and Workforce
U.S. House of Representatives
Washington, District of Columbia 20510

Re: Statement for the Hearing Record-June 16, 2015 Hearing on H.R. 511

Dear Chairman Roe and Ranking Member Polis:

On behalf of UNITE HERE, a labor union representing over 275,000 members in the hospitality industry, I am submitting this letter to be part of the hearing record for the legislative hearing held on June 16, 2015 on H.R. 511 the "Tribal Labor Sovereignty Act" as I feel compelled to respond to the June 16, 2015 statement from Congresswoman Betty McCollum that intentionally mischaracterized the testimony of our member, Gary Navarro, who appeared as a witness before the committee.

First, Mr. Navarro is a slot-attendant at the Graton Resort and Casino who testified to the best of his knowledge about his workplace. Any factual inaccuracies in Mr. Navarro's testimony were unintentional and our union stipulates to the hearing record whatever facts Graton Tribal Chair Greg Sarris submitted to the committee in his correspondence regarding employment figures at Graton Resort and Casino. Moreover, Mr. Navarro and UNITE HERE regret any implication in his testimony that the current general manager, employed by Stations Casino Management Company, has ever acted in any way other than as a respectful and professional manager of the casino. It is our view that he deserves respect for the job that he does and has done. However, this does not discount Mr. Navarro's testimony regarding issues of harassment that have occurred in the past.

The June 16th statement from Congresswoman Betty McCollum intentionally mischaracterized Mr. Navarro's testimony. Mr. Navarro's testimony focused on what would happen if H.R. 511 "The Tribal Labor Sovereignty Act" became law. Specifically, he and his co-workers would be stripped of their rights as American citizens of 'full freedom of association' and 'self-organization' without 'discrimination' under the National Labor Rights Act. Congresswoman McCollum chose to blatantly mischaracterize Mr. Navarro's testimony by claiming he compared tribal governments to "dictatorships." Mr. Navarro's written testimony described a scenario where he and his

co-workers would have little to no rights on the job if H.R. 511 became law. Congresswoman McCollum's statement was an attempt to create a distraction and phony controversy to give her an excuse to support H.R. 511, something our union believes she intended to do all along.

To elaborate on Mr. Navarro's written testimony, Graton Tribal Chairman Greg Sarris has been responsive to employee concerns, particularly in dealing with the for-profit company hired to run the casino--Stations Casino. Should H.R. 511 "The Tribal Labor Sovereignty Act" become law, and there was a change in the Graton Tribal leadership, whereby the Tribe's Labor Relations Ordinance (TLRO) is eroded, coupled with the fact that there is sovereign immunity for tribes in federal and state courts (unless waived), employees would be left with little or no recourse. The Tribal Labor Relations Ordinance is required under the state compact developed pursuant to Indian Gaming Regulatory Act, but only the State of California has authority to enforce the compact, not workers employed at the casino.

Additionally, a great deal of the hearing's witness testimony and comments focused on tribal governments seeking parity with state and local governments. Regrettably, the inconsistency in the parity argument about how tribes should be treated just like state and local government reveals that the agenda is fundamentally about attacking the rights American citizens enjoy under the National Labor Rights Act. Testimony at the hearing made that agenda plain, most notably Governor Keel's gratuitous reference to the August 1981 strike by the Professional Air Traffic Controllers (PATCO).

Sincerely,

D. R Taylor

D. Taylor
UNITEHERE! President

[Whereupon, at 3:36 p.m., the Subcommittee was adjourned.]

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