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H.R. 986, TRIBAL LABOR SOVEREIGNTY ACT OF 2017

HEARING

BEFORE THE

SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND PENSIONS

COMMITTEE ON EDUCATION AND THE WORKFORCE

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTEENTH CONGRESS

FIRST SESSION

HEARING HELD IN WASHINGTON, DC, MARCH 29, 2017

Serial No. 115–12

Printed for the use of the Committee on Education and the Workforce

Available via the World Wide Web:
www.gpo.gov/fdsys/browse/committee.action?chamber=house&committee=education
or
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24–757 PDF WASHINGTON : 2018

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H.R. 986, TRIBAL LABOR SOVEREIGNTY ACT OF 2017

Wednesday, March 29, 2017
House of Representatives
Committee on Education and the Workforce,
Subcommittee on Health, Employment, Labor, and Pensions
Washington, D.C.

The subcommittee met, pursuant to call, at 10:00 a.m., in Room 2175, Rayburn House Office Building, Hon. Tim Walberg [chairman of the subcommittee] presiding.

Present: Representatives Walberg, Roe, Rokita, Allen, Lewis, Mitchell, Smucker, Ferguson, Sablan, Wilson of Florida, Norcross, Blunt Rochester, Shea-Porter, Espaillat, and Courtney.

Also Present: Representatives Foxx and Scott.

Staff Present: Bethany Aronhalt, Press Secretary; Andrew Banducci, Workforce Policy Counsel; Ed Gilroy, Director of Workforce Policy; Jessica Goodman, Legislative Assistant; Callie Harman, Legislative Assistant; Nancy Locke, Chief Clerk; Geoffrey MacLeay, Professional Staff Member; John Martin, Professional Staff Member; Dominique McKay, Deputy Press Secretary; James Mullen, Director of Information Technology; Krisann Pearce, General Counsel; Alissa Strawcutter, Deputy Clerk; Joseph Wheeler, Professional Staff Member; Tylease Alli, Minority Clerk/Intern and Fellow Coordinator; Austin Barbera, Minority Press Assistant; Michael DeMale, Minority Labor Detailee; Denise Forte, Minority Staff Director; Nicole Fries, Minority Labor Policy Associate; Christine Godinez, Minority Staff Assistant; Stephanie Lalle, Minority Press Assistant; Kevin McDermott, Minority Senior Labor Policy Advisor; Richard Miller, Minority Senior Labor Policy Advisor; Veronique Pluviose, Minority General Counsel; and Elizabeth Watson, Minority Director of Labor Policy.

Chairman WALBERG. A quorum being present, the Subcommittee on Health, Employment, Labor, and Pensions will come to order.

Good morning to everyone here today, the committee as well as our witnesses, and those attending to hear what is going on. We thank you.

I would like to begin by extending a warm welcome to our distinguished panel of witnesses, including leaders of tribal governments. We are fortunate to have you all with us today, and look forward to hearing from you.

This hearing is about one basic principle: the sovereign rights of Native Americans must be protected. A simple statement, it is a

simple principle. There are complex things surrounding it, but we hope to sort some of those out today.

This core principle is woven deep into the fabric of our shared history. It is part of who we are as a society, and has long defined the unique government-to-government relationship that exists between the United States and independent tribal nations.

What does tribal sovereignty mean? It means that Native American tribes have a fundamental right to self-govern. They have a right to self-determination. They have the freedom to advance their own economic policies in the pursuit of prosperity for tribal members.

Bipartisan support for tribal sovereignty has been reaffirmed time and time again in Congress, and for more than 180 years, the Supreme Court has held that tribes possess a nationhood status and retain inherent powers of self-government.

Unfortunately, the National Labor Relations Board has taken a number of alarming steps in the past decade that have created widespread concern in the Native American community and threatened Tribal sovereignty as we know it.

For nearly 70 years, the Board respected Native American sovereignty, and did not apply its jurisdiction under the *National Labor Relations Act over tribes*. The reason was simple. While the NLRA provides important protections for workers, it is a private sector labor law that specifically excludes state, local, and federal governmental employees.

Congress recognized the differences between public and private sector employment, so it afforded every level of government the freedom to determine its own labor policies, but that all changed in 2004 with its San Manuel Bingo & Casino decision, where the Board suddenly reversed course.

It abandoned long-standing precedent and began using an arbitrary test to determine when and where to exert its jurisdiction over Native American tribes.

The Board's move understandably sparked outrage within the Native American community. In fact, the Chairman of the Mashantucket Pequot Nation testified before this very committee saying the Board's decision was, and I quote, "an affront to Indian Country." He added, and I quote again, "It suggests that Indian Tribes are incapable of developing laws and institutions that protect the rights of employees."

We also heard from the Lieutenant Governor of the Chickasaw Nation, one of the largest tribes in the country. He testified that tribal sovereignty is, I quote, "a profound issue of national importance that cannot be left in the hands of an admittedly inexpert Federal agency." I could not agree more.

The NLRB has no expertise in Indian law, and has no business meddling in the affairs of Tribal Nations, but the aggressive approach we have seen from unelected bureaucrats at the NLRB has only grown worse. A series of inconsistent and misguided decisions have created significant legal confusion for Native Americans and tribal-owned businesses.

In order to prevent future NLRB overreach, Congress must pass the *Tribal Labor Sovereignty Act*. The legislation would amend the *National Labor Relations Act* to clarify that the law does not apply

to businesses owned and operated by Native American tribes and located on tribal land.

This will ensure that tribes receive the same treatment as States and local governments when it comes to policies impacting their workforce.

I want to thank our colleague, Todd Rokita, for championing this legislation, and I would like to point out that this legislation is not about union workers versus non-union workers. What this legislation is about is very simple, it is about the fundamental principle that tribal governments are sovereign and are free to self-govern.

Congress now has the opportunity to reaffirm this principle and follow through on our promise to the Native American community.

I hope we can have a thoughtful discussion today on how we can further our commitment to protecting tribal sovereignty.

I will now yield to my friend, Ranking Member Sablan, for his opening remarks.

[The statement of Mr. Walberg follows:]

Prepared Statement of Hon. Tim Walberg, Chairman, Subcommittee on Health, Employment, Labor and Pensions

This hearing is about one basic principle: The sovereign rights of Native Americans must be protected.

This core principle is woven deep into the fabric of our shared history. It is part of who we are as a society and has long defined the unique government-to-government relationship that exists between the United States and independent, tribal nations.

What does tribal sovereignty mean? It means that Native American tribes have a fundamental right to self-govern. They have a right to self-determination. And they have the freedom to advance their own economic policies in the pursuit of prosperity for tribal members.

Bipartisan support for tribal sovereignty has been reaffirmed time and time again by Congress. And for more than 180 years, the Supreme Court has held that tribes possess a nationhood status and retain inherent powers of self-government.

Unfortunately, the National Labor Relations Board has taken a number of alarming steps in the past decade that have created widespread concern in the Native American community and threatened tribal sovereignty as we know it.

For nearly 70 years, the board respected Native American sovereignty and did not apply its jurisdiction under the *National Labor Relations Act* over tribes. The reason was simple. While the NLRA provides important protections for workers, it is a private sector labor law that specifically excludes state, local, and federal government employers.+

Congress recognized the differences between public and private sector employment, so it afforded every level of government the freedom to determine its own labor policies. But that all changed in 2004. With its San Manuel Bingo & Casino decision, the board suddenly reversed course. It abandoned long-standing precedent and began using an arbitrary test to determine when and where to exert its jurisdiction over Native American tribes.

The board's move understandably sparked outrage within the Native American community. In fact, the Chairman of the Mashantucket Pequot Nation testified before this very committee, saying the board's decision was "an affront to Indian Country." He added that it "suggests that Indian tribes are incapable of developing laws and institutions that protect the rights of employees."

We also heard from the Lieutenant Governor for the Chickasaw Nation—one of the largest tribes in the country. He testified that tribal sovereignty is a "profound issue of national importance that cannot be left in the hands of an admittedly inexpert federal agency." I couldn't agree more. The NLRB has no expertise in Indian law and has no business meddling in the affairs of tribal nations.

But the aggressive approach we've seen from unelected bureaucrats at the NLRB has only grown worse. A series of inconsistent and misguided decisions have created significant legal confusion for Native Americans and tribal-owned businesses.

In order to prevent future NLRB overreach, Congress must pass the Tribal Labor Sovereignty Act. The legislation would amend the National Labor Relations Act to clarify that the law does not apply to businesses owned and operated by Native

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Protecting Tribal Sovereignty

Over

560

federally recognized Indian tribes across the country.

Since 1832, the Supreme Court has held that Native American tribes retain inherent powers of **self-government**.

In 2004, the NLRB **abandoned 70 years of settled law** and asserted jurisdiction over tribes.

Mr. SABLAN. Thank you very much, Mr. Chairman, for holding today's hearing on H.R. 986, the *Tribal Labor Sovereignty Act*, and I would also like to wish a good morning and a welcome to all of our witnesses today.

The effect of this legislation would be to strip employees who work at businesses owned and operated by an Indian tribe and located on Indian lands of the protections afforded by the *National Labor Relations Act*.

This bill deals with a dispute between the sovereign rights of Native American tribes and the rights of workers to organize and bargain collectively. However, this bill does not reconcile these competing interests, but rather strips hundreds of thousands of workers of their rights.

I am a Chamorro, one of the indigenous people of the Marianas, and fully appreciate the importance of tribal sovereignty for Native Americans.

I also believe deeply in workers' rights to organize, to collectively bargain, and to protect their right to fight for a safe workplace, fair pay to provide a living for themselves and their families, and good benefits.

To be fair, legislation and Labor Board decisions must balance these competing principles, and not favor one at the expense of the other. That is precisely what happened in the San Manuel Indian Bingo & Casino decision, where a Bush-era Labor Board by a bipartisan 3–1 vote asserted jurisdiction over a tribal casino on tribal lands.

Using a template widely accepted by the federal courts, the Board stated it would exercise jurisdiction over commercial tribal enterprises, unless doing so would "touch exclusive rights of self-government in purely intramural matters" or "abrogate rights guaranteed by treaty."

In the San Manuel decision, the Board noted a distinction between commercial tribal enterprises that employ a substantial number of non-Indians and cater to a non-Indian clientele versus traditional tribal services or governmental functions.

At least 75 percent of employees at tribal casinos are non-tribal members, and in some cases, as few as one percent of the employees are members of the tribe operating the casino. They have no say in the decision making of tribal governments.

There has been criticism of the San Manuel decision. However, the NLRB applied the same criteria as has been applied to other laws of general applicability, such as the *Occupational Safety and Health Act* (OSHA), the *Fair Labor Standards Act*, and many criminal statutes.

For that reason, it is not surprising that multiple appeals courts have upheld San Manuel. Last year, the Supreme Court declined two petitions to overturn San Manuel.

Federal labor law and tribal sovereignty can comfortably co-exist at tribal casinos without stripping workers of their rights under the *National Labor Relations Act*.

As will be explained by a witness, some unions have consented to being governed by Tribal Labor Relations Ordinances, because these tribes adopted a mutually agreeable labor ordinance that pro-

tects workers' rights to join a union, and establishes a neutral dispute resolution panel.

The important point being, however, is that if these tribal ordinances were amended in the future, these workers would still be protected by the NLRA. Tribal labor ordinances can be a workable option only if (1) they provide protections substantially equivalent to those afforded by the *National Labor Relations Act*, and (2) the NLRA exists as a backstop.

I want to thank the witnesses for taking the time to prepare their testimony and traveling to be here with us today. I also want to recognize one of the tribal casino workers, Mary Elizabeth Carter, who works at the Cache Creek Casino in Yolo County, California, and is a member of UNITEHERE!.

I yield back my time, Mr. Chairman.

[The statement of Mr. Sablan follows:]

Prepared Statement of Hon. Gregorio Kilili Camacho Sablan, Ranking Member, Subcommittee on Health, Employment, Labor and Pensions

Thank you Mr. Chairman for holding a legislative hearing on H.R. 986, the Tribal Sovereignty Act.

The effect of this legislation would be to strip employees, who work at businesses owned and operated by an Indian tribe and located on Indian lands, of the protections afforded by the National Labor Relations Act.

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I want to thank the witnesses for taking the time to prepare their testimony and traveling to be here with us today. I also want to recognize one of the tribal casino workers, Mary Elizabeth Carter, who works at the Cache Creek Casino in Yolo County California, and is a member of UNITE HERE. I yield back my time.

Chairman WALBERG. I thank the gentleman. Pursuant to Committee Rule 7(c), all 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 such statements and other extraneous materials referenced during the hearing to be submitted for the official hearing record.

It is now my pleasure to introduce our distinguished panel of witnesses, beginning with the Honorable Brian Cladoosby, who is president of the National Congress of American Indians, and chairman of the Swinomish Indian Senate. Welcome.

The Honorable Nat Brown, who is delegate to the Navajo Nation Council. Welcome.

Mr. John Gribbon is the California Political Director of the UNITEHERE! International Union. Welcome, Mr. Gribbon.

The Honorable Robert J. Welch is chairman of the Viejas Board of Kumeyaay Indians. We welcome you as well.

I will now ask our witnesses to stand and raise your right hand, if you would.

[Witnesses sworn.]

Chairman WALBERG. Thank you. You may be seated. Let the record reflect the witnesses answered all in the affirmative.

Before I recognize you to provide your testimony, let me briefly explain the lighting system, and make that very brief. It is like the stop lights that we generally honor. I am only speaking for myself there. When it is green, keep going. You have five minutes during that green segment. When it turns yellow, that means a minute is left, so go faster, and do not push it to orange. When it turns red, complete your sentence, your basic thought. We appreciate that. There will be plenty of opportunity to expand on that as we ask questions.

Now, I would like to recognize our first witness, Chairman Cladoosby.

TESTIMONY OF BRIAN CLADOOSBY, PRESIDENT, NATIONAL CONGRESS OF AMERICAN INDIANS, AND CHAIR, SWINOMISH INDIAN TRIBAL COMMUNITY

Mr. CLADOOSBY. Good morning, Chairman Walberg, Ranking Member Sablan. It is an honor to be here with you and your distinguished members of the subcommittee to talk about a very important subject that is near and dear to the hearts of many tribes, all tribes across the nation, and we are here to voice our strong support of H.R. 986, the *Tribal Labor Sovereignty Act of 2017*.

The *Tribal Labor Sovereignty Act* is a simple fix that adds "Tribes" to the definition of "governmental entities exempt from the *National Labor Relations Act of 1935*." In doing so, the legislation reinforces a critical part of Congress' efforts to support governmental parity for tribal governments and respect for sovereignty of tribal governments.

I want to start by saying that Indian Country does not view this as a fight between tribal governments and labor. In many tribal communities across the country, tribal governments and unions work hand in hand to improve the working conditions of Indian and non-Indian workers.

We greatly appreciate the significant contributions that unions have made, not only in Indian Country, but across the United States.

Where tribal sovereignty is undermined or threatened in any way, we have no choice but to take a strong stand. This is what has happened in the National Labor Relations Board application of the NLRA to tribes. When the NLRA was enacted in 1935 to address growing upheavals in private industry, Congress exempted all government employers and all government owned and operated businesses from the act and the reach of the NLRB.

The act does not specifically exempt the District of Columbia, U.S. Territories, and tribal governments, but the Board consistently interpreted the government exemption to include tribes and these other governments.

Until 2004, for 70 years, the Board reversed a long-standing interpretation that declared that Congress intended the act to apply to tribal governments. With that decision, the Board upended 70 years of precedent, and unilaterally disregarded tribal labor law and made tribal governments the only governments in the United States subject to the NLRA.

With the *Tribal Labor Sovereignty Act*, Congress resolves any question about whether the NLRA applies to tribal governments and affirms sovereign governmental rights of Indian tribes to make their own labor policies that govern their own governmental employees.

Sovereignty means that these decisions must be left to the tribes, not federal bureaucrats, just as 90,000 other units of governments across the United States make these decisions for their employees.

I've discussed what the *Tribal Labor Sovereignty Act* does, now let me take a moment to describe what it does not do. The legislation will not expand tribal jurisdiction outside that allowed to other sovereigns. It will not create union free zones on Indian lands. The bill only applies to employers who are first, tribal governments, and second, who operate on their own lands.

For private sector employers located on Indian lands, the legislation would have no effect or application. The legislation would simply restore the intent of Congress that tribal governments should not be treated as private sector employers under the NLRA.

Applying a private sector model to force collective bargaining over all conditions of employment under the threat of protected strikes is a formula for destabilizing any government. Giving an outside party the power to call a strike of a government's workforce is counter to the very concept of sovereignty, and requires that a governmental employer choose between surrendering its sovereign right to enact laws or being shut down by work stoppages.

This is particularly problematic for tribal governments who lack an effective tax base and are required to engage in economic activity to raise revenue and fund local programs and services.

As a result, for many tribal governments, tribal agriculture, energy, gaming operations, timber operations, and other tribal enterprises constitute the sole source of governmental revenues used to fund essential governmental services. Unlike private businesses, no government can safely shut down its enterprise operations because of labor disputes. Tribal police and fire departments, our schools and hospitals, our courts and our tribal legislatures must stay open to provide governmental services to our citizens.

Thus, passage of the *Tribal Labor Sovereignty Act* is consistent with Congress' initial intent to exempt governmental employers from the *National Labor Relations Act*.

In conclusion, I want to reiterate that Indian tribes support strong relationships with their employees. The *Tribal Labor Sovereignty Act* builds upon the principle that when Tribal sovereignty is respected and acknowledged, successful, accountable, and responsible governments and economies follow.

Thank you for your commitment to maintaining the integrity and effectiveness of tribal governments, and for guarding against actions that would deny to those governments the same rights accorded to other state and local governments. Thank you very much, Mr. Chairman and ranking member.

[The statement of Mr. Cladoosby follows:]

Statement of the Honorable Brian Cladoosby

President of the National Congress of American Indians and

Chair of the Swinomish Indian Tribal Community

Testimony before the

United States House of Representatives

Committee on Education and the Workforce

Subcommittee on Health, Employment, Labor and Pensions

Hearing on *H.R.986 – The Tribal Labor Sovereignty Act of 2017*

March 29, 2017

INTRODUCTION

Good morning Chairwoman Foxx, Ranking Member Scott, and distinguished members of this Subcommittee. Thank you for your invitation to testify today and for your commitment to upholding the Constitution of the United States, and with it the governmental status of Tribal Nations and the trust and treaty responsibilities of the federal government. Tribal sovereignty is an essential aspect of our governmental status. I thank you for focusing today's hearing on tribal sovereignty.

I would like to thank Representative Rokita for sponsoring H.R. 986, the Tribal Labor Sovereignty Act of 2017, and thank his bi-partisan colleagues who have co-sponsored it, Representatives Cole, Noem, Moore, Lujan Grisham, Peterson, Mullin, Cheney, LaMalfa, Gosar and Lewis.

I've been honored to serve as President of the National Congress of American Indians for the past four years. NCAI is the oldest, largest, and most representative tribal government organization in the nation. NCAI urges Congress to move quickly to enact H.R. 986 to fix a problem created by the National Labor Relations Board's decision to single out Indian tribes as the only form of government in the United States subjected to the National Labor Relations Act.

NCAI views the enactment of the Tribal Labor Sovereignty Act as a crucial step for Congress to take to ensure that the United States consistently respects the sovereignty of tribal governments, and does so by explicitly adding "tribes" to the definition of governmental entities exempt from the National Labor Relations Act of 1935.

TRIBAL LABOR MATTERS ARE BEST LEFT TO INDIAN TRIBES

At the outset, I want to say that many tribal leaders recognize and appreciate the significant contributions that labor unions have made to working people in the United States, including those working in Indian Country. Many of us have worked on farms and in factories and on jobsites all over the United States. We greatly appreciate the efforts of labor unions to improve wages and working conditions for American men and women in the workforce.

For years, the member tribes of NCAI have deliberated over tribal labor matters and have voiced their enduring and strong support for the Tribal Labor Sovereignty Act. Attached please find a copy of NCAI Resolution SD-15-056, Support for Tribal Labor Sovereignty Act. NCAI supports H.R. 986 because it affirms the sovereign governmental right of Indian tribes to make their own labor policies that govern their own governmental employees based on the economic and social conditions existing on tribal lands. A significant number of Indian tribes exercise that sovereign authority by welcoming labor unions and encouraging union activity and organization of the tribal workforce under tribal law. But sovereignty means that is a choice reserved for Indian tribal governments --- not a choice made for a tribe by federal bureaucrats.

H.R. 986 will restore the intent of Congress that tribal governments should not be treated as private sector employers under the National Labor Relations Act ("NLRA"). The NLRA was enacted in 1935 in the midst of the Great Depression to address growing upheavals in private industry. Congress exempted all government employers and all government-owned and operated businesses from the Act and from the reach of the National Labor Relations Board ("NLRB" or "Board"). Although the NLRA did not specifically list out every type of exempted government (e.g., it did not expressly identify the governments of the District of Columbia, U.S. Territories, or Indian tribes), for decades the Board properly and consistently interpreted the governmental employer exemption to include the governments of the District of Columbia, the U.S. Territories and possessions, and the various Indian tribes.

In 1976, in *Fort Apache Timber Company and Construction*, the Board considered application of the NLRA to a commercial timber and construction company owned and operated by the White Mountain Apache Tribe, which has its principal office and place of business located at the tribal government headquarters on its Reservation near White River, Arizona. The Board examined and acknowledged the commercial nature of the Tribe's corporation in ruling that the Tribe's corporation did not fall within the NLRA's definition of a private sector "employer" but instead was within the Act's governmental employer exemption.

> Consistent with our discussion of authorities recognizing the sovereign-government character of the Tribal Council in the political scheme of this country it would be possible to conclude that the Council is the equivalent of a State, or an integral part of the government of the United States as a whole, and as such specifically excluded from the

> Act's Section 2(2) definition of 'employer.' We deem it unnecessary to make that finding here, however, as we conclude, and find that the Tribal Council, and its self-directed enterprise on the reservation that is here asserted to be an employer, are implicitly exempt as employers within the meaning of the Act.

In 2004 the NLRB did an about-face in *San Manuel Indian Bingo and Casino, 341 NLRB 138,* and -- without either receiving new statutory language from Congress or consulting tribes -- declared that Congress intended the Act to apply to tribal government employers engaged in revenue raising activity. The Board created a new *governmental v. commercial* test to determine whether it will apply the NLRA to tribal governmental employers. In *San Manuel,* the Board found that "the tribe's operation of the casino is not an exercise of self-governance.... The casino is a typical commercial enterprise, it employs non-Indians, and caters to non-Indian[s]." This rationale ignores the stated goals and intent of the federal Indian Gaming Regulatory Act as well as the function and importance of Indian gaming revenues to tribal government operations, programs and community services.

The 2004 *San Manuel* decision upended seventy years of precedent and unilaterally disregarded tribal labor law and instead imposed NLRB jurisdiction on a tribal government's relationship with its own governmental workforce when a tribe is operating on tribal lands to raise governmental revenue and provide employment to tribal members. This interpretation of the Act is in direct conflict with the Act's exemption of governmental employers. Over 90,000 other units of government in America, who employ over 21 million Americans, are not subject to the NLRA. The Board in 2004 made tribal governments the only governments subject to the NLRA.

LIKE OTHER GOVERNMENTS, TRIBAL GOVERNMENTS
RELY ON ENTERPRISES TO GENERATE GOVERNMENTAL REVENUES

Congress's wisdom in exempting governmental employers from the NLRA is plain. Applying a private sector model of forced collective bargaining over all conditions of employment, under the threat of protected strikes, is a formula for bringing a government to its knees. Giving an outside party the power to call a strike of a government's workforce requires that governmental employer to choose between surrendering its sovereign right to enact laws or being shut down by work stoppages. This is particularly problematic for tribal governments who lack an effective tax base and are obliged to engage in economic activity to raise revenue to fund programs and services to their members and neighbors. Indian lands are held in trust by the U.S. and cannot be subjected to real estate taxation, high reservation unemployment makes income taxation unworkable, and restrictive Supreme Court rulings have severely limited tribal government sales taxes. As a result, for many tribal governments—Indian gaming operations, tribal agriculture, energy and timber operations, and other tribal government enterprises constitute the sole source of governmental revenue that is used to fund tribal public safety, education, health, housing and other essential services to residents of Indian Country.

Let me make one point very clear -- the Tribal Labor Sovereignty Act is a very limited "fix." It will not create "union free zones" on Indian lands. By its own terms, H.R.986 only applies to employers who are, #1, tribal governments, and #2, who operate on their own Indian lands. So

for private sector employers located on Indian lands, H.R.986 would have no effect or application.

Tribal government enterprise activities are as critical to the delivery of essential government services as is a tax base to any other government. Unlike private businesses, no government can safely shut down its enterprise operations because of labor disputes. Our police and fire departments, our schools and hospitals, our courts, and our tribal legislatures must stay open, and they require funding from tribal enterprises. Likewise, it is a basic aspect of tribal sovereignty for Indian Nations to control our relations with our own governmental employees on our own lands. A tribal governmental employer exemption from the NLRA, as H.R. 986 provides, is crucial to our existence as sovereign tribal governments.

THE NLRB'S SAN MANUEL DECISION TURNED ON AN UNWARRANTED AND UNFAIR FOCUS ON TRIBAL GOVERNMENT GAMING

Although tribal governments operate many types of enterprises with government employees, most often in natural resources management, much of the focus of this tribal labor relations issue has been on Indian gaming enterprises. The Indian Gaming Regulatory Act ("IGRA") expressly states its purpose "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. Section 2702(1) (Declaration of Policy). In addition, IGRA mandates that tribal governments use net revenues from Indian gaming solely for government purposes: to fund tribal government operations or programs; to provide for the general welfare of the tribal community; to promote tribal economic development; to donate to charitable organizations; or to help fund operations of local government agencies. 25 U.S.C. Section 2710(b)(2)(B). Indian gaming revenues are often the sole source of non-federal funds to improve reservation health care, education, public safety, and the general welfare of Native communities. Tribal gaming has also helped begin to rebuild tribal infrastructure, roads, water and telecommunications systems, and much more. In sum, tribal governmental gaming is essential to furthering the congressional goals of tribal self-government and self-sufficiency.

The NLRB makes no commercial vs. governmental distinction for state and local government commercial enterprises, including state lottery and other gaming-related governmental operations. Disparate treatment of Indian tribes for purposes of the NLRA violates the longstanding federal policy of Indian Self-Determination.

The IGRA is quite clear in treating tribal gaming as governmental in nature and not commercial gaming. Tribal gaming is a government activity to raise desperately needed revenue for tribal government functions. In this way, tribal gaming is much more akin to state lotteries than to commercial gaming.

Statements by members of Congress at the time IGRA was deliberated make clear that IGRA was not intended to undermine tribal government regulatory authority on the reservation. As Senator Daniel K. Inouye, one of IGRA's main sponsors in the Senate and long-time Chairman of the Senate Committee on Indian Affairs, stated on the floor shortly before IGRA cleared the Senate:

> There is no intent on the part of Congress that the compacting methodology be used in such areas such as taxation, water rights, environmental regulation, and land use. On the contrary, the tribal power to regulate such activities, recognized by the U.S. Supreme Court . . . remain fully intact. The exigencies caused by the rapid growth of gaming in Indian country and the threat of corruption and infiltration by criminal elements in Class III gaming warranted utilization of existing State regulatory capabilities in this one narrow area. No precedent is meant to be set as to other areas. (134 Cong. Rec. S24024-25, Sept. 15, 1988)

H.R.986 RE-AFFIRMS TRIBAL SOVEREIGNTY IN LABOR RELATIONS

It is important that the Committee understand that in many ways tribal communities are an emerging market, often with vulnerable economies and that labor policy on Indian lands is an important aspect of economic regulation that should be left to Indian tribes as sovereign governments. There are at least four ways that the NLRB's flawed interpretation of its governing statute substantially interferes with important attributes of tribal sovereignty in ways that have not been contemplated or authorized by Congress.

First, guaranteeing tribal employees the right to strike would preempt tribal law and threaten tribal government services. We are very concerned that the right to strike would allow outside forces --- third parties with little or no connection to the tribal community --- to control tribal government decisions. On most reservations there is only one major employer and it is a tribal government enterprise, usually a casino or an agriculture or timber operation. It is often the only major source of tribal revenue, so it must keep operating in order to keep the schools open and the police departments staffed and vigilant. Allowing labor unions the right to strike would give them inordinate leverage to demand larger and larger shares of the tribal enterprise revenue, revenues that are intended to provide desperately-needed services in tribal communities. Government services are critically important to a large segment of the public, and the public is especially vulnerable to "blackmail" strikes by government employees. This is the reason that government employees are generally barred from striking. Federal employees and most state employees generally do not have the right to strike. See 5 U.S.C. 7116(b)(7), 7311; DiSabatino, *Who Are Employees Forbidden to Strike Under State Enactments or State Common-Law Rules Prohibiting Strikes by Public Employees or Stated Classes of Public Employees*, 22 A.L.R. 4th 1103 (1983). Where government employees do have the right to strike, the government itself has alone made its own sovereign decision to expose itself as an employer to a strike. It is the antithesis of sovereignty for one government to make that decision for another government. Yet this is precisely what the Board did in its 2004 *San Manuel* decision.

Tribal governments have as urgent a need as state or local governments to uninterrupted performance of services to the community, and are demonstrably more vulnerable. Many tribal governments have little or no discretionary funding other than revenue from their economic enterprises. Strikes against tribal enterprises that the NLRB dismissively describes as "commercial in nature – not governmental" could easily disrupt tribal programs and services to a greater degree than state or local governments because other governments can rely on the bulk of their revenues coming from a tax base which tribes lack. The NLRB has made the implausible

assumption that Congress intended to expose tribal governments to strikes by tribal employees – an exposure the Act spares other governments.

Second, treating Indian tribes as private employers under the NLRA would interfere with tribal authority to require Indian preference in employment. With the approval of Congress and the courts, the vast majority of Indian tribes have enacted tribal laws requiring employers doing business in Indian Country to give preference to Indians in all phases of employment. Preference laws are important because the unemployment rate in Indian communities is much higher than anywhere else in the country. On many large, rural reservations a majority of adults are unemployed or out of the workforce. Congress recognized and explicitly protected tribal preference laws in Title VII of the Civil Rights Act, which excludes tribes from the definition of "employer" and exempts businesses "on or near" Indian reservations. In *Morton v. Mancari*, 417 U.S. 535 (1974), the U.S. Supreme Court unanimously upheld this provision.

Application of the NLRA to tribal enterprises would jeopardize a tribe's right to enforce its Indian preference laws. If tribal employees chose a union it would become the "exclusive representative of all the employees." The union would have the duty of equal treatment and nondiscrimination among its members. The tribe would be obligated to negotiate with the union in order to exercise its sovereign right to apply its Indian preference laws. The union might resist the application of Indian preference, or seek to condition its acceptance on concessions by the tribe on other issues. Requiring a tribe to bargain to retain its Indian preference laws seriously interferes with the tribe's core retained rights to make and enforce its own laws. In view of Congress's strong support of Indian preference, it cannot reasonably be assumed that Congress intended to force tribes to bargain with unions to preserve their Indian preference laws. Yet this is what follows from the NLRB's construction of the NLRA.

Third, treating Indian tribes as private employers interferes with the fundamental right of tribes to exclude non-members in the employment context. The tribal power to exclude from tribal lands is one of the most fundamental powers of tribal government and the partial source of tribal civil jurisdiction over non-members. The power to exclude includes the power to "place conditions on entry, on conditioned presence, or on reservation conduct." See, *Merrion v. Jicarrilla Apache Tribe*, 455 U.S. 130 at 144 (1982).

However, if the NLRA applies to tribes as employers, their right to exclude in that context would be abrogated. For example, a hearing or arbitration required under the NLRA could lead to reinstatement and return of employees that the tribe had fired and lawfully banned from the reservation for misconduct. The NLRB makes the unreasonable assumption that Congress intended to interfere with this core right of tribal sovereignty.

Fourth, and finally, a union with many tribal members could substantially interfere with tribal government internal politics. On larger reservations the majority of the employees are tribal members. A powerful union leader could manipulate union votes in tribal elections. The union could strike or threaten to strike immediately before an election. The union could demand health care benefits that are better than other tribal members. The union could bargain to limit employment in order to raise wages and interfere with the tribal government's plans to employ as many tribal members as possible. Because of the relatively small size of tribal communities,

unions could sow considerable political and social discord and dominate tribal politics in a way that would benefit union members but operate to the detriment of the tribe as a whole.

ENACTING H.R. 986 WOULD NOT DEPRIVE ANYONE OF THEIR RIGHTS

Non-native employees working for tribal governments are in no different position than are out-of-state employees working for local or state government. Millions of Americans cross state and local government borders every day to go to work, including to state and local government jobs. Nowhere is this more clear than in Washington, DC, where workers from Northern Virginia, DC and Maryland commute daily across state lines to work for state or local governments. None of these employees have voting rights to participate in the political process of the state or local government of their employer. For example Census Bureau reports detail how many police officers live in the cities where they serve. On average, among the 75 U.S. cities with the largest police forces, 60 percent of police officers reside outside the city limits. Just 12 percent of officers in the Metropolitan Police Department in Washington, D.C. live in the District — and only 7 percent of officers in Miami live within city limits. Even with these numbers, no one can suggest that out-of-jurisdiction employees are unfairly unable to influence their governmental employers. To the contrary, Indian tribes, like other governmental employers, have a huge interest in ensuring that their employees are satisfied and productive in serving community needs. In fact, tribal government employers regularly are hailed as the best employers in their regions.

H.R. 986 IS NOT A "TROJAN HORSE" VIS A VIS OTHER WORKFORCE LAWS

Some have suggested the legislation before this subcommittee is nothing more than a "Trojan Horse" that, if enacted, will inevitably lead to other bills frustrating the application of other federal workforce laws to activities on Indian lands. This is simply untrue: the Tribal Labor Sovereignty Act will not affect the implementation of any other federal law regulating the workplace. Each of those laws is from a different era and deals with Indian tribes on its own terms. For example the Americans with Disabilities Act of 1990 specifically exempts Indian tribal governments from the definition of "employer." Today Indian tribes have worked diligently to create accessible workplaces using their own sovereign authority.to do so, providing an excellent example of how tribal governments whose sovereignty is respected will advance worker protection as a matter of tribal self-determination.

CONCLUSION

In conclusion, I want to reiterate that Indian tribes support strong relationships with their employees. Indian reservations are not in urban centers and have suffered from decades of unemployment, poverty and federal neglect. We have to work hard to attract and retain good employees. The exercise of tribal sovereignty has led to development of tribal enterprises and has been one of the major success stories of the rural economy in many economically depressed tribal areas. However, these are still Indian reservations. The only reason people commute to jobs on Indian reservations is because tribes compete favorably against other employers, offering better wages and working conditions. It defies reality to suggest that Indian tribes are able to

disadvantage non-Indian employees who have mobility to find better pay and working conditions elsewhere. We are not aware of any tribe that does not have extensive process for employees to make complaints and to appeal adverse employment decisions. My point is that tribal enterprises have not succeeded by fighting with their employees; rather tribal enterprises prosper by building partnerships with their employees that benefit all. But a partnership with a tribal government has to be founded on the recognition that a tribe is a government and the mechanism for setting tribal policies must come from within the tribe's government, rather than being imposed from the outside.

The Tribal Labor Sovereignty Act builds upon a principle that has been long established by Indian tribes across the country: when tribal sovereignty is respected and acknowledged, successful, accountable and responsible governments and economies follow. This is not merely a legal issue but a moral imperative of protecting and defending the sovereignty of America's Indian tribes, and guarding against any discrimination against those tribes. There is no good reason to treat tribal governments in any way different from other governments. Federal law should uphold, not undercut, parity of treatment and equality of opportunity for tribal governments.

Thank you for your commitment to maintaining the integrity and effectiveness of tribal governments, and for guarding against actions that would deny to those governments the same rights accorded other state and local governments.

Chairman WALBERG. I thank the gentleman. Now, I recognize Delegate Brown for his testimony.

TESTIMONY OF NATHANIEL BROWN, DELEGATE, 23RD NAVAJO NATION COUNCIL, THE NAVAJO NATION

Mr. BROWN. Yáaťeeh, Chairman Walberg, Ranking Member Sablan, and members of the Committee. My name is Nathaniel Brown, 23rd Navajo Nation Council. I am sitting here on behalf of Navajo Nation president, Russell Begay. He apologizes for not being able to testify, but he had other obligations that he could not get out of.

However, thank you for this opportunity to present testimony on H.R. 986, the *Tribal Labor Sovereignty Act of 2017*. Let me start off by stating that we support this legislation as well as the companion bill in the Senate, S. 63. The bill is a step in the right direction towards honoring our sovereignty and self-determination.

We are a sovereign nation. We have been here since time immemorial. We have signed treaties with Spain, Mexico, and the United States in 1868. We continue to honor the Treaty of 1868, which is approaching its 150th anniversary.

We also have the inherent right to self-determination and self-governance. In exercising these principles, the Navajo people have created and developed our own government made up of executive, legislative, and judicial branches. Our executive and legislative leaders are elected by the Navajo people. Our judicial branches are appointed by the president of the Navajo Nation and confirmed by the legislative branch, similar to the federal government.

We also develop, pass, and execute our own laws. When we pass laws, we expect these laws shall govern that our laws are not superseded or pushed aside by the laws of another governmental entity, including the federal government.

We are not asking for special treatment. We want the same treatment as the federal government and states. If they are able to self-govern and be self-determined with regard to the NLRA, so should we.

The NLRA was passed in 1935, and at that particular time, Indian tribes may not have been considered in many pieces of legislation. It was probably not even contemplated that the NLRA might have jurisdiction over Indian Tribes until 1976, in the Fort Apache Timber Company matter.

It has been a long time coming, more than 80 years, and we have the opportunity to resolve this issue. We also need clarity and certainty. In 1976, the NLRB took one position, holding that tribal governments and tribal enterprises were exempt from the NLRA. However, in 2004, the NLRB reversed their position in San Manuel Indian Bingo & Casino, and held that the Board has jurisdiction over tribally-owned enterprises. A different Board took a different view of the law and what facts should apply.

Boards have also been consistent in its approaches in applying NLRA to Indian tribes. H.R. 986 can provide a level of certainty so that the NLRB can have a consistent view even if Board members change from time to time.

Furthermore, a troubling trend that we see in NLRB decisions is that when Indian tribes and their enterprises are not doing what

is considered traditional tribal or governmental functions, they will be regulated. If we become more involved in commercial activity, we will be regulated.

We need to get away from this type of thinking in the federal government. In today's world, Indian tribes have to get involved in a commercial world in order to help fund a continuous shortage of federal funding to provide needed services on the reservation. An Indian tribe's use of tribal enterprise in a commercial arena to help fund needed services should not be used to hamper or punish the Indian tribe.

The Navajo Nation does have unions that operate on the reservations. The Navajo tribal government has entered into three collaborative bargaining agreements under our Division of Public Safety, our Executive Branch, and Head Start Department.

From my understanding, there are some private sector/labor union agreements in place for employees on the Navajo Nation. A worker's right to join a union is protected pursuant to our *Navajo Preference and Employment Act*. We understand some tribes may have laws that are different than ours, but our ultimate message is that each Indian tribe should be able to determine its own direction on labor issues, as well as other issues.

In conclusion, thank you for holding this hearing. Again, we support this legislation because it supports our sovereignty and self-determination. It will also greatly simplify and provide clarity to this issue. We appreciate the leadership of this subcommittee, and look forward to working with the chairman and ranking member to pass this important legislation. Aheheé.

[The statement of Mr. Brown follows:]

THE NAVAJO NATION RUSSELL BEGAYE PRESIDENT
JONATHAN NEZ VICE PRESIDENT

Testimony of Nathaniel Brown
Navajo Nation Council Member
The Navajo Nation

Before the
United States House Education and the Workforce Committee
Subcommittee on Health, Employment, Labor & Pensions

Hearing on
HR 986 – Tribal Labor Sovereignty Act of 2017

Wednesday, March 29, 2017

Yá'át'ééh (hello) Chairman Walberg, Ranking Member Sablan, and members of the Committee. My name is Nathaniel Brown and I am a member of the Navajo Nation Council. I am testifying on behalf of Russell Begay, the President of the Navajo Nation. Thank you for this opportunity to present testimony on HR 986, the Tribal Labor Sovereignty Act of 2017.

Let me start off by stating that we support this legislation as well as its companion bill in the Senate, S. 63. The Tribal Labor Sovereignty Act of 2017 is a step in the right direction, towards honoring our sovereignty and self-determination.

SOVEREIGNTY

We are a sovereign nation. We have been here since time immemorial. We have signed treaties with Spain, Mexico, and the United States in 1868. We continue to honor the Treaty of 1868, which is approaching its 150th anniversary.

We also have the inherent right to self-determination and self-governance. In exercising these principles, the Navajo people have developed our own government made up of an executive, legislative and judicial branch. Our executive and legislative leaders are elected by the Navajo people. Our judicial branch judges are appointed by the President of the Navajo Nation and confirmed by the legislative branch, similar to the federal government. We also develop, pass and execute our own laws. When we pass laws, we expect that these laws shall govern and that our laws are not superseded by or pushed aside by the laws of another governmental entity, including the federal government.

PARITY WITH STATES AND LOCAL GOVERNMENTS

As part of their jurisdictional standards, we understand that the National Labor Relations Act (NLRA) excludes "the United States or any wholly owned Government corporation, . . . or any State or political subdivision thereof" from its definition of "employer." 29 U.S.C. § 152(2). In addition, the National Labor Relations Board (NLRB), as part of their jurisdictional standards,

states that "Federal, state and local governments, including public schools, libraries, and parks, Federal Reserve banks, and wholly-owned government corporations" are exempt from NLRA.[1] Our understanding is that Congress, as a policy matter, afforded the federal government, state governments and their entities this exemption because of the essential and sensitive nature of their work. Furthermore, Congress recognized these local governments' ability to self-govern.

The NLRA was passed in 1935 and at that particular time, Indian tribes may have not been considered in many pieces of legislation. It was probably not even contemplated that the NLRA might have jurisdiction over Indian tribes until the 1976 *Fort Apache Timber Co.* matter. It has been a long time coming, more than 80 years, and we have the opportunity to resolve this issue. In requesting passage of this bill, we are not asking for special treatment. The United States and States have been afforded this exemption. We simply want parity. If they are able to self-govern and be self-determined with regards to the NLRA, so should we. We are simply asking that our right to self-govern is acknowledged and not brushed aside by an external agency.

CLARITY AND CERTAINTY

We need to have clarity and certainty in regards to this issue. From my understanding, the NLRB in 1976 took the position in *Fort Apache Timber Co.*, 226 NLRB 503, not to assert their jurisdiction, holding that tribal governments, including a tribal enterprise, were exempt from the NRLA's definition of employer. However, in 2004, the NLRB administratively reversed and flip-flopped its position in the *San Manual Indian Bingo & Casino*, 31 NLRB 138. Suddenly it held that the board has jurisdiction over a tribally-owned enterprise. In our view, those decisions should remain consistent and should not change because a different board may have a different view of the law and what facts should apply.

Our own Navajo Department of Justice attorneys also note that there is a problem of consistency between circuits where different federal circuit courts use different tests on the NLRA's application. In *NLRB vs San Juan Pueblo*, the Tenth Circuit applied a governmental/proprietary distinction to hold the Pueblo could regulate labor relations independent of the NLRA. 276 F.3d 1186 (10th Cir. 2002). However, in *San Manuel Indian Bingo and Casino v. NLRB*, the D.C. Circuit held the NLRA applied, adopting a sliding scale of sovereignty test, and deeming a casino to not be a "traditional act" performed by a government. 475 F.3d 1306 (D.C. Cir. 2007). Then, in two other cases, the Sixth Circuit held the NLRA applied to two tribal casinos. In the first case, the panel adopted the Ninth Circuit's Coeur D'Alene approach to laws of general applicability, holding the NLRA applies to tribal governments unless one of three exceptions exist, including whether "the law touches exclusive rights of self-governance in purely intramural matters," *Donovan v. Coeur D'Alene Tribe*, 751 F.2d 1113, 1116 (1985); *see* also *NLRB v. Little River Band of Ottawa Indians Tribal Gov't*, 788 F.3d 537 (2015). In the second, the panel felt compelled to follow *Little River Band*, despite their disagreement with the approach, but the majority also rejected an argument that the tribe's treaty exempted its casino from the NLRA, despite a Tenth Circuit opinion reaching the opposite conclusion for the Navajo Nation in the context of OSHA. *Soaring Eagle Casino and Resort v. NLRB*, 791 F.3d 648 (2015). As you can see, the different

[1] National Labor Relations Board. Jurisdictional Standards. Retrieved March 27, 2017 from https://www.nlrb.gov/rights-we-protect/jurisdictional-standards

circuits have applied different tests to determine whether the NLRA applies, creating significant confusion and uncertainty. Further, despite these conflicts within the Sixth Circuit and among the several circuits, the U.S. Supreme Court denied cert., leaving the inconsistent approaches intact.

Therefore, as I stated previously, we need clarity and certainty on this issue and HR 986 can provide a level of certainty so that the NLRB can have a consistent view even if board members change from time to time.

GOVERNMENTAL VS. COMMERCIAL

One troubling trend that we see in the NLRB's approach in the *San Manual Indian Bingo & Casino* matter is that they have taken into consideration whether a tribal enterprise is "fulfilling traditionally tribal or governmental functions" or whether the tribe's activity is more commercial involving non-Indians and substantially affecting "interstate commerce." In fact, as a part of their jurisdictional standards, the NLRB "asserts jurisdiction over the *commercial enterprises* owned and operated by Indian tribes, even if they are located on a tribal reservation."[2] However, they do not assert jurisdiction "over tribal enterprises that carry out *traditional tribal or governmental functions*."[3] This type of consideration is troubling when a federal body can assert its jurisdiction when Indian tribe is participating in an activity the body considers outside a traditionally tribal or governmental function, such as commercial activity. Federal courts also make these distinctions when considering NLRA jurisdiction. We also face a similar test on whether an Indian tribe is eligible for tax exempt bonding. As far as I know, states and local governments do not have to go through this type of test, so why should we.

Navajo as well as other Indian tribes do not have a tax base and it is difficult to implement a tax when unemployment rate hovers above 40-50 percent. As such, Navajo relies on the revenue of its enterprises to fund the tribal government and its services. Revenues from tribal enterprises do not go to the benefit of individual investors like it would in a private corporation, rather it goes toward essential governmental services such as healthcare, education, scholarships, public safety, housing, veterans' benefits, employment, etc. This should carry a lot of weight, but the NLRB dismisses this consideration in *San Manuel Indian Bingo & Casino*.

We must stray from this type of thinking in the federal government. Since Congress passed the Indian Self-Determination Act, Indian tribes have continued to advance and have entered the commercial world in order to help fund a continual shortage of federal funding to provide needed services on the reservation. An Indian tribe's use of tribal enterprise in a commercial arena to help fund needed services should not be used to hamper or punish an Indian tribe.

NAVAJO LAWS

The Navajo Nation has passed its own laws governing labor, including the Navajo Preference in Employment Act (NPEA) that provides protection for its employees. It provides for rules on

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[2] *Id.*
[3] *Id.*

preference in employment, wages, health and safety, appeals, hearings, etc. Navajo also has the system in place to handle disputes on those issues through an administrative appeals and judicial court system. A Navajo worker's right to join a union is protected pursuant to the NPEA under 15 N.N.C. § 606, which states as follows:

> § 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.

As a result, the Navajo tribal government has entered into three collective bargaining agreements under our Division of Public Safety, our Executive Branch, and our Head Start department. From my understanding, there are some private sector labor union agreements in place for employees on the Navajo Nation.

Some Indian tribes have developed and passed right to work laws and that should be their prerogative. Navajo does not necessarily have explicit right to work laws, but whether an employee is required to join a union under a collective bargaining agreement has been determined by the vote of the employees. In two of our collective bargaining agreements, the employees voted to require employees of the units to join the union and pay fees. In the other agreement, the employees voted to make it voluntary. Again, each Indian tribe should be able to determine its own direction on labor issues. Therefore, we ask that unions work with tribes just like they do with the federal government and states, and recognize our tribal sovereignty.

CONCLUSION

Thank you for holding this hearing. Again, we support this legislation because it supports our sovereignty and self-determination. It will also greatly simplify and provide clarity to this issue. We appreciate the leadership of this subcommittee and we look forward to working with the Chairman and Ranking Member to pass this important legislation. Thank you. Ahéhee'.

Chairman WALBERG. Thank you, Delegate Brown. Mr. Gribbon, welcome, and you have five minutes of testimony.

TESTIMONY OF JOHN GRIBBON, CALIFORNIA POLITICAL DIRECTOR, UNITEHERE! INTERNATIONAL UNION, AFL–CIO

Mr. GRIBBON. Good morning, Mr. Chairman, and members. Thank you for inviting me to testify today. My name is Jack Gribbon. I serve as the political director for UNITEHERE! in California. Our union represents hotel and casino workers in the United States and Canada, about 275,000, including 7,000 workers in tribal casinos in California.

Accompanying me here today is Mary Elizabeth Carter, a member of UNITEHERE!, who is employed at the Cache Creek Casino and Resort owned by the Yocha Dehe Band of Wintun Indians in California.

It is my hope to cover four points during my oral testimony. The first would be the importance of the *National Labor Relations Act* and the fundamental rights to free speech and free association.

Second would be why tribal employers versus state and local government employers are not analogous.

Third, Tribal Labor Relations Ordinances and their inadequacy absent the National Labor Relations Board, and then finally, the real life positive outcomes for workers and their families as the result of free expression and freedom of association.

The importance of the NLRA jurisdiction: it is important to understand that the tribal gaming industry has become a $28 billion per year industry nationally. In California, it's an $8 billion industry. The Las Vegas strip by example is a $6 billion a year industry.

Title VII of the *Civil Rights Act of 1964* has been held not to apply to Indian tribes. The only way employees of tribal enterprises subject to harassment and other forms of discrimination may speak out about them with any degree of safety is through the NLRA. It is important to note that the decision of the NLRB under San Manuel was a measured decision. It would not interfere with tribal rights of self-governance in purely intramural matters. It would not abrogate rights guaranteed by treaty, and it would not be contrary to the congressional intent.

Some argue that employees of tribal enterprises should be treated like employees of state and local governments. However, the National Indian Gaming Association has stated 75 percent of workers at tribal casinos are not members of the owner tribe, 75 percent of the workers nationally. In California, it's much, much higher than that because we have tribes who have very small enrolled memberships, so it's upwards of 85 to 90 percent of the workers are not members of the tribe. They cannot petition the government of the tribe. They cannot elect chairpersons or tribal members of the tribal Council. They do not have any influence over that.

Contrary to that, local and state employees do. They have the right and they take advantage of that right, and they have protected their free speech rights and they have bargained over their wages and their benefits and other issues of employment with their employers, because they have the right to be involved politically with their government.

The 85 to 90 percent of the workers at tribal casinos in California do not have the right to do that in Indian Country, nor should they, because they are not enrolled members of the tribes.

The other issue that we should talk about here is the inadequacy of the Tribal Labor Relations Ordinances. There are many Tribal Labor Relations Ordinances (TLRO) in compacts in California. There are six different ones, at least. I think there are more than six different ones, but at least six.

There are examples of TLROs that are not neutral, nor do they implement free speech or free association rights, and in particular, the Tribal Labor Relations Ordinance implemented by the Saginaw Chippewa Tribe in Michigan prohibited employees from forming or joining a union. It was also a firing offense for any employee to solicit for any purpose in any place.

Finally, my last point here is a real-life issue. Because of the rights that the NLRA provides for tribal casinos in California, and because of the work of our union and the organizing of the workers at those casinos, workers like Mary Elizabeth Carter, who is with me today, who has been working at Cache Creek since 2013, has been able to support her family, help her husband get through electrician's school, keep her four children with health care, and put herself through school. That is because of the work that we have done, and that is what the real story is here in my view.

[The statement of Mr. Gribbon follows:]

Testimony of Jack Gribbon

California Political Director, UNITEHERE! International Union, AFL-CIO

Before the Health, Employment, Labor and Pensions Subcommittee of the Committee on Education and the Workforce of the U.S. House of Representatives

Legislative Hearing on H.R. 986, the Tribal Labor Sovereignty Act of 2017

March 29, 2017

Mr. Chairman and members of the Subcommittee, thank you for inviting me to testify today. My name is Jack Gribbon. I serve as the Political Director for UNITEHERE! in California. Our union represents hotel and casino workers in the United States and Canada, including 7,000 workers in tribal casinos in California. Accompanying me here today is Mary Elizabeth Carter, a member of UNITE HERE!, who has been employed at the Cache Creek Casino and Resort owned by the Yocha Dehe Band of Wintun Indians since 2013.

UNITEHERE!'s Involvement in the Tribal Gaming Industry

After the passage of the Indian Gaming Regulatory Act (IGRA) in 1988, the tribal gaming industry in CA was, according to the federal government, operating 14,000 "illegal" Class III slot machines on Indian lands that the State did not have jurisdiction to regulate absent a Tribal/State Compact. The federal government had ordered a "stand down" and was threatening the closure of the existing tribal casinos and stopping the development of additional casinos, if the tribes and the state did not reach agreement on compact terms.

In 1997 a number of Tribes in California who had been involved in Tribal/State Compact negotiations with then-Governor Pete Wilson's administration contacted UNITEHERE! for help. Some matters were controversial, and included, among other issues, workers' organizing rights under a Tribal Labor Relations Ordinance (TLRO) since the NLRB had not at that time asserted jurisdiction, as well as, local mitigation costs for infrastructure, police and fire, and other issues that some of the CA Tribes considered to be infringements on their sovereignty. UNITEHERE! worked with our partners in Indian Country, including the Pala Band of Mission Indians, the Yocha Dehe Band of Wintun Indians, the United Auburn Indian Community, the Jackson Rancheria and several others to help secure ratification of these compacts so that their operations would not be closed down or their opportunity to develop would not be impaired. We have continued to support those tribes who are amenable to workers' rights over the years including the Graton Rancheria, the North Fork Tribe, Los Coyotes, the Enterprise Rancheria, the Lytton Band of Pomo Indians, Jamul and others.

The Importance of NLRA Jurisdiction over Tribal Enterprises

According to the National Indian Gaming Association (NIGA), the tribal gaming industry in the United States is a $28 billion per year enterprise. California's tribal casinos are an $8 billion per year enterprise eclipsing the Las Vegas strip (at $6 billion per year). Absent a robust tribal labor ordinance with a neutral dispute resolution process, employees of tribal enterprises have few rights to free speech on the job absent NLRA jurisdiction. This becomes particularly acute when it comes to workplace discrimination, including harassment. Title VII of the Civil

Rights Act of 1964 has been held not to apply to Indian tribes. Again, absent a robust tribal labor ordinance with a neutral dispute resolution process, the only way employees of tribal enterprises subject to harassment and other forms of discrimination may speak about them with any degree of safety is through the NLRA.

It is important to note that the decision of the NLRB under San Manuel was a measured decision with the sovereign rights of tribes given consideration and respect. The *San Manuel* decision provides that the NLRA applies only wherein its application:

1) Would not interfere with tribal rights of self-governance in purely intramural matters;

2) abrogate rights guaranteed by treaty; or

3) be contrary to congressional intent.

Consistent with the three exceptions under *San Manuel*, the Board declined jurisdiction over an Oklahoma casino run by the Chickasaw tribe that was party to an 1830 treaty which exempts the tribe from nearly all federal laws.

The NLRB also considers whether there are policy reasons to not to assert jurisdiction "to balance the Board's interest in effectuating the policies of the Act with its desire to accommodate the unique status of Indians in our society and legal culture." Thus, the Board has declined to exercise jurisdiction over tribal enterprises including a health clinic that served primarily tribal members in Alaska based on this policy consideration.

However, the Board noted that the matter is different if a tribe is reaching out to participate in the national economy through a commercial enterprise employing many non-Indian employees, catering largely to non-Indians, and competing with non-Indian businesses. In that different circumstance, the balance of conflicting considerations favors Board jurisdiction, because the tribe's activity "affect[s] interstate commerce in a significant way."

Most importantly, the NLRB is clear that it has no jurisdiction over internal tribal governmental matters, but only over the protection of free speech and the protected concerted activity of employees in commercial tribal enterprises.

Tribal Employees vs. State and Local Government Employees

Some argue that employees of tribal enterprises should be treated like employees of state and local governments and be exempt from the NLRA. This is fundamentally wrong. Employees of state and local governments have protected free speech rights. Moreover, they can, and have been successful, in organizing as citizens with the right to vote to impact their governments in their communities.

The National Indian Gaming Association (NIGA) states that 75% of tribal gaming workers are not Native Americans (an estimated 150,000 nationally). In addition, when you include Native Americans who work in tribal casinos who are not members of the "owner tribe" the addition of "non-owner tribe" Native Americans increases the percentage to well over 85% of the work force who are not members of the owner tribe and can't (nor should they) have influence in internal tribal politics. In some cases, as few as 1% of the workforce are members of the tribe operating a casino. Non tribal members can't petition or campaign or, in any way,

influence internal tribal policies or elections, unlike state and local government employees. The only way that these workers who are not members of the owner tribe, but who are the engine behind these lucrative commercial businesses, have any rights to free speech and free association, is through the NLRA.

The Inadequacy of the "TLRO" as Replacement for the NLRA

Over the last 20 years of Tribal-State Compact negotiations in California, each administration from former Governor Pete Wilson's administration in the 1990s to Governor Jerry Brown's administration today, Tribal Labor Relations Ordinances have been negotiated in every compact. However, those TLROs are very different depending on which administration was part of the negotiations. There are at least 6 separate and distinct TLROs in Tribal-State compacts in the State. Some include binding arbitration for all disputes, including collective bargaining impasse. Many are much weaker and do not provide for binding arbitration for all disputes, and all of them provide that workers cannot strike or picket on tribal lands in order to resolve a dispute. Under Governor Gray Davis' administration, where the majority of tribes negotiated their existing TLROs, not one worker has been able to organize under those TLROs because of inherent weakness in the ordinance. In all cases, a labor organization will lose access to any of the terms of the TLRO, if it elects to resolve disputes through the NLRA.

Currently, under casino gaming compacts between the State of California and tribal casinos with more than 250 employees, tribes must establish a Tribal Labor Relations Ordinance or TLRO. The TLRO in CA only applies to casino employees, and not all casino employees. There are many other tribal enterprises (mining, construction, sand and gravel, commercial farming, retail, etc.) that are non-gaming enterprises which not subject to compact negotiations and, H.R. 986 will deprive these workers of their current free speech and free association rights.

There are examples of TLROs that are not neutral nor do they implement free speech or free association rights. The Tribal Labor Ordinance previously implemented by the Saginaw Chippewa Tribe in Michigan prohibited employees from forming or joining a union. It was also a firing offense for any employee to solicit for any purpose in any place.

Finally, with respect to the TLRO, should a new Governor in California decide to renegotiate Tribal/State Compacts and remove the current TLRO, the only way a worker would have protections for free expression and freedom of association on the job would be through the protections under the NLRA.

A Real Life Story Regarding Outcomes for Workers at a Tribal Enterprise under Collective Bargaining.

Mary Elizabeth Carter, who is with me today, has been working at the Cache Creek Casino and Resort owned by the Yocha Dehe Band of Wintun Indians since 2013. Because of the living wages and affordable family health care provided in the collective bargaining agreement between the Tribe and UNITEHERE!, Mary has been able to support her family during a period of her husband's unemployment when he was able to complete an electrician's apprenticeship. During that time she was also able to provide for their 3 children and also become the guardian of a "special needs" child while her husband was able to find full time employment as an electrician. Last year, Mary and her husband purchased a house for their family.

This is what free speech and freedom of association is all about. It's about living wages, employer provided health care, caring for children. Meanwhile, the Yocha Dehe Band of Winton Indians, a tribe with less than 50 members and the employer of over 2,500 individuals who are not members of the tribe, has a very successful commercial casino. Mary's experience is similar to the experiences of thousands of workers in CA tribal casinos who have negotiated collective bargaining agreements providing good working class jobs that support their families' futures.

Summary

While UNITE HERE workers enjoy the protections of Tribal Labor Ordinances at a number of casinos, they rely upon the National Labor Relations Act as a backstop if a TLRO is weakened or not enforced. This could happen when or if a state-tribal compact is amended in the future. The elimination of NLRA jurisdiction over tribal enterprises would undermine these collective bargaining agreements in tribal casinos and in many other commercial enterprises owned and operated by tribes in our country.

In closing, I would note that the International Labour Organization (ILO) raised concern about the deprivation of internationally recognized labor rights for workers employed at tribal enterprises under the Tribal Labor Sovereignty Act. In its letter regarding the legislation introduced in the 114th Congress (which is the same as H.R. 986) the ILO stated:

> "While elements of indigenous peoples' sovereignty have been invoked by the proponents of this bill, the central question revolves around the manner in which the United States Government can best assure throughout its territory the full application of the fundamental principles of freedom of association and collective bargaining... It is critical that the State (the national authority) takes ultimate responsibility for ensuring respect for freedom of association and collective bargaining throughout its territory."

Chairman WALBERG. Thank you, Mr. Gribbon. I recognize Chairman Welch for your five minutes of testimony.

TESTIMONY OF ROBERT J. WELCH, JR., CHAIRMAN, VIEJAS BAND OF KUMEYAAY INDIANS

Mr. WELSH. Good morning. My name is Robert Welch, Jr., I am chairman for the Viejas Band of Kumeyaay Indians. Thank you for allowing me to testify today regarding H.R. 986 and its importance to our tribal members, employees, and tribal sovereignty.

The Viejas Band owns and operates Viejas Casino & Resort, which is the source of 99 percent of the government revenue used to fund initial services and programs, including education, health, housing, and public safety.

The Viejas Casino & Resort provides over 1,600 jobs to our wonderful employees and annually contributes millions of dollars to the local economy. Tribal gaming has made self-determination and economic self-sufficiency a reality for Viejas.

H.R. 986 is about respecting the sovereignty of tribes and affirming that they possess the same power as federal, state, and local governments to regulate labor relations on sovereign lands. H.R. 986 would reverse the NLRB's overreach under its 2004 San Manuel decision, when it ignored 30 years of precedent to rule that the NLRA applies to Tribes.

Opponents of H.R. 986 characterize the measure as anti-union and argue that the NLRA is essential to protect the rights of employees. That is not true, and the history of labor relations of Viejas shows why.

Viejas would not be as successful without the good people who work for us, many of whom have been employees for over a decade. In August 1998, long before anyone believed the NLRA applied to tribes, Viejas entered into a voluntary election agreement in January 1999. CWA was elected as the bargaining representative for approximately 30 percent of the Viejas Casino & Resort workforce. Soon thereafter, a collective bargaining agreement was ratified.

Every stage of the process, from organizing to contract ratification, reflected an intelligent sovereign decision by Viejas to capably regulate labor relations on its reservation. None of the procedures were compelled or forced upon Viejas.

In September 1999, Viejas formally codified its labor relations law in the form of a Tribal Labor Relations Ordinance, TLRO, and has amended it since then with additional protections for employees and labor organizations.

The TLRO is similar to the NLRA in that it includes access to elections, and unfair labor practice and dispute resolution provisions. It necessarily differs, however, in matters that are unique to Tribal gaming, including recognition of Indian hiring preference, the exclusion of certain employee classifications from organization, the ability to require a labor organization to secure a gaming license, and the resolution of labor disputes through binding arbitration.

Substantially similar TLROs have been adopted by over 70 tribes in California and unions have spoken in support of the TLROs before the California legislature.

TLROs have worked for over 17 years. Unfortunately, Viejas' sovereignty, TLRO, and employment practices are currently under attack by the NLRB. The old adage "no good deed goes unpunished" best describes the NLRB's current enforcement action, which involves Viejas' payment of bonuses to represented employees in December 2015, bonuses that Viejas had no obligation to pay at all.

In early 2015, Viejas and the UFCW negotiated a collective bargaining agreement, and Viejas offered to include annual bonuses in the agreement, but UFCW rejected the offer, insisting instead upon larger annual wage increases. Ultimately, the ratified agreement contained wage increases but no bonuses.

2015 was a more successful year for Viejas Casino & Resort than expected. Viejas was able to pay bonuses to its unrepresented employees as budgeted, but also wanted to reward its represented employees for a year's success. Viejas decided to treat both groups of employees fairly.

Since represented employees had already received their larger negotiated pay increases earlier in the year, paying them a gratuitous bonus meant Viejas needed to pay unrepresented employees an additional bonus amount in order to equalize overall annual compensation.

Viejas' reward for the discretionary bonus was a NLRB enforcement action, which Viejas has been defending for the past 14 months at considerable expense.

This case is now before the Board following an ALJ ruling that Viejas violated the NLRA. If the NLRB affirms the ruling, Viejas will be forced to seek review before the Ninth Circuit and potentially the U.S. Supreme Court.

The passage of H.R. 986 would immediately halt NLRB intrusion into tribal labor relations, and would save money for the U.S. taxpayers and tribes from ongoing and future litigation.

In conclusion, H.R. 986 is about protecting tribal sovereignty. Tribes have proven they can best develop laws to protect the rights of employees and also facilitate tribal government gaming operations and government services.

They run just like federal, state, and local governments. The tribe should not be treated as second class citizens—second class governments, excuse me. I do believe freedom of speech is covered under the First Amendment.

Viejas respectfully requests that Congress enact H.R. 986. Thank you for listening to my testimony today, and I stand ready to answer any questions you may have.

[The statement of Mr. Welch follows:]

TESTIMONY OF ROBERT J. WELCH, JR.
CHAIRMAN, VIEJAS BAND OF KUMEYAAY INDIANS

BEFORE THE
U.S. HOUSE OF REPRESENTATIVES
EDUCATION AND THE WORKFORCE COMMITTEE
SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR AND PENSIONS

HEARING ON H.R. 986 – "TRIBAL LABOR SOVEREIGNTY ACT OF 2017"

MARCH 29, 2017

Good morning. My name is Robert Welch, Jr. and I serve as Chairman for the Viejas Band of Kumeyaay Indians (the "Viejas Band"), one of seven elected members of the Viejas Tribal Council. On behalf of the Viejas Band, I would like to thank you for allowing me to testify today regarding H.R. 986, the "Tribal Labor Sovereignty Act of 2017". H.R. 986 is critical for the recognition of the sovereignty of Tribal Governments like Viejas, and would ensure that tribal governments are afforded the same dignity and respect as all other governments within the United States to make and be governed by their own labor laws tailored to the unique needs of their governments and employees.

ABOUT THE VIEJAS BAND AND VIEJAS CASINO & RESORT

The Viejas Band, one of the 12 remaining bands of the Kumeyaay Indian Nation, resides on a 1,600-acre reservation in the Viejas Valley, east of the community of Alpine in San Diego County, California. The Kumeyaay people have lived in the San Diego County region for over 10,000 years. Prior to the passage of the Indian Self-Determination and Education Assistance Act of 1975, the story of the Viejas Band, like that of many other tribes in California and throughout the nation, was one of struggle, resilience, and survival against genocide, enslavement, forced removal from ancestral lands, termination, assimilation, and extreme poverty. Following this critical shift towards Tribal self-determination, in 1976, the Viejas Band was able to secure funds in order to create its first Tribal enterprise: Ma Tar Awa RV Park. While the Indian Self-Determination and Education Assistance Act of 1975 helped start Tribes on a path towards rebuilding their governments, the revenue producing opportunities it created were not substantial enough to promote economic self-sufficiency, and most Tribes still relied heavily on federal funding to support their governments. And without a sizeable population base to generate tax revenue, Tribes desperately needed a mechanism, under their control, to generate

meaningful government revenue and control their own destinies. That is where Tribal government gaming stepped in.

The U.S. Supreme Court's ruling in *Cabazon*[1], the passage of the Indian Gaming Regulatory Act of 1988[2] ("IGRA"), and the execution of Tribal-State gaming compacts recognized and preserved the rights of Tribes to utilize government gaming to generate critical revenue, in the same way that many States earn substantial revenues through government-operated lotteries.

Today the Viejas Band proudly owns and operates Viejas Casino & Resort, which is the primary source of revenue for the Viejas Tribal Government. The revenues generated by Viejas Casino & Resort fund the types of essential governmental departments, services, and programs that many non-Indians take for granted, such as education, health, housing, water, roads, fire, and public safety. In addition, Viejas Casino & Resort provides over 1,600 jobs to the local community, including employment opportunities for citizens of the Viejas Band, annually contributes millions of dollars to the local economy through the purchase of goods and services, and is a proud supporter of many charitable organizations throughout San Diego County. Tribal government gaming has been a success story for the Viejas Band and our local community. It has made self-determination and economic self-sufficiency a reality, and is essential to the continued prosperity of the Viejas Band and its people.

THE NATIONAL LABOR RELATIONS ACT AND INDIAN TRIBES

The National Labor Relations Act ("NLRA") was first enacted in 1935. At that time, Indian tribes around the country were trying to recover from the devastating impacts of allotment. The NLRA was intended to provide collective bargaining rights to employees of large corporations. For that reason, most governments were exempted from the NLRA, including the United States, states, and local governments. Unfortunately, Indian tribes had almost no employees, as all government and enterprise operations were handled by the Bureau of Indian affairs, thus, the thought of including Tribal governments in the list of exempted governments did not occur to the drafters of the NLRA. This oversight, however, was handled administratively by the National Labor Relations Board ("NLRB").

Underpinning the exemption for governments in the NLRA was an acknowledgment that governments have significantly different considerations in how they handle their business when compared to private enterprises. Governments are not driven by pure profit motive; rather, they are driven by the responsibilities and authorities given them by their citizens. To best meet those responsibilities and exercise those authorities, governments need flexibility. Thus the NLRA left it to governments to determine what laws would best govern their employee relations. Tribal governments are no different. The operations and enterprises of a Tribal government, even those that raise revenues, are not driven by purely profit motives, but by the responsibility to deliver services and meet the present and future needs of its citizens. Ultimately, it is the sovereign responsibility of a Tribal government to determine how it can best deliver services and meet the needs of its people.

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[1] *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).
[2] 25 U.S.C. 2701 *et seq.*

Gaming, whether through private commercial operations like Las Vegas casinos, or through governmental operations like Tribal gaming under IGRA or state lotteries, is a unique business that requires significant regulation and oversight. The unique regulatory and oversight needs of the business led to enactment of IGRA by the U.S. Congress, promulgation of significant regulations by the National Indian Gaming Commission, and enactment of a substantial body of Tribal law and regulation. Subsequent interactions with state governments has further led to the numerous Tribal-State compacts adopted around the country. To adequately address all of these laws, regulations, and agreements, while at the same time developing a well-trained, educated, and happy workforce, Tribal governments need great flexibility.

The Viejas Band's history in Tribal government gaming is a great example in how these sometimes conflicting responsibilities can be reconciled by careful consideration, balancing of interests, and great flexibility.

H.R. 986 AND THE NLRB DECISION IN *SAN MANUEL*

H.R. 986, as its title suggests, is about respecting and protecting the sovereignty of Tribal governments. It is about affirming that Tribal governments possess the same powers as the federal government, states and local governments, to govern labor relations on sovereign lands. H.R. 986 would reverse the NLRB's improper and about-face change in policy in the 2004 *San Manuel* decision[3], when the NLRB ignored thirty years of precedent to rule, for the first time, that the NLRA applies to Tribal governments. Finally, H.R. 986 would set the record straight, once and for all, regarding Congress' intent as to the exemption of Tribal governments from the NLRA. As sovereign governments engaged in economic activities essential to fund government services, Tribes, such as the Viejas Band, should enjoy the same exempt status as the United States, State governments, and their government business. If exemption is appropriate for state lotteries, it should be for Tribal governments too.

THE VIEJAS BAND AS AN EMPLOYER

Opponents of H.R. 986 will likely characterize this measure as "anti-union". They will also likely suggest that imposition of the NLRA upon Tribal governments is essential to protect the rights of non-tribal member employees. But the voluntary actions of the Viejas Band, and many other Tribal governments across the U.S., fundamentally expose the fallacy of those myths. As one of the largest employers in east San Diego County, the Viejas Band takes its role as an employer very seriously. The Viejas Band recognizes the key role that all of its employees play in the growth, success, and well-being of Viejas Casino & Resort, and by extension the Viejas Band itself. That is why the Viejas Band continually strives to treat all of its employees fairly and with respect. The Viejas Band provides its employees with competitive salaries and great benefits, including health, dental, and vision insurance, basic life insurance, a 401(k) program with employer matching, a college tuition reimbursement program, a robust wellness program with fitness club dues reimbursement, and paid leave and vacation, to name a few. The Viejas Band treats its employees well because it is the right thing to do, not because it has been compelled to do so by some federal or state laws or agencies.

[3] *San Manuel Indian Bingo & Casino*, 341 N.L.R.B 1055 (2004).

THE HISTORY OF UNION ORGANIZING AT VIEJAS CASINO & RESORT

The history of labor organization at Viejas Casino & Resort is a striking example of why the application of the NLRA is unnecessary for Tribal governments, in the same way it is unnecessary for federal, state, and local governments.

In August 1998—long before anyone, including the NLRB, believed the NLRA should be applied to Tribal governments—the Viejas Band entered into a voluntary election agreement with Communications Workers of America ("CWA"), to provide access to service employees working at Viejas Casino & Resort for purposes of organizing. The voluntary election agreement provided for an election trigger (union authorization cards signed by 30% of the service employees) and a secret ballot election process supervised by an independent arbitrator.

In January 1999, a secret ballot election occurred and CWA was certified as the bargaining representative for approximately 30% of the Viejas Casino & Resort workforce. Shortly thereafter, the Viejas Band and CWA commenced negotiating the first collective bargaining agreement. The negotiation process concluded in October 1999, with the Viejas Band and members of the CWA ratifying a first of its kind collective bargaining agreement between a Tribal government and a labor organization in the State of California.

Every stage of the process, from organizing activity to ratification of a collective bargaining agreement, reflected a choice made by the Viejas Band in the exercise of its sovereignty as a Tribal government. None of those procedures were compelled or forced upon the Viejas Band. And each stage started and concluded without the involvement of the NLRB or the application of the NLRA.

The Viejas Band's exercise of its sovereignty demonstrates why Tribal governments should be empowered to exercise sovereignty in labor relations, rather than have it stripped away by federal laws or agencies. The Viejas Band's actions were received positively by its represented employees, other Tribes, and other labor organizations. In fact, a few months after the ratification of the historic collective bargaining agreement, the Viejas Band was honored by the San Diego-Imperial Counties Labor Council, AFL-CIO, at its 12th annual Worker's Memorial Dinner with its Spirit of Cooperation Award.

THE TRIBAL LABOR RELATIONS ORDINANCE

On September 14, 1999, the Viejas Band passed its own law governing labor relations: a Tribal Labor Relations Ordinance (the "TLRO"). The TLRO, like similar voluntarily adopted state laws addressing labor relations for government agencies, contains numerous provisions that are similar to the NLRA, including detailed procedures for representation proceedings, a guarantee of rights to engage in concerted activity, enumeration of unfair labor practices by Tribes and unions, and procedures for secret ballot elections and union decertification. The TLRO, however, also diverges from the NLRA in matters that are unique to Tribal government gaming, including the recognition of an Indian hiring preference, the exclusion of certain employee classifications from organization (such as Tribal Gaming Commission employees), the ability for

a Tribal Gaming Commission to require a labor organization to secure a gaming license, and the resolution of any labor disputes through binding arbitration before an independent Tribal Labor Panel (rather than the NLRB). The Viejas Band amended its TLRO in November 2016 to provide additional protections to employees and labor organizations.

Over 70 other Tribal governments in California have adopted their own, substantially similar, TLROs. The TLROs have worked well for over 17 years, have been publically praised by California labor union representatives speaking before the California legislature, and would continue to be undermined by NLRB interference if H.R. 986 were not passed.

THE UNRESOLVED IMPACTS OF *SAN MANUEL* ON THE TLRO AND IGRA

During its 14 years as the bargaining representative, CWA never once challenged the TLRO, or attempted to invoke action by the NLRB against the Viejas Band. But that changed in August 2014, when a represented employee filed a petition before the NLRB to decertify the CWA as the bargaining representative pursuant to the NLRA. The NLRB asserted that it had jurisdiction over the decertification election in light of the *San Manuel* decision and did not agree that the TLRO decertification procedures controlled. In addition, Viejas was informed that a majority of the represented employees had signed on to the decertification petition, such that the Viejas Band would alienate hundreds of employees if it objected to the NLRB process. It was a no-win situation, under which the Viejas Band was essentially compelled to agree to NLRB jurisdiction to avoid expensive litigation concerning NLRB jurisdiction and thereby angering its employees with the delay it would cause. The Viejas Band reluctantly stipulated to the NLRB election.

Through the NLRB election process, a new and previously unknown union, the United Food and Commercial Workers Local 135 ("UFCW"), was allowed to intervene at the eleventh hour and was added to the election ballot, which would not have been permitted under the TLRO. During the "campaign" process immediately preceding the election, the NLRB notified the Viejas Band that it was required to comply with the NLRA election procedures. Through the election, the UFCW was selected as the new representative for represented employees at Viejas Casino & Resort. The UFCW was certified by the NLRB as the bargaining unit representative on September 30, 2014. Shortly thereafter, the UFCW and the Viejas Band commenced collective bargaining. The UFCW commenced negotiations under the NLRA, whereas the Viejas Band commenced negotiations under the TLRO, and problems immediately arose.

Due to the differences between the TLRO and the NLRA, there was substantial disagreement on certain issues addressed by the TLRO, including the ability for the Viejas Tribal Gaming Commission to require the UFCW to secure a gaming license. In contrast to CWA, the UFCW refused to be licensed and filed an unfair labor practice charge with the NLRB. The Viejas Band, of course, objected to the jurisdiction of the NLRB and contested the unfair labor practice charge on the merits.

Fortunately, in March 2015, and prior to the NLRB issuing any decision, Viejas and the UFCW were able to complete negotiations on a collective bargaining agreement and temporarily resolve their differences, including UFCW's voluntary agreement to licensure by the Viejas Tribal Gaming Commission. But the collective bargaining agreement remains silent as to whether the

TLRO or the NLRA governs labor relations for Viejas Casino & Resort, which created an environment ripe for future jurisdictional disputes between the NLRA and the TLRO.

The *San Manuel* decision also clearly conflicts with IGRA creating even more uncertainty. The Viejas Band's TLRO is an indisputably sovereign act adopted pursuant to the Viejas Band's compact with the state of California. The D.C. Circuit, in its opinion in *San Manuel*, observed that the enactment of a TLRO, and the negotiation of a gaming compact under IGRA, are governmental acts. The Viejas-California Compact was approved by the United States Secretary of the Interior, as required by IGRA. And the plain language of IGRA recognizes that gaming operations are governmental activities of Tribes and identifies gaming on tribal lands as "a means of promoting tribal economic development, self-sufficiency and strong tribal governments." 25 U.S. C. § 2702(1). Against this background, the *San Manuel* decision fundamentally negates two sovereign acts by the Viejas Band: the Tribal State Compact and TLRO, which were specifically adopted by the Viejas Band, approved by and the State of California, and approved by the Secretary of the Interior, in accordance with IGRA.

The uncertainty and continued threat of NLRB intrusion into tribal governance undermines the ability of a tribal government, like the Viejas Band, to carry out its ultimate responsibility to deliver essential government services and meet the present and future needs of its citizens.

NLRB v. Viejas Band of Kumeyaay Indians – Case No. 21-CA-166290

The old adage "no good deed goes unpunished" is an apt characterization of the current encroachment by the NLRB upon the sovereignty of the Viejas Band. Through the improper assertion of jurisdiction by the NLRB, the Viejas Band has been forced to defend an enforcement action arising out of the Viejas Band's payment of bonuses to represented employees in December 2015, which were bonuses that the Viejas Band had no obligation to pay at all.

During collective bargaining in January 2015, the Viejas Band and UFCW negotiated compensation for represented employees. The Viejas Band informed UFCW that it intended to pay year-end bonuses to unrepresented employees if Viejas Casino & Resort financially performed to budget during 2015. The Viejas Band offered to structure bonuses into the collective bargaining agreement as well. UFCW rejected annual bonuses and insisted upon larger annual percentage wage increases instead. Consequently, the parties reached a collective bargaining agreement that contained the annual wage compensation structure preferred by UFCW, and contained no requirement for the Viejas Band to pay any bonuses to represented employees.

Fortunately, 2015 was a financially successful year for Viejas Casino & Resort. At year end, the Viejas Band was able to pay bonuses to its unrepresented employees as budgeted. Due to the financial success, the Viejas Band was also in a position to pay bonuses to its represented employees so that all of its employees could share in the success. One challenge the Viejas Band had to address, however, was structuring bonuses. The Viejas Band want to treat both groups of employees fairly, so the Viejas Band decided to structure bonus amounts in order to equalize the overall annual compensation increase received by represented and unrepresented employees during 2015. Because represented employees received a high percentage wage increase earlier

in 2015, the Viejas Band paid a lesser bonus to its represented employees, and thereby equalized overall year-over-year employee compensation increases for 2015. The Viejas Band determined that paying a lesser bonus was better for its represented employees than adhering to the terms of the collective bargaining agreement and paying no bonus at all.

The Viejas Band notified UFCW of its decision to pay a bonus immediately before it was announced to all employees, and three days before it was to be paid. UFCW had the opportunity during those three days to object to the bonus or demand negotiation. It did neither.

Instead, UFCW waited until after the bonuses were paid and then filed charges with the NLRB alleging that the Viejas Band engaged in discriminatory unfair labor practices under the NLRA. UFCW completely disregarded the TLRO.

During the past 14 months, the Viejas Band has been defending against the NLRB's enforcement action at considerable expense, including contesting the NLRB's jurisdiction, responding to NLRB subpoenas requiring the production of multiple government records, participating in a multi-day trial before an NLRB administrative law judge ("ALJ"), and drafting numerous trial briefs and exceptions challenging the ALJ's adverse ruling.

The NLRB has not yet taken any further action on the ALJ's ruling, but if it affirms the ruling, the Viejas Band will be forced to commit additional government resources over the next several years to have the ruling reviewed by the Ninth Circuit and potentially the U.S. Supreme Court. The passage of H.R. 986, however, would immediately end the NLRB's meddling in the tribal governance of the Viejas Band, would restore the sovereignty of the Viejas Band and its labor laws, and would save U.S. taxpayers and tribal governments from the substantial legal costs of ongoing and future actions by the NLRB against tribal governments. Moreover, it would reaffirm the power of the Viejas Band to look out for the best interests of all of its employees consistent with the Viejas Band's tribal law (the TLRO).

CONCLUSION

In conclusion, H.R. 986 is about protecting Tribal sovereignty. The Viejas Band and other Tribes across the nation serve as key examples of how Tribal governments, when allowed to exercise their sovereignty, are capable of developing laws that protect the rights of workers within a fair framework, while continuing to meet the strict regulatory needs of their gaming enterprises. The Viejas Band believes that its agreement with the State of California, and its adoption of the TLRO, should be respected. The NLRA and NLRB should have no application or role in labor relations upon the Viejas reservation.

The Viejas Band respectfully requests that Congress enact H.R. 986 and reaffirm that Tribal governments possess the same status as the federal government, states and their political subdivisions. This is not an issue to be left for the courts decide what Congress "intended". H.R. 986 should set the record straight, once and for all, regarding Congress' intent to exempt Tribal governments and their government enterprises from the NLRA. Thank you.

Chairman WALBERG. Thank you, Chairman. I thank each of the witnesses for doing pretty well in keeping to the time frame. That is not always the case here.

Now, I have the privilege to recognize the chairwoman of the Full Education and the Workforce Committee, Dr. Foxx.

Mrs. FOXX. Thank you, Mr. Chairman. I want to thank our witnesses today, and I also want to thank Mr. Rokita for introducing this bill and for the bipartisan support that he has obtained for it.

Delegate Brown, at its core, this bill is about protecting the sovereign rights of Indian Nations. It is about protecting Native Americans from special interests who are less concerned about the sovereign rights of tribal members and more concerned with expanding union membership and filling union coffers.

Some of those special interests claim that the workers affected are generally not tribal members. At Navajo enterprises, are most of the workers Navajo? Also, in your experience, are most unions run and staffed by members of the Navajo Nation?

Mr. BROWN. Thank you, Chairwoman Foxx, for the question. The unions, the Navajo Nation enterprises, the Navajo Nation Tribe, the majority of our employees are Navajo. For the sovereignty and for the union, our employees are protected with unions, and we also have "for cause" requirements for disciplinary actions. This is how our employees are protected.

In meeting with some of the unions last week, they appreciate the function and the protection of the unions within the Navajo Nation. Thank you.

Mrs. FOXX. Thank you very much. Chairman Welch, I am also concerned about the same way the organizations opposing this bill are misrepresenting how these commercial enterprises operate, as well as have the revenue they generate or utilize.

Chairman Welch, it is my understanding that tribes use the revenues from their businesses to support core services provided by the tribal governments, such as public safety and infrastructure.

How are revenues from your government owned businesses used by the Viejas?

Mr. WELSH. We use the money we receive to fund our government programs, such as health, education, and fire departments, whatever we need to do on the reservation. Also, we are very generous on donating money to the surrounding communities, especially the Town of Alpine, the schools that our children go to.

It's very important for us as Indian people to give back. There was a time when we were very, very poor, and we have a history of giving. So, when we were blessed with money, we made sure the surrounding community was taken care of, which is very interesting, because in Alpine—my mother was born in 1940. She went to public schools in Alpine. They had, as in the South, processed drinking water for Indians and white people, and that didn't deter us when we made money.

We decided that the Town of Alpine was our partner, and we have funded a lot of their Kiwanis Clubs, et cetera.

Mrs. FOXX. Thank you, Mr. Chairman. I yield back.

Chairman WALBERG. I thank the gentlelady, and now I recognize the ranking member, Mr. Sablan.

Mr. SABLAN. Thank you very much, Mr. Chairman. I serve on another committee that also has oversight over Native Americans, Native Alaskans, Native Hawaiians, and the Territories. In this committee, we recently had a hearing on the state of Indian schools, BIE schools.

I agree that you need all the money you can to upgrade the education and health services provided to your people. I do not disagree with that.

Let me ask, Mr. Gribbon, if I may, if H.R. 986 was enacted, are there any provisions that would prevent tribes from weakening or eliminating their existing labor laws?

Mr. GRIBBON. No. However, there's a couple of different issues here. One is that the existing collective bargaining agreements are not throughout all of tribal casinos in California, or across the country, nor are they in place in a variety of other industries, like mining, in some places.

Without the NLRA, the *National Labor Relations Act*, which would be exempted by this bill, H.R. 986, without that, there's not the incentive to work out these Tribal Labor Relations Ordinances, in my view, and in my experience.

Then again, some of these Tribal Labor Relations Ordinances have led to collective bargaining agreements that increased wages and benefits for workers, that have worked well in partnership with tribes that we work with.

Some of them are not adequate, like the one I mentioned from the Saginaw Chippewa Tribe. Some of them, like the majority of them in California, are extremely weak, ones that were negotiated in 1999 by the Gray Davis Administration, then-Governor Gray Davis, not one worker has organized under those TLROs.

So, without it, without the NLRA, there isn't a continued ability to be able to improve TLROs, and moreover, every time there's a new governor, you know, it depends on who he or she is, what kind of position they're going to take with respect to that part of the compact.

Mr. SABLAN. So, without the *National Labor Relations Act*, there is really no backstop of protection for workers is what you are saying?

Mr. GRIBBON. It's an absolute foundation.

Mr. SABLAN. Let me ask the witnesses, if I could just get a yes or no answer, I would appreciate it, the witnesses who are here to support the bill, are you saying that for the sovereignty of Indian Country, the *National Labor Relations Act* should not apply because of the sovereignty? Is that across the board or just for your tribes? For your individual tribes? Yes, across the board or just for your Tribe?

Mr. CLADOOSBY. Yes.

Mr. SABLAN. Yes to which one, just your tribe, or do you speak for all Native Americans?

Mr. CLADOOSBY. The National Congress of American Indians advocates for 567 Tribal Nations, and we have three conferences a year, and at those conferences, we have an opportunity to pass resolutions.

One of the resolutions that was passed unanimously, and we are a consensus organization, was to support this legislation, so that's where our marching orders come from.

Mr. SABLAN. Because you as a tribe are sovereign?

Mr. CLADOOSBY. Yes.

Mr. SABLAN. So, why is it there are tribes with casinos who go to great length and extent to deny tribes without casinos a license? Are they not also sovereign tribes that you represent today?

Mr. CLADOOSBY. Denied a license?

Mr. SABLAN. Denied a casino license. They come to Congress and lobby. Are they not as sovereign as each one of you here?

Mr. CLADOOSBY. Yes.

Mr. SABLAN. Then why do you lobby Congress to deny them a casino license? Why can they not get the same thing you have?

Mr. CLADOOSBY. I'm not sure what you're referring to, Congressman.

Mr. WELSH. May I try?

Mr. SABLAN. Yes, please. I do not have much time, but please.

Mr. WELSH. It all depends on the situation. In California, if they're trying to do off reservation gaming, then I can see why other tribes would try to stop them from getting licensure, because that's not what's in the compact or what the state voted for, what California voted for.

As for H.R. 986, I cannot speak for any other tribe in the United States other than my own, if I was able to, I would say yes, but it is a yes for my tribe.

Mr. SABLAN. Thank you. I appreciate that. Thank you.

Chairman WALBERG. I thank the gentleman. The gentleman's time has expired. I now recognize myself for five minutes of questioning.

Chairman Cladoosby, your testimony mentions that the National Congress of American Indians is the oldest, largest, most represented tribal government organization in the Nation. Suffice it to say the NCAI represents a wide variety of tribal governments, and on a wide range of issues.

On the question of tribal sovereignty and assertion of jurisdiction by the National Labor Relations Board over tribal commercial operations, let me ask you, is there a consensus among your members, even beyond what you just alluded to in the previous answer?

Mr. CLADOOSBY. Yes, definitely so. You know, in a nutshell, we didn't ask for this relationship with Congress, we inherited it. Every one of you Congressmen sitting up there—

Chairman WALBERG. Some of us have inherited it, too.

Mr. CLADOOSBY. Yes. We both inherited this relationship, and you are our trustee. We've always been recognized, even in the Constitution, as sovereigns, and that's all we want to be recognized as. I can't imagine if the NLRB took any of the other 90,000 governments and told them they no longer are protected by this, they have to abide by different rules, what kind of rush to this hearing you would have.

We just want to be treated as sovereigns, as other governments. We've heard it loud and clear from our membership at NCAI, and we're an organization that advocates for tribes, and they give us

our marching orders through resolutions, to come here to let you know that we wholeheartedly support H.R. 986.

Chairman WALBERG. These are long-standing hard fought battles over the decades and decades as well that we are dealing with here in the issue of sovereignty. I appreciate that.

Delegate Brown, I understand the Navajo Nation hosts private sector businesses like defense contractors and mining operations on your lands that employ a good number of Navajo citizens. Could you tell us about these in a little bit of detail?

Mr. BROWN. Thank you, Chairman Walberg, for your question. With some of the private sector, including Peabody, SRP and such, they currently have unions where they are protected, and they enjoy this protection. It creates a voice for them within the Navajo Nation.

Chairman WALBERG. So, you are not creating union free zones in these cases?

Mr. BROWN. No.

Chairman WALBERG. Those are private entities that have the good opportunity to work, to the benefit of both, Navajo Nation as well as their own interests, and unions are afforded that opportunity?

Mr. BROWN. Yes.

Chairman WALBERG. I just wanted to get that point, this bill does not create union free zones, neither do your efforts and involvements with these private sector contractors, et cetera. Thank you.

Chairman Welch, you spoke about costly litigation under the NLRA. Can you expand on how tribal enterprises which provide funds for tribal government services are threatened by long, drawn out litigation under the NLRA, and also, how this differs from your previous Tribal Labor Relations Ordinances?

Mr. WELSH. Because we have to go through the NLRB process, which is kind of expensive for us, and we have done all our research on NLRA and NLRB for the judgments. It seems like they always favor the unions.

So, if that happens, we have the right to appeal, and for the appeal, we have to go up the ladder, which will cost us significant dollars that could be spent on our tribe and for whatever we need to provide a better lifestyle for our members, and also could affect the team members who work for us.

Chairman WALBERG. Thank you. Now, I recognize the gentleman from New Jersey, Mr. Norcross.

Mr. NORCROSS. Thank you, Chairman, appreciate the time, and certainly bringing this issue to light. I find it fascinating going through the different laws that we passed over the years that do apply.

I would like to start my questioning with the Honorable Brian Cladoosby. This issue you find offensive to the sovereign nation, and I can understand what you are saying. The *Fair Labor Standards Act*, OSHA, they apply to you. Do you feel that is also an attack on your sovereignty?

Mr. CLADOOSBY. Thank you, Congressman. Thank you for the question. Yes, as sovereign nations, there are still certain things that we have to abide by when it comes to federal law, not state

law, but when it comes to holding us to a different standard, you have governments in your districts, and if those governments were treated differently by the NLRA, you would hear it loud—

Mr. NORCROSS. I understand. Why is this more offensive to you than let's say ERISA, that protects pensions and retirements? Why is this more offensive?

Mr. CLADOOSBY. Treated differently. We are a government. I think all the members up here would recognize that we are sovereigns, we are nations, we are governments.

Mr. NORCROSS. I understand that. Why is this different than all the others that apply to you, and why are you not trying to change those also?

Mr. CLADOOSBY. We would love to. We would love to be treated as true sovereigns, to be self-sustaining, to be under the arm of a paternalistic form of government that was placed upon us over the last 200 years, but unfortunately, you know, that is not going to happen.

Mr. NORCROSS. I understand. We have both inherited this.

Mr. CLADOOSBY. Yes.

Mr. NORCROSS. Decisions made by people who came before us puts us into a position. When the NLRA was first passed, I do not think we had the issue before you of having tens of thousands of employees working for casinos. It is a very different world now.

So, Mr. Gribbon, let me ask you, why is this different? Is this the traditional conversation we have, employer versus employee? Is that why this is different?

Mr. GRIBBON. Well, it seems that way to me, but one of the issues that I think is important to understand here, the Kaiser Family Foundation has put out a report, separate and apart from anything that my union has proposed, and contrary—I shouldn't go there. The bottom line is the average difference per year for a casino worker in California, depending upon whether they are union or not union, is about $8,000 a year.

Now, these are very, very successful casinos, and very successful casinos in California, an $8 billion a year industry, but workers standing up for supporting their families with health care and with decent wages, it does have a cost, it does have a financial cost. It's one they deserve to be able to struggle for.

Mr. NORCROSS. So, what I am hearing is it is a cost issue for the employee, and I heard great things about what the profits go for, certainly things that we all care about.

Delegate Brown, I appreciate you had card checks for many of the unions that operated it on you. Why is this different for you than it is for all the other casinos? Is it because the percentage of employees are actual tribal members?

Mr. BROWN. Thank you, Mr. Norcross, for your question. With Navajo, yes, the majority of the employees are Navajo.

Mr. NORCROSS. They get card check recognition. You have a higher percentage, you gave them card check; you have a very low percentage, and you tend to fight it. Help me rectify that in my mind, why that would be two different ways.

Mr. BROWN. Could you repeat the question?

Mr. NORCROSS. You have card check where you recognize the rights of the employees to have a voice. In California, what I am

hearing is where there is a very low percentage of members who work there, the tribe tends to fight this much more vigorously. Why is that? Is it because it is the percentage of tribal members that work at the casino that drives that decision?

Mr. BROWN. Yes. Again, the number of employees with the Navajo Nation, basically our laws protect the workers under the *Navajo Nation Equal Employment Act*. I don't know about other tribes.

Mr. NORCROSS. I see my time is running out. I yield back. Thank you.

Chairman WALBERG. I thank the gentleman. I now recognize the immediate past chairman of this subcommittee, the gentleman from Tennessee, Dr. Roe.

Mr. ROE. Thank you, Mr. Chairman. Since 1832, the Supreme Court has held that Native American tribes retain inherent powers of self-government. I just looked up "sovereignty." It says "The authority of a State to govern itself."

What these tribes are looking for is parity, the same as any other state and local government. That is all they are asking for. It is not complicated. It was mentioned about how many billion dollars in the industry, thank goodness that the Indian tribes have lived in poverty for so many years and now have some resources to help the people they represent.

I know exactly what that is like. They represent their people and their tribe and their government just like I represent the people in my government.

So, thank you for what you do, and I think this is an assault on liberty when you try to have a big federal government tell a tribal government what to do.

I am going to start by just asking a couple of questions. First, Chairman Cladoosby, many federal labor laws specifically exclude Indian tribes from the definition of "employer." Is there any mention of Indian tribes in NLRA, and if the act is solid, what theory has the NLRA applied to jurisdiction over tribes?

Mr. CLADOOSBY. That is a real good question, Mr. Roe, because for 70 years, we were exempted, and then in 2004—once again, thank you for recognizing the impact that Tribes are now having on the local economy. In some places, we're the largest employers in our counties.

We just want to be recognized as a government like the other governments. The gentleman asked about OSHA, the difference is a federal third party, a union, being forced on the tribes is really a big issue that I wanted to address with that gentleman also. Thank you for that question.

Mr. ROE. Delegate Brown, could you further elaborate on the size and scope of the Navajo government? Do you have courts, legislative branch, other government functions that a private employer would not have? What role do tribal enterprises play in maintaining these operations?

Mr. BROWN. Thank you for your question, sir. Within Navajo Nation, we have over 300,000 members, this is on and off the Navajo Nation. Again, we are a mirror to the federal government. We do have a legislative, judicial, and executive branch. Within judicial, we do have a court system. We have our Labor Relations Office,

and we also have the Navajo Nation labor relations laws that protect our people.

Mr. ROE. We should respect that. How do Navajo employee wages and benefits compare to local averages where you live and govern?

Mr. BROWN. Within Navajo Nation, we still have a high unemployment rate. However, some of the wages are comparable, and we do have a good medical package, and I think that's where we try to make up for some of the low wages in some areas, but they're pretty comparable otherwise.

Mr. ROE. As a leader of one of the largest tribal governments, what does sovereignty mean to you and your people?

Mr. BROWN. Sovereignty is to govern ourselves as we have our ways of life, and we understand that today, the way any government would function is with money. Slowly, we would like to be completely sovereign, to have our say, to have our stance, and we would like to be respected the way the United States federal government is.

Mr. ROE. I was a mayor before I came here, mayor of my local city, 65,000 people. I think you just want to be treated the same way and operate the same way I was when I was mayor of Johnson City, Tennessee. I think that is what I am hearing and what I read in this bill, in Mr. Rokita's bill, which I wholeheartedly support.

One last question to Mr. Cladoosby, if you can. You spoke about the possibility of unions interfering in tribal politics and elections. A single union could end up representing a large portion of tribal voters. How would unions under NLRA jurisdiction have an even greater ability to interfere with Tribal elections than unions under Tribal labor laws?

Mr. CLADOOSBY. Once again, I want to make it very clear that we're not anti-union. The unions, they fulfill a very, very important role in the United States, and they have since its creation.

We just want to make sure that as sovereigns, we're able to treat our employees the best that we can, enact the laws that we need to protect our employees, and I believe every Tribal government does that.

We have witnessed outside interference in our homelands since the non-Indian came into this beautiful country, the greatest country in the world. We've been dealing with that ever since.

So, we view this as just one more attempt by the federal government to allow a third party to come into a sovereign, something that you don't allow for your city, your former city, any of your cities, where you guys come from. You have a system set up, a government set up, and we just want to be treated like that government.

Mr. ROE. Thank you, Mr. Chairman. Thank you for being here, and I yield back.

Chairman WALBERG. I thank the gentleman. I recognize the gentlelady from Florida, Ms. Wilson.

Ms. WILSON of Florida. Thank you, Chairman Walberg and Ranking Member Sablan, and our Ranking Member Scott.

I want to thank our witnesses for sharing your perspectives with us. It is important for us to hear from you so that we will know how to best move forward in our endeavors.

I would like to thank all of my colleagues here today, and I strongly support the sovereignty of the Native American Nations. I believe we need to promote their rights to self-governance, as well as their independence.

However, I also strongly believe in the rights of workers to organize, and to be able to work in a safe environment. This includes Native American workers and non-Native Americans that work in tribal enterprises. Congress should not favor one at the expense of the other.

That said, Mr. Chairman, I cannot support this bill in its present form before us today, since it would severely harm workers' rights by stripping hundreds of thousands of workers employed at Indian owned tribal enterprises of their voice in the workplace, and deny protections for them under the *National Labor Relations Act*.

I want to direct my question to Mr. Jack Gribbon, political director for UNITEHERE! Why do you oppose H.R. 986, and explain to us why it is important not to eliminate NLRA as a backstop even where you have a Tribal Labor Relations Ordinance?

Mr. GRIBBON. Congresswoman, thank you very much for the question. It's important because the NRLA is the foundation and the only foundation on federal lands for the ability for a worker to have the right of free speech and free association.

It has also created the incentive for workers and tribes to come together and work out additional avenues of reaching an agreement that prevent the ability for striking, that prevents some of the concerns that some of the tribes here have described today.

The bottom line is in the San Manuel decision, the NLRB noted a really big distinction here within that decision, between commercial tribal enterprises, like a casino, like a mine, like a construction company, and enterprises that employ a substantial number of non-tribal members, and cater to non-Indian clientele versus traditional tribal services or governmental functions.

Most importantly, the National Labor Relations Board is clear that it has no jurisdiction over internal tribal governmental matters, but only over the protection of free speech and the protected, concerted activity of employees in commercial tribal enterprises.

Ms. WILSON of Florida. A witness on the panel testified that the application of the *National Labor Relations Act* would undermine federal and tribal policies requiring Indian preference in employment. Do unions have the right to restrict whom employers hire under NLRA, or was that outlawed under the *Taft-Hartley Act*?

Mr. GRIBBON. It is outlawed. But let me just tell you practically speaking, my union, we don't have an impact on the employer prehiring. We don't actually have protections for workers for the first 90 days that they are employed in covered employment under a collective bargaining agreement at a casino. After that 90th day, we have the ability to protect and grieve, whatever, should there be a reason to do that.

Having said all that, there are tribes in California, particularly Graton Rancheria, where they are absolutely crystal clear that they have a Native American preference for hiring, and we salute that, we support that. They have been actually very successful at doing that.

Chairman WALBERG. I thank the gentlelady. I now recognize the sponsor of this legislation, the gentleman from Indiana, Mr. Rokita.

Mr. ROKITA. I thank the chair for holding this hearing. I thank the past chair for holding the hearing last Congress. I thank the chairman of the full committee for doing this.

This is a stand-alone bill, it is not supposed to be a controversial issue. It got out of the House in a very strong way with bipartisan support last Congress, and I expect even more bipartisan support this time.

The fact of the matter remains, Chairman, it is a very busy time. We are talking in terms of reconciliation and mega bills, this and that, and the other thing, a tax reform, health care.

This bill is none of that. This bill is simple on its face, and while the word talked about most here is "sovereignty," and I think that is a very important concept, I think an even more important word that came up in this hearing is "parity."

Mr. Norcross asked the question of several of the witnesses, well, why is this different than any other. Well, it is different because under the NLRA, the *National Labor Relations Act*, state and local governments are not covered, nor, Mr. Gribbon, are there commercial enterprises covered.

So, this foundation that Mr. Gribbon speaks of that is so badly needed for our Native American leaders is not found for our leaders and our governments at the State and local levels. That is the parity we are talking about.

Mr. GRIBBON. Can I speak?

Mr. ROKITA. No. OSHA does speak to state and local governments, OSHA does cover that, and that is another difference here. That is simply what we are talking about, do we believe that our Native American leaders are any less legitimate to operate their governments or in a less way than our state and local leaders do? What is it about Native American leaders that the Obama Administration and NLRB does not trust?

Are these leaders sitting before us today, ladies and gentlemen of this committee, less legitimate than any other mayor, like Phil Roe was, or any other elected leader, and by extension, why are Native American voters who elected these leaders not trusted in parity as leaders of State and local governments were elected?

I do not know, but that is what it boils down to. We need this foundation, Mr. Gribbon describes, because these leaders apparently, and their governments, cannot handle it, in that mindset. That is wrong. That idea itself is the idea that is illegitimate.

That is what this bill intends to correct. I think we are going to get there, Mr. Chairman, this time. We had 24 Democrats vote for it off the House floor last Congress. I do not know why all of them did not.

Our Native American partners, our brothers and sisters, are either sovereign or they are not, and where do we stand? Fair is fair and right is right.

Chairman Cladoosby, in your written testimony, you state that you "Are not aware of any tribe that does not have an extensive process for employees to make complaints and to appeal adverse employment decisions."

What are some examples of how tribes are protecting their employees? Is there anything that we in the Federal Government can learn from the Tribes on this topic?

Mr. CLADOOSBY. Thank you, Mr. Rokita. Yes, definitely, and once again, when I was growing up, Swinomish had five employees in the late 1960s/early 1970s, five employees. Now, we have over 900 employees that are paid very good wages, that have great benefits. Some of my employees have been with us 30 plus years because they love working for Indian tribes.

We have definitely set up internally from a tribal governance perspective rules that govern our employees, and we have a process set up where we have a full H.R. Department, we have an attorney that is well versed in labor laws that came to us.

We are in a position now where we have the infrastructure that we've never had before, and we do take care of our employees and make sure that their concerns are taken care of.

Just one other point on the NLRB, it has ruled that tribal preference is unlawful in a case involving Chickasaw and Choctaw. That is a concern that tribes have across the Nation of allowing a third party coming in to our homelands. Thank you.

Mr. ROKITA. Thank you, Chairman. Mr. Chairman, my time has expired.

Chairman WALBERG. I thank the gentleman. I now recognize my friend from Connecticut, Mr. Courtney.

Mr. COURTNEY. Thank you, Mr. Chairman. Thank you to all the witnesses for being here. I have a little less gloomy perspective than my friend, the sponsor of this bill, in terms of the choice that we have before us.

As some of you know on the panel, I am proud to represent Eastern Connecticut, which is home to two of the largest Native American casinos, Mohegan Sun and Foxwoods Casino, which is Mashantucket Pequot Nation.

Ten years ago, roughly, almost 10 years ago, the UAW and the Mashantucket Pequot Tribal Nation entered into an agreement regarding a labor organizing drive, which again started with the NLRB, but ended up with the legal framework of the Mashantucket Pequot Nation. For again almost 10 years, they have had a very harmonious relationship for the bartenders and the dealers that the UAW represents, again, within the framework of tribal law.

Again, I do not want to misrepresent anything. I know the Mashantucket's support this legislation, and I want to make that clear on the record, but what I would just say is the notion that this is a totally insolvable problem for the two sides to work out, recognizing an overall right to collective bargaining, which has been guaranteed since the 1930s and recognized by the United Nations, and in the 1800s, Pope Leo recognized collective bargaining as an essential element of human dignity.

Again, we can find a way to make this work. As I said, that in fact has been the case. Right now, the UAW and the Mashantucket Pequot's are hard at work at the Connecticut State legislature sort of trying to fend off a threat up in Massachusetts in terms of a casino operation opening up there.

Actually, that collective bargaining relationship, I think, has actually helped them in terms of having sort of more political muscle in terms of dealing with that challenge to the casino's future.

I want to thank all the witnesses for being here. Again, sovereignty issues are in the fabric of our Nation's history, and we have to be really careful and mindful of it.

Whether it is a police jurisdiction on casinos or OSHA jurisdiction, these are issues that I think have to be dealt with a scalpel and not a sledge hammer.

As I said, I am an optimist in terms of the fact that reasonable people can come to an agreement, recognizing again sovereignty and sovereign control.

So, I really do not have a question. I would like, however, Mr. Chairman, to enter into the record a letter from the folks, the workforce, at Foxwoods, in terms of again just confirming the fact this has worked out, that this issue has been worked out in a harmonious fashion, recognizing the rights of both sides.

Again, with that, I would yield back.

Chairman WALBERG. Hearing no objection, it will be entered.

I thank the gentleman. I now recognize the gentleman from Minnesota, Mr. Lewis.

Mr. LEWIS. Thank you, Mr. Chairman. In 1935, the *National Labor Relations Act* was enacted to ensure fair labor practices, and the Board, of course, associated with it. It excluded deliberately federal, state, and local governments from its reach. For 70 years, that had been the legal precedent, and it applied to Tribal governments as well, until the San Manuel decision in 2004. So, we are going on new legal ground here in a very dramatic way.

Now, as a representative from the great state of Minnesota, in my district, I am proud to have two striving tribes, and doing very well, so I am proud to be a co-sponsor of this legislation with Representative Rokita and applaud his hard work.

The problem here is the NLRA is applied to the tribes as a covered entity. This would just be the camel's nose. What other government rules from the federal government that are currently excluded from local governments, state governments, and commercial activities, will now be applied to the tribes as well?

I have to say I fear when that happens that many of the rules in non-tribal enterprises that are hamstringing those will hamstring the tribes as well. These are great enterprise zones, an example of great prosperity for a number of people.

If we start applying these rules, especially since the tribal governments do not get sales, income, or property tax credits, they rely on their commercial activities at this point, and I fear that it will do them great damage if we start letting a very capricious NLRB start to regulate them.

In fact, in the San Manuel case, the decision was decided or applied on a case by case basis. So, we have a situation now where the Board could act and apply rules in a very, very capricious way, and some might even say a political way, which would add more uncertainty to tribal governments.

It has been noted by some of the witnesses or one of the witnesses that workers at casinos—many workers at casinos are not

tribal. So, therefore, it is a commercial activity, and the NLRB ought to be have jurisdiction there.

One of the reasons that so many workers, at least in my district, at our very successful tribes, are not all from the tribes itself is because these are good jobs. So, non-tribal folks in the Second District want to work there.

That, I think, is a testament as to why Representative Rokita's bill needs to be passed, to make certain they can continue to strive and to continue to offer good jobs to tribal members and non-tribal members alike.

So, I really have no questions for the witnesses other than to say in the interest of legal precedent, as well as the concept of subsidiarity and local government, these enterprise zones ought to be allowed to flourish, and I would add the free speech of tribal governments ought to be allowed to flourish as well.

So, I am proud to support the *Tribal Labor Sovereignty Act* of 2017, and urge the committee—

Mr. ROKITA. Will the gentleman yield?

Mr. LEWIS. I do.

Mr. ROKITA. I thank the gentleman for yielding. Will the gentleman consider entering into the record this letter from the United States Chamber of Commerce, which asks that this bill be favorably reported not only out of the full committee but out of the House of Representatives and out of the Senate?

Mr. LEWIS. Mr. Chairman, I would request this letter from the United States Chamber of Commerce be entered in the record that advocates the markup of the bill.

Chairman WALBERG. Hearing no objection, it will be entered.

Mr. LEWIS. Thank you.

Chairman WALBERG. I thank the gentleman. Now, I have the privilege to recognize the ranking member of the full Education and the Workforce Committee, the gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman, and thank you to you and the ranking member for holding the hearing. I am not sure which representative will want to answer this, but it is my understanding that currently and under the bill, government operations are not covered by the NLRB. Is that true?

Mr. GRIBBON. What I can say to you is the NLRB has said that under the San Manuel decision, it provides that the NLRA applies only wherein its application would not interfere with tribal rights of self-government in purely intramural matters, abrogate rights guaranteed by treaty, or be contrary to congressional intent.

Mr. SCOTT. Let me ask some of the other witnesses. Does anybody doubt government operations, city councils, government employees, would not be covered by the NLRB, both under the bill and under present law?

Mr. CLADOOSBY. I guess you would need to look at the definition of "government operations."

Mr. SCOTT. Tribal employees employed by the tribal organization doing governmental functions, road building—employees of the tribal government doing governmental functions would not be covered by the NLRB either under present law or under the bill?

Mr. CLADOOSBY. Just like federal, state, and local government employees?

Mr. SCOTT. Right.

Mr. CLADOOSBY. That are not covered under the NLRB, we want to be treated the same as those federal, those state, and those local governments—

Mr. SCOTT. I am just trying to determine and focus on what the impact of the bill would be.

Mr. CLADOOSBY. I think the impact of the bill would look at tribal sovereigns like they did for 70 years under the NLRB, and treat us like federal, state, and local governments. That is all we are asking today.

Mr. SCOTT. Under current law and under the bill, you are not covered right now for governmental functions? Is that right?

Mr. CLADOOSBY. Right now, the NLRB has—

Mr. SCOTT. Does not apply to government operations?

Mr. CLADOOSBY. Once again, your definition of "government operations" might be different than my definition of "government operations."

Mr. SCOTT. We have not gotten to that. On the government operations, you are not covered. The bill would extend that exemption to Indian owned and operated enterprises. Is that right?

Mr. CLADOOSBY. Just like we have mega lotteries run by states across the nation. We're not the only government that runs gaming.

Mr. SCOTT. I am just trying to understand the bill.

Mr. CLADOOSBY. So, I would hope that you would look at our government operations the same way you would look at a state.

Mr. SCOTT. I am just trying to understand what the bill does.

Mr. CLADOOSBY. Right.

Mr. SCOTT. The bill extends the exemption to Indian owned and operated enterprises.

Mr. CLADOOSBY. The same way it does for state owned and operated enterprises.

Mr. SCOTT. Okay. Does the bill extend to privately owned enterprises?

Mr. CLADOOSBY. No. So, once again, we are not creating union free zones in Indian Country under this bill. We need to make that very clear.

Mr. SCOTT. Would a tribal organization be able to prohibit unions from a reservation?

Mr. CLADOOSBY. Once again, a sovereign should be allowed to govern the way it wants to, no other outside—

Mr. SCOTT. I am talking about for a private enterprise.

Mr. CLADOOSBY. If a tribe wants to unionize, that is up to the Tribe.

Mr. SCOTT. I am not talking about the tribe. I am talking about a private non-Indian owned, non-government owned enterprise, a privately owned enterprise, should they be able to prohibit on the reservation unions—

Mr. CLADOOSBY. You mean like a proprietary business operating on a reservation?

Mr. SCOTT. Right.

Mr. CLADOOSBY. I would hope that this private business operating on a reservation would work with the sovereigns. I think they would want to—

Mr. SCOTT. This bill does not do that, this bill just affects Indian owned and operated enterprises. My question was whether or not under your standard, the tribe could prohibit unions from operating in a privately owned enterprise.

Mr. CLADOOSBY. That's a good question.

Mr. SCOTT. Does federal criminal law apply to Indian reservations?

Mr. CLADOOSBY. Once again, I hope I'm answering your question right, I just want to make it very clear that it does not create union free zones in Indian Country. I don't know if that's what you're looking for.

Mr. SCOTT. Right, that was the question. Does federal criminal law apply on reservations?

Mr. CLADOOSBY. Excuse me?

Mr. SCOTT. Federal criminal law.

Mr. CLADOOSBY. Of course, it does.

Mr. SCOTT. OSHA?

Mr. CLADOOSBY. Of course, it does.

Mr. SCOTT. Minimum wage?

Mr. CLADOOSBY. Of course, it does, just like federal law applies to other governments also, I believe. Whether it is a state or local or county government, they, too, have federal laws that they have to abide by.

Mr. SCOTT. I am just asking what applies and what does not. I am not trying to argue the point.

Mr. CLADOOSBY. I hope that answers the question, all governments have federal laws they have to abide by.

Mr. SCOTT. Title VII, should that apply to everybody? It applies to state and local governments.

Mr. CLADOOSBY. Yes

Chairman WALBERG. The gentleman's time has expired.

Mr. CLADOOSBY. Thank you very much. Those are really, really good questions, Mr. Scott. If you need follow up, we're more than happy to give follow up on those questions, but they were really great questions. Thank you.

Chairman WALBERG. I thank the gentleman. I now turn to the gentleman from Michigan, my good friend, Mr. Mitchell.

Mr. MITCHELL. Thank you, Mr. Chairman. Chairman Cladoosby, can you share with me, under the San Manuel decision, the Board indicated it would not assert jurisdiction if the application of law would abrogate treaty rights, does the NLRB have any special knowledge of Indian treaties, and where does it gather this knowledge from?

Mr. CLADOOSBY. Well, unfortunately, treaties with Indian tribes in the United States are not truly understood by the majority of the citizens. I would hope that any one of our trustees working in the Federal Government would want to get educated on the understanding of treaties and treaty rights. I think that should be definitely a 101 for all employees.

You know, I cannot speak for the NLRB on what their—

Mr. MITCHELL. Does that decision not create two separate classes, tribes with treaties, tribes without? They are still sovereign nations. Does it not in some manner subdivide them?

Mr. CLADOOSBY. Yes, we feel that way.

Mr. MITCHELL. What is the impact on your tribes?

Mr. CLADOOSBY. Once again, it boils down to us having the ability to govern ourselves as sovereigns. We would just want to be treated like all the other governments in the U.S.

Mr. MITCHELL. Mr. Gribbon, maybe you could help me understand how it is that the NLRB will magically develop expertise in terms of the treaty rights and treaty law, since it has not been their primary expertise?

Mr. GRIBBON. Well, thank you very much for the question. In fact, they already have been doing that. The NLRB also adopted a criteria where it considers whether there are policy reasons to not assert jurisdiction.

Mr. MITCHELL. Let me stop you—

Mr. GRIBBON. The—

Mr. MITCHELL. Excuse me, sir. I get to ask the questions, you get to answer them. Thank you very much.

Mr. GRIBBON. Okay, but this—

Mr. MITCHELL. Excuse me, sir. I am going to ask the question, you are going to answer the question. You are not going to answer what you want. I said how is it that the NLRB has developed the expertise internally, not what policies they developed, I want to know where their expertise comes from, their experience, what qualified people they have on that. That is my question, sir, not what policy they may develop. Please answer the question.

Mr. GRIBBON. Well, what I can tell you is that consistent with the three prong test under San Manuel, the Board declined jurisdiction over an Oklahoma casino run by the Chickasaw Tribe that was party to an 1830 treaty, which exempts the tribe from nearly all Federal laws, and that proves that they're doing their job.

Mr. MITCHELL. That simply indicates at this point in time they have chosen not to do so, not that they had the expertise internally, which was the question, sir.

Let me try another one here. Did the NLRB engage with the public prior to deciding the San Manuel decision? Did they request briefs from tribes? What expertise did they gather to make the decision that it could make that distinction?

Mr. GRIBBON. I don't work for the NLRB, so I don't know what kind of input they got. I can imagine that it was substantial and huge, from every direction, since that's how they work. That's why it takes them usually so long to make a decision. They take information from all interested parties.

Mr. MITCHELL. So, your opposition to this bill is solely based on your assessment that they have done a great job so far and not any argument they have expertise to make this determination?

Mr. GRIBBON. Absolutely not. That is not my argument. My argument is and my argument would be that workers deserve better rights than they receive in this country, whether they be on Indian lands or not. That workers have been harassed and abused, especially by your party, really badly, over a whole number of years, and there could be very, very good improvements made if we were

really worried about raising wages and personal income and respect and dignity in this country.

I believe we could do much better. I'm saying the NLRA is an absolute bare minimum—

Mr. MITCHELL. You did not answer my question.

Mr. GRIBBON. Bare minimum. I'm not happy with it, it's a bare minimum.

Mr. MITCHELL. I am happy for you, but I get to ask the questions. You get to testify, I get to ask the questions. If you want to stop by my office later, I am happy to have a debate with you.

Mr. GRIBBON. Okay.

Mr. MITCHELL. That would be great. First, I grew up in a union household. Like my friend from Minnesota, we have a lot of employees, and people go to work in the casinos that in fact have options to go to jobs that are represented, and they choose to go there because they are good jobs, and they are better jobs than union represented jobs in many places.

What you see as the panacea, protection, it does not offer much, and does in my opinion violate the sovereignty of the tribal nations.

I am asking Mr. Rokita to please add me as a co-sponsor of the bill, and if you want to continue the debate, please stop by my office and we can talk about labor relations.

Mr. GRIBBON. All right. I think—

Mr. MITCHELL. My time has expired. I yield back, sir.

Mr. GRIBBON. Totally missed the point.

Chairman WALBERG. I thank the gentleman. I now recognize the gentleman from Pennsylvania, Mr. Smucker.

Mr. SMUCKER. Thank you, Mr. Chairman. Chairman Cladoosby, is it not true that many tribes have enacted their own laws or ordinances that govern labor relations at tribal commercial enterprises?

Mr. CLADOOSBY. Yes, sir.

Mr. SMUCKER. Could you please expand a little on what they are?

Mr. CLADOOSBY. Sure. Once again, tribes have never had the opportunity to have a Marshall Plan. Do I wish it was some other form of operations that enabled us to create this great infrastructure? Yes. It is what it is.

So, right now, tribes around the nation have shown that they have the ability to be the largest employers in their areas, and they take care of their employees very well. Many of them have implemented employer rights ordinances to make sure that their employees are taken care of satisfactorily.

Like the gentleman said, you know, we do pay pretty fair wages in some of our operations and full benefits.

Mr. SMUCKER. Do you have concerns if the NLRB determines it has jurisdiction what will become of those tribal labor laws?

Mr. CLADOOSBY. Once again, I would hope that the NLRB would see this as an intrusion into a sovereign, and that they would recognize that we have the ability internally to take care of our own, just like any other government, whether it be state, county, or local.

Mr. SMUCKER. Chairman Welch, I will ask you to sort of address the same question. You spoke about the Viejas Tribal Labor Relations Ordinance that has worked well over the years. Why do you

think that TLROs are more important for a sovereign entry than the NLRA?

Mr. WELSH. Our TLRO was brought forward to us with working hand in hand with the California state, the government. The governor at that time asked that we put one together to enter into for compact negotiations.

I think the governor at that time did not believe the NLRA or NLRB had jurisdiction over the reservation, which has been proven, because 1935 to 2004, when Congress enacted the NLRA, they never envisioned Tribes being successful as they are, so they were never put into it.

So, how can NLRB finish the process of what Congress had instituted when Congress hadn't finished it? That's one of our big objectives with NLRA and NLRB.

Mr. SMUCKER. Thank you. Mr. Chairman, I yield back.

Chairman WALBERG. I thank the gentleman. I recognize the gentleman from Georgia, Mr. Allen.

Mr. ALLEN. Thank you, Mr. Chairman, and thank you all for being with us today. Chairman Welch, the NLRB, which was enacted in 1930, was intended to govern private sector labor management relations. Can you explain why the application of the NLRB is in conflict with the role of the state, local, and tribal governments?

Mr. WELSH. Can you repeat that, the last part?

Mr. ALLEN. Can you explain why the application of the NLRB is in conflict with the sovereignty of the tribal governments?

Mr. WELSH. Because they're trying to tell us what to do, and we have sovereign rights enacted to us by Congress and the Constitution.

Mr. ALLEN. All right, good. You answered that.

Mr. Cladoosby, many federal laws specifically exclude Indian tribes from the definition of "employer." Is there any mention of "Indian Tribes" in the NLRA? If the act is silent, what theory has the NLRB applied to exert jurisdiction over Indian tribes?

Mr. CLADOOSBY. That's a really good question, sir, and their ability to assert jurisdictions over a government is one that we are trying to figure out also. We feel that we protect the rights of our employees very, very well.

I guess once again, you know, when we look at it from a state, local, and county perspective, what right would they have to go into those governments like they want to come into ours.

Mr. ALLEN. Again, the act was enacted in the 1930s, how have tribal governments and tribal enterprises changed since then, and why does this further support the idea that tribal enterprises on tribal lands should not be subject to the NRLA?

Mr. CLADOOSBY. I think you've heard about the income. I'm not sure if this is about money or about looking out for the best interests of the employees. I know we as tribes have come a long way. Like I said earlier, Swinomish only had five employees when I was growing up, and to have over 900 now that we take care of very well is a great accomplishment.

Like one gentleman said, they can't vote, a lot of them, because they're not tribal members, but if you look at Las Vegas and Reno,

where you have a lot of gaming, a lot of those employees come from outside of Las Vegas and Reno, and they can't vote there either.

We just want to be treated the same as other governments.

Mr. ALLEN. It is not that your wages are below what is normally paid, or you are taking advantage of members of your tribe in your operation here? You just want to do—given the rights you have been given, you just want to be able to manage this the way it was originally established?

Mr. CLADOOSBY. Yes, sir.

Mr. ALLEN. Exactly. Here we have the government saying that we want to intervene. We have that problem in a lot of areas. Of course, that is why so many people want to get into this country, because of the way we treat our workers with dignity and respect.

In fact, I had the opportunity to work in the small business arena for 35 years, and I was able to—the greatest blessing I had received, and I realized this later on in my career, I wish I had realized it earlier, but boy, what a blessing it was, and I am sure you are experiencing this, from what I have heard in your testimony, is to give people the opportunity to have a good job, to give them the dignity and respect they deserve, and to allow them to provide for their families, and also provide for their Nation. That is a great privilege.

I thank you for coming out and providing your testimony today. I look forward to working with you on this.

Mr. CLADOOSBY. Thank you, Mr. Allen. I think at the end of the day, any operation, any business, all they want is good employee relationships, employees to feel comfortable coming to work, and they want their employees to feel like they have the greatest jobs in the world.

Tribes are in a position now to do some things that we've never ever been able to do, and we're just very blessed. The Creator has blessed us and allowed us to be able to make a lot of families happy that otherwise wouldn't have that opportunity.

Mr. ALLEN. I am going to do my best to keep the federal government out of your way.

Mr. CLADOOSBY. Thank you, sir.

Mr. ALLEN. Yes, sir. Thank you. I yield back.

Chairman WALBERG. I thank the gentleman. Now, it is my privilege to recognize the ranking member, Mr. Sablan, for your closing remarks.

Mr. SABLAN. Thank you very much, Mr. Chairman. I want to thank all the witnesses today for their testimony. I am not trying to stick my nose into your business.

As I noted at the outset, the San Manuel decision struck a balance between the protection of tribal sovereignty rights and the protection of workers' rights. Although Tribal Labor Relations Ordinances have been adopted by some tribes, these ordinances vary greatly in the levels of workforce protection.

I have Section 3107 of the 2010 Blackfeet Tribal Employment Rights Ordinance and Safety Enforcement Act of 2010, which I ask to insert in the record. It reads "Unions are prohibited in the Blackfeet Indian reservation."

So, there are tribes that discourage unions in their organizations.

Chairman WALBERG. Without objection, it will be entered.

Mr. SABLAN. There is no uniform standard for tribal ordinances, which means there could be 567 different labor standards, depending on the tribe.

What provides protection is the *National Labor Relations Act*. However, if H.R. 986 is enacted, workers would lose the protection of the federal minimum standard. Similar concerns were raised by the International Labor Organization in a letter to Congress regarding the *Tribal Labor Sovereignty Act*.

ILO wrote in part, in those cases where there are no Tribal Labor Relations Ordinances, undue restrictions on collective bargaining, excessive limitation on freedom of association rights, or lack of protection from unfair labor practices, workers on tribal territories would be left without any remedy for violation of their fundamental freedom of association rights, short of the Constitution.

Mr. Chairman, I would ask unanimous consent also to include this three-page letter from the International Labor Organization in the record of this hearing.

Chairman WALBERG. Without objection, it will be entered.

Mr. SABLAN. Thank you, sir. I would also ask for unanimous consent to include the letter in opposition from the AFL–CIO, International Union of Operating Engineers, United Auto Workers, Local 2121, and the United Steel Workers, into the record.

Chairman WALBERG. Without objection, they will be entered.

Mr. SABLAN. As we have learned today, Indian Tribes are subject to a number of federal employment laws, including the *Fair Labor Standards Act*, OSHA, ERISA, the *Family and Medical Leave Act*, but Mr. Cladoosby, in your response to the Ranking Member's question if Title VII of the *Civil Rights Act* applies to the tribes, you answered "yes". The answer is "no".

Title VII of the *Civil Rights Act* does not apply to Indian tribes, but it does to any local government.

Mr. CLADOOSBY. Thank you for that correction, sir.

Mr. SABLAN. You are welcome, sir.

A review of the committee's activities may help explain the focus since the Majority took control in 2011: there have been 26 hearings or markups attacking the National Labor Relations Board's rules on these issues, compared with 17 on-the-job training and technical education, 11 on OSHA and mine safety, 15 on pensions and retirement issues, and 11 on wages and hour issues.

What we know is that only 6.4 percent of the private sector workforce today is covered by a union agreement. Union agreements have provided many low wage service workers employed in tribal casinos or other tribal businesses with improved wages and benefits, which has provided them with a foothold to the middle class. By negotiating employer provided health care, the cost to state and local governments for health care costs has gone down.

Legislation in this area needs to balance the sovereign rights of Native American tribes with the rights of workers to organize and bargain collectively.

Mr. Chairman, we should not be enacting legislation that weakens workers' ability to bargain for a fair share of the wealth, whether it is in a commercial business or a tribal enterprise.

If I may, one of the main reasons if not the main reason that I ran for Congress was to find a way to help improve the education

of the poor people that I represent in the Northern Mariana Islands. In the seven years working on that, I am finally happy, with the help of Mr. Kline and Mr. Scott, and I think Mr. Rokita was also ranking at that time, that we were able to increase the formula for Title I money.

We had that hearing, and I saw the appalling state of Indian schools, so I was able also working with Mr. Kline to increase the funding for Bureau of Indian Education. You guys need to speak up for your people, their education, and the appalling state of the education ran by the Department of Interior is not something that I can say I am proud of, to be an American.

After saying that, Mr. Chairman, I yield back the balance of my time.

Chairman WALBERG. I thank the gentleman, and thank you especially as you come from a perspective of actually being a tribal member, and appreciate your passion and your concern.

I want to thank Chairman Cladoosby, Delegate Brown, Mr. Gribbon, and also Chairman Welch, for taking the time and effort to travel, et cetera, to be here. I appreciate that fact.

I want to thank my colleague, Mr. Rokita, for your diligence in bringing this back up. As chairman of the K–12 Subcommittee, this fits, as we talk to young people, talk about the wealth of our Nation and our history, that includes also some challenging times as we worked out treaties, as we dealt with the Native American population.

There were some—I guess the weakest words to use would be "frustrating times," there were some tragic times as well. Treaties have been developed, sovereignty has been affirmed, not simply by statement but by law and agreement.

That term "sovereignty" is extremely important for us to understand. We revel in that here in the United States of America. We understand that we are a sovereign nation, and when we recognize other nations in the world as being sovereign, including the nations we are looking at right here in front of us this morning, that is something that we ought to make sure our young people understand, K–12 on up, and it is something more importantly that we ought to keep the faith with in our treaties, in our agreements, and in our laws.

That is all this is here today. We are not talking about holding back unions and union organization. We are not talking about that. I think all of us here would respond that we respect and we want to continue the freedom for our workers to organize in unions. Do it fairly, on both sides, of course, but that ought to be a right.

We are talking of a sovereign nation. It is their determination that comes first, and we ought to honor that. Today, we are answering a question, can we do it better than the tribes? Maybe, but that is not our authority. Maybe not as well. That is your authority.

I think that is what we are affirming today. Definitely, Mr. Chairman, we are affirming parity. We wrestle with that in our States, do we not? The Tenth Amendment, liberties, that we say all the time are being stepped upon by the Federal Government. Today, we are seeing that it is the same type of situation for the tribes.

I appreciate the questions, the testimonies given today, and I appreciate the thought processes to move this forward and to put it in front of us, and I think because of that we will also put the point in history of reminding ourselves that those treaties, those agreements, have purpose, have strength, have power, and it is about time we recognized that, and we push back on entities of our U.S. federal government when they are attempting to step over the bounds, regardless of what certain courts have said, we identify with our responsibility to uphold the Constitution just as much as any court.

Seeing there is no further business before the subcommittee, we stand adjourned.

[Additional submission by Mr. Cladoosby follows:]

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April 12, 2017

The Honorable Tim Walberg, Chairman
U.S. House Committee on Education and the Workforce
Subcommittee on Health, Employment, Labor and Pensions
2176 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Gregorio Kilili Camacho Sablan, Ranking Member
U.S. House Committee on Education and the Workforce
Subcommittee on Health, Employment, Labor and Pensions
2176 Rayburn House Office Building
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Re: Supplemental Statement of the Honorable Brian Cladoosby, President of the National Congress of American Indians and Chair of the Swinomish Indian Tribal Community, Testimony before the United States House of Representatives Committee on Education and the Workforce, Subcommittee on Health, Employment, Labor and Pensions Hearing on H.R. 986 – The Tribal Labor Sovereignty Act of 2017.

(Supplemental Testimony) ***H.R.986 – The Tribal Labor Sovereignty Act of 2017***

Dear Chairman Walberg and Ranking Member Sablan,

On behalf of the National Congress of American Indians, thank you again for your invitation to testify on March 29, 2017 regarding H.R. 986 – The Tribal Labor Sovereignty Act of 2017. It was a privilege to present to the Committee on the importance of bringing parity to tribal governments by ensuring that tribal governments are treated like other governments under the National Labor Relations Act. This testimony serves to clarify and expand on some of the questions asked during the hearing.

1. ***Are Tribes subject to Federal Statutes like the American with Disabilities Act (ADA), Occupational Health and Safety Act (OSHA), the Employee Retirement Income Security Act (ERISA) and others?***

It depends. An enduring principle of federal Indian law recognizes that in order to limit tribal sovereignty, Congress must clearly express its intent to do so. This is known as the clear statement rule. Under this principle, when a federal statute is silent as to its application to Indian tribes, that silence should not be used against tribes to limit tribal sovereignty or authorize lawsuits against tribal governments. In the U.S. Supreme Court case of *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149 (1982), the Court stated that "because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper

inference from silence … is that the sovereign power … remains intact." In this context, the Supreme Court interprets congressional silence to mean that the authority of tribes to act in certain instances or on particular issues remains intact, further recognizing and promoting tribal sovereignty and self-determination. In 2014, this enduring principle was affirmed in the *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2031–32 (2014) in stating that courts "will not lightly assume that Congress in fact intends to undermine Indian self-government."

The OSHA, ERISA, and other federal statutes considered to be generally applicable to persons, property or groups do not mention tribes in either text or through legislative history. Circuit Courts have asserted different approaches and reasoning in determining whether these generally applicable federal statutes apply to tribally owned operations on tribal lands. For example, both the Tenth and Eighth Circuit Court of Appeals have applied the clear statement rule requiring specific statutory intent or language before applying those statutes to the conduct of tribes. See, e.g., *Donovan v. Navajo Forest Products Industries*, 692 F.2d 709 (10th Cir. 1982) (regarding the Occupational Safety and Health Act); *E.E.O.C. v. Fond du Lac Heavy Equip. and Constr. Co.*, 986 F.2d 246 (8th Cir. 1993) (regarding the Age Discrimination in Employment Act).

The Tenth Circuit decision in *NLRB v. Pueblo of San Juan Pueblo*, 280 F.3d 1278 (10th Circuit 2000) again applies the clear statement rule to find that the NLRB did not prevent the Pueblo from applying its own right-to-work laws on its own tribal lands. The Court explained that when "tribal sovereignty is at stake, the Supreme Court has cautioned that 'we tread lightly in the absence of clear indications of legislative intent'" to abrogate the sovereignty of tribes. The Court also found that the NLRB by its terms is not a statute of general applicability because it does exclude states and territories.

Other Circuit Courts including the Ninth, Seventh and Second Circuits assert a different approach and have made the presumption that federal statutes of general applicability apply to tribes if the statutes do not interfere with a tribe's sovereign authority or those rights that were recognized through treaties. The turning point for these Courts seems to rely on whether tribal employers are engaged in "governmental" activity versus "commercial" activity.

This is particularly problematic for tribal governments who lack an effective tax base and are obligated to engage in economic activity to raise revenue to fund programs and services to their members and neighbors. Indian lands are held in trust by the U.S. and cannot be subjected to real estate taxation, high reservation unemployment makes income taxation unworkable, and restrictive Supreme Court rulings have severely limited tribal government sales taxes. As a result, for many tribal governments—Indian gaming operations, tribal agriculture, energy and timber operations, and other tribal government enterprises constitute the sole source of governmental revenue that is used to fund daily tribal services including, public safety, education, health, housing, social services and other essential services to residents of Indian Country.

Furthermore, the Indian Gaming Regulatory Act ("IGRA") expressly states its purpose "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. Section 2702(1) (Declaration of Policy). In addition, IGRA mandates that tribal governments use net revenues from Indian gaming solely for government purposes: to fund tribal government operations or programs; to provide for the general welfare of the tribal community; to promote tribal economic

development; to donate to charitable organizations; or to help fund operations of local government agencies. 25 U.S.C. Section 2710(b)(2)(B).

We note that the Americans with Disabilities Act of 1990 contains a clear statement and specifically exempts Indian tribal governments from the definition of "employer." Even with this, Indian tribes have worked diligently to create accessible workplaces using their own sovereign authority to do so. The ADA provides an excellent example of how tribal governments whose sovereignty is respected will advance worker protection as a matter of tribal self-determination.

Favoring the Supreme Court's clear statement principle not only promotes tribal sovereignty but reaffirms the established precedent that absent express intent by Congress, federal statutes that serve to restrict or limit a sovereign governments ability to regulate on its own tribal lands should not apply to tribes. Furthermore, the NLRB has not been commissioned to effectuate the policies of the NLRA so single mindedly that it may wholly ignore other and equally important Congressional objectives.

2. ***Are tribes asking to be exempt from every federal statute?***

Absolutely Not. I want to emphasize that tribal governments are not seeking to avoid federal statutes that protect the safety of workers or promote healthy working conditions like OSHA or the Americans with Disabilities Act (ADA). Let me be clear that as tribal governments, we all strive to provide the best working conditions and the best incentives for workers who choose to be employed in our tribal operations. Many of those workers who do choose to work for tribes do so because of the many beneficial and favorable working conditions that currently exist. Indian tribes, like other governmental employers, have a huge interest in ensuring that their employees are satisfied and productive in serving community needs. In fact, tribal government employers regularly are hailed as the best employers in their regions.

However, when the authority of tribal governments to govern and regulate their own workforce on tribal lands is directly restricted or limited, inconsistent with U.S. Supreme Court law and without a specific act of Congress, then tribes must take an aggressive position against these restrictions. As I mentioned in my previous testimony, The NLRB's decision not to exempt tribes as governmental entities, in effect, gives outside third-party unions the power and control to call a strike of a tribal government's workforce and face possible shut downs of revenue generating operations needed and relied upon by tribal communities on a daily basis.

Those public services include public safety, law enforcement, schools, health care centers, housing, social services programs and other essential services to residents of local Indian communities. This is not just a problem for tribes, it is a problem that all governments would face is they were subject to the NLRA. There is a reason why 90,000 other governmental entities are exempt in this country and tribes should be included in this exemption. Giving unions all the power under the NLRA is simply not the answer and putting private interests ahead of governmental interests is inconsistent with the federal governments trust responsibilities to tribes.

Federal employees and most state employees generally do not have the right to strike. Where government employees do have the right to strike, the government itself has alone made its own sovereign decision to expose itself as an employer to a strike. It is the antithesis of sovereignty for

one government to make that decision for another government. Yet, this is the current condition facing tribal governments. This must be fixed.

3. ***If Tribes are exempt from the National Labor Regulation Act, would this create union free zones on tribal lands?***

No. As I mentioned in my previous testimony, some have suggested the legislation before this subcommittee is nothing more than a "Trojan Horse" that, if enacted, will inevitably lead to other bills frustrating the application of other federal workforce laws to activities on Indian lands. This is simply untrue. The Tribal Labor Sovereignty Act will not affect the implementation of any other federal law regulating the workplace.

Tribes should possess the authority to hire employees under their own labor laws, including the authority to hire based on Indian preference and regulate the worker-employer relationship occurring on their own tribal lands. Many tribes have already enacted labor laws/ordinances for their own communities to provide mechanisms for labor unions to negotiate collective bargaining agreements. As part of their gaming compacts with the State of California, many California tribes are doing so as part of compact negotiations and agreements. Still other tribes across this country have enacted labor ordinances that are tailored to meet the demands of a growing workforce as well as those governmental obligations tribes have in serving their greater communities.

Conclusion:

In conclusion, once again, thank you for the opportunity to present to the committee on H.R. 986, the Tribal Labor Sovereignty Act of 2017- a very critical and important piece of legislation that tribal governments across the United States strongly support. NCAI views the enactment of the Tribal Labor Sovereignty Act as a crucial step for Congress to take to ensure that the United States consistently respects the sovereignty of tribal governments, and does so by explicitly adding "tribes" to the definition of governmental entities exempt from the National Labor Relations Act of 1935.

Sincerely,

Brian Cladoosby

Brian Cladoosby
President

[Additional submission by Mr. Courtney follows:]

UAW Local 2121
2 Chapman Lane
Suite 1A Unit 3
Gales Ferry, CT 06335

www.uawatfoxwoods.org

(860) 381-5467

Chairwoman Virginia Foxx
Ranking Member Bobby Scott
Committee on Education and the Workforce
U.S. House of Representatives
2176 Rayburn House Office Building
Washington, DC 20515

Dear Chairwoman Foxx and Ranking Member Scott:

UAW Local 2121 and UAW International Union are writing in opposition to H.R. 986, the Tribal Labor Sovereignty Act. This bill would deny protection under the National Labor Relations Act (NLRA) to hundreds of thousands of workers, including more than two hundred thousand workers employed by tribal casinos. UAW Region 9A represents fifteen hundred dealers at Foxwoods Resort and Casino, an enterprise of the Mashantucket Pequot Tribal Nation in Connecticut.

In 2007, the D.C. Circuit Court ruled in *San Manuel vs. National Labor Relations Board (NLRB)* that commercial enterprises owned by tribes are subject to U.S. labor law if the employees and patrons are predominately not tribal members. An estimated 43% of all U.S. gaming is tribally owned, creating approximately 628,000 jobs nationwide. Of those jobs, approximately 75% are held by non-tribal employees, which is certainly the case at Foxwoods.

The UAW won an NLRB election at Foxwoods in November, 2007 to represent all dealers and assistant floor supervisors. MPTN lost its jurisdictional challenge before the NLRB and subsequently violated federal law by refusing to bargain with the Union.

On October 10, 2008, while the NLRB pursued enforcement of an order to bargain in the courts, the UAW and MPTN entered into a "Framework Agreement" pursuant to which the union agreed to bargain under MPTN tribal law, if the MPTN made agreed upon amendments to its Labor Relations and Right to Work laws and certified the UAW as the exclusive bargaining representative for the unit that had previously been certified by the NLRB. The MPTN certified that these conditions were met on October 28, 2008.

This agreement and underlying tribal labor law only works because there is an expressed written reservation of rights that allow the union to revert to the jurisdiction of the NLRA if the Tribal government makes fundamental changes to its labor law or refuses to abide by arbitral decisions.

The right to return to the protections of NLRA can be invoked by the UAW at any time upon thirty days' notice to the Mashantucket Tribal Gaming Enterprise if the UAW determines that

tribal institutions and procedures have not provided due process and a fair determination of employee rights. Without this mechanism that guarantees fair labor laws, the current contract and the right to collectively bargain would be meaningless.

We again sincerely urge you to not pass this bill.

Sincerely,
Andrea Goodrich

Andrea Goodrich, President
UAW Local 2121 Foxwoods Resort and Casino

We are writing in opposition to HR 986 the Tribal Labor Sovereignty Act. This bill would deny protection under the National Labor Relations Act to more than two hundred thousand workers employed by tribal casinos. UAW Region 9A represents more than 40,000 active and retired members in the New England states, New York City and Puerto Rico including fifteen hundred dealers at Foxwoods Resort and Casino, an enterprise of the Mashantucket Pequot Tribal Nation in Connecticut.

In 2007, the D.C. Circuit Court ruled in San Manuel vs NLRB that commercial enterprises owned by Tribes are subject to U.S. labor law if the employees and patrons are, predominately, not tribal members. An estimated 43% of all U.S. gaming is tribally owned creating about 628,000 jobs nationwide. Of those jobs, approximately 75% are held by non-tribal employees, which is certainly the case at Foxwoods.

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We again sincerely urge you to not pass this bill.

Sincerely,

Andrea Goodrich, President
UAW Local 2121 Foxwoods Resort and Casino

[Additional submission by Mr. Lewis follows:]

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

NEIL L. BRADLEY
SENIOR VICE PRESIDENT &
CHIEF POLICY OFFICER
GOVERNMENT AFFAIRS

1615 H STREET, NW
WASHINGTON, DC 20062
(202) 463-5310

March 29, 2017

The Honorable Tim Walberg
Chairman
Subcommittee on Health, Employment,
Labor, and Pensions
Committee on Education and the Workforce
U.S. House of Representatives
Washington, DC 20515

The Honorable Gregorio Sablan
Ranking Member
Subcommittee on Health, Employment,
Labor, and Pensions
Committee on Education and the Workforce
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Walberg and Ranking Member Sablan:

The U.S. Chamber of Commerce strongly supports H.R. 986, the "Tribal Labor Sovereignty Act of 2017" (TLSA), which is being heard by your subcommittee today.

H.R. 986 would respect and promote tribal sovereignty by affirming the rights of tribal governmental employers to determine their own labor practices on their own lands. Sponsored by Rep. Todd Rokita, TLSA enjoys bipartisan support. During the 114th Congress this bill passed the House with that strong support.

In 1935, the National Labor Relations Act (NLRA) was enacted to ensure fair labor practices, but excluded federal, state, and local governmental employers from its reach. Though the NLRA did not expressly mention Indian tribes let alone treat Indian tribes as governmental employers, the NLRB respected the sovereign status of tribal governmental employers for close to seventy years before abruptly abandoning its own precedent and reversing course with the *San Manuel Indian Bingo* case in 2004.[1]

Since that decision, the NLRB has been aggressively asserting jurisdiction over tribal labor practices when the Board determines tribal government employers are acting in a "commercial" rather than a "governmental" capacity – an analysis it does not apply to federal, state, or local government employers.

TLSA would build upon a demonstrably successful principle: where tribal sovereignty is vigorously exercised, economic success follows. H.R. 986 would prevent an unnecessary and unwarranted overreach by the NLRB into the sovereign jurisdiction of tribal governments. By amending the NLRA to specifically exempt tribal governments, H.R. 986 would provide

[1] San Manuel Indian Bingo and Casino, 341 N.L.R.B. 1055 (2004).

certainty and clarity to ensure that tribal governmental statutes concerning labor relations would remain intact. The Chamber believes that this approach would best meet the needs of the tribes and the American business community more generally.

The Chamber strongly supports H.R. 986 and requests that the full Committee ultimately favorably report the bill so the House can take it up for consideration expeditiously.

Sincerely,

Neil L. Bradley

cc: Members of the Committee on Education and the Workforce

[Additional submissions by Mr. Sablan follow:]

UNITED STEELWORKERS

UNITY AND STRENGTH FOR WORKERS

Leo W. Gerard
International President

March 27, 2017

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

RE: United Steelworkers oppose anti-worker H.R.986, Tribal Labor Sovereignty Act of 2017

Dear Representative:

On behalf of the 850,000 members of the United Steelworkers (USW), we strongly urge you to reject the anti-worker and undemocratic Tribal Labor Sovereignty Act of 2017 (H.R.986). If H.R.986 were to become law it would exempt all employees of federally recognized Native American-owned commercial enterprises operated on Indian lands from the protections of the National Labor Relations Act (NLRA).

To be absolutely clear this legislation strips workers, both Native American and non-Native American of their NLRA protections. While some organizations have falsely attempted to paint tribal governments as similar entities to states (which are exempt from the NLRA), tribal governments are substantially different than states in one key democratic principal. State governments allow workers an ability to vote for their legislators no matter their ancestry, while most tribal governments require blood quantum or lineal descent to determine who is eligible for membership or citizenship.

Simply put, U.S. citizens working in the United States for tribal commercial enterprises would not be able to vote for the elected representatives who will set their labor laws. These workers will lose the ability to petition the government that oversees their working conditions if this bill becomes law.

In the gaming industry which is an employer for approximately 246 of the 567 federally recognized American Indian tribes; the industry has over 600,000 casino workers on tribal lands, the overwhelming majority of whom are not Native Americans. In 2011 before the Senate Indian Affairs Committee, the National Indian Gaming Commission testified that the vast majority of employees (up to 75 percent) were non-tribal members.

USW understands the importance of the principle of tribal sovereignty; however the fundamental human rights of employees are not the exclusive concern of tribal enterprises or tribal governments. As the International Labor Organization highlighted in a letter on a previous version of this bill, "it is critical that the State (the national authority) takes ultimate responsibility for ensuring respect for freedom of association and collective bargaining rights throughout its territory"[1]. That is why USW believes the current test set by the NLRB is the best course of action until labor laws are strengthened in the United States.

In 2004, the Bush Administration NLRB ruled for the first time that Tribal casino workers should have the benefit of NLRA protections, *San Manuel, 341 NLRB No. 138 (2204)*. Yet, since the *San Manuel* ruling, the NLRB has stepped very carefully, asserting jurisdiction on a case-by-case. In 2015, the NLRB declined 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 solely to tribal members*]," *Yukon Kuskokwim Health Corporation, 341 NLRB 139 (2004).*

The NLRB has developed a reasonable and responsible test to determine jurisdiction. H.R.986 is unnecessary and creates significant confusion and jurisdictional issues over labor law enforcement. Our union asks you to oppose H.R.986 and ask you to instead work to expand worker's rights not restrict them further.

Sincerely,

Leo W. Gerard
International President

LWG/cdk

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[1] http://www.usw.org/get-involved/legislative/ILO-opinion-on-Tribal-Labor-Sovereignty-Act.pdf

International Labour Office
Bureau international du Travail
Oficina Internacional del Trabajo

Route des Morillons 4
CH-1211 Genève 22

Tél. direct:
Fax direct:
E-mail:

Réf.: AFL-CIO
Votre réf.:

Mr R. L. Trumka
President
AFL-CIO
815 Sixteenth Street, N.W.
Washington, D.C. 20006
United States of America

Dear Mr. Trumka,

I acknowledge receipt of your letter dated 22 October 2015 requesting an informal opinion and guidance from the International Labour Organization in respect of a Bill being considered by the United States Congress.

In particular, you have raised concerns about the Tribal Labor Sovereignty Act (H.R. 511) which you state would deny protection under the National Labor Relations Act (NLRA) of a large number of workers employed by tribal-owned and tribal-operated enterprises located on tribal territory and ask for the informal opinion of the Office as to whether such an exclusion of workers employed on tribal lands would be in conformity with the principles of freedom of Association which are at the core of the ILO Constitution and the ILO's Fundamental Principles and Rights at Work.

In conformity with the regular procedure concerning requests for an informal opinion from the International Labour Office in respect of draft legislation and its possible impact on international labour standards and principles, the views set out below should in no way be considered as prejudging any comments or observations that might be made by the ILO supervisory bodies within the framework of their examination of the application of ratified international labour standards or principles on freedom of association.

Your links to committee reports of the congressional majority and minority and other background information have enabled the Office to consider the views of the parties both for and against the proposed amendment and they all appear to confirm recognition of the United States' obligation to uphold freedom of association and collective bargaining. While the proponents of the Bill assert that this can be achieved through the labour relations' regimes autonomously determined by the tribal nations, the opponents – and you yourself in your request - maintain that excluding tribal lands from the NLRA will in effect result in a loss (or at the very least inadequate protection) of their trade union rights. Not only do you refer to tribal labour relations ordinances which in your view provide inadequate protections in this regard, but you also refer to instances where there are no tribal labour relations ordinances at all.

.../....

While elements of indigenous peoples' sovereignty have been invoked by the proponents of this Bill, the central question revolves around the manner in which the United States Government can best assure throughout its territory the full application of the fundamental principles of freedom of association and collective bargaining. From an ILO perspective, while the variety of mechanisms for ensuring freedom of association and collective bargaining rights may differ depending on distinct sectoral considerations or devolution of labour competence, it is critical that the State (the national authority) takes ultimate responsibility for ensuring respect for freedom of association and collective bargaining rights throughout its territory.[1]

As you have indicated, the 2004 *San Manuel Indian Bingo and Casino* decision assures possible recourse to the National Labor Relations Board (NLRB), an overarching mechanism aimed at ensuring the protection of freedom of association, while also maintaining deference to the sovereign interests of the tribal nations so as to avoid touching on exclusive rights of self-governance.

Full abdication of review via an exclusion from the scope of the NLRA for all workers employed on tribal lands as described might make it very difficult for the United States Government to assure the fundamental trade union rights of workers. In cases like those mentioned where there are no tribal labour relations ordinances, undue restrictions on collective bargaining, excessive limitations on freedom of association rights or lack of protection from unfair labour practices, workers on tribal territories would be left without any remedy for violation of their fundamental freedom of association rights, short of a constitutional battle. Furthermore, the exclusion proposed, with no avenue for federal review or overarching mechanism for appeal should there be an alleged violation of freedom of association, would give rise to discrimination in relation to the protection of trade union rights which would affect both indigenous and non-indigenous workers simply on the basis of their workplace location.

Given the concerns that you have raised, it would be critically important that, at the very least, a complete legal and comparative review be undertaken to support assurances that all rights, mechanisms and remedies for the full protection of internationally recognized freedom of association rights are available to all workers on all tribal lands. In the absence of such assurances, it would appear likely that an exclusion of certain workers from the NLRA and its mechanisms would give rise to a failure to ensure to these workers their fundamental freedom of association rights.

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[1] 340th Report of the Freedom of Association Committee, March 2006, Case No.2405, para 450: While observing that this case concerns the Province of British Columbia, the Committee is bound to remind the federal Government that the principles of freedom of association should be fully respected throughout its territory.

In accordance with ILO procedure concerning requests for informal opinions on draft legislation, this communication will also be brought to the attention of the United States Government and the representative employers' organization, the US Council for International Business.

Yours sincerely,

Corinne Vargha
Director of the International Labour
Standards Department

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

March 28, 2017

The Honorable Tim Walberg
House Education & Workforce
Subcommittee on Health, Employment,
Labor, and Pensions
2176 Rayburn House Office Building
Washington, DC 20515

The Honorable Gregorio Kilili Camacho Sablan
House Education & Workforce
Subcommittee on Health, Employment,
Labor, and Pensions
2101 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Walberg and Ranking Member Sablan:

The International Union of Operating Engineers opposes the Tribal Labor Sovereignty Act (H.R. 986), 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

JTC:sm

JAMES T. CALLAHAN
GENERAL PRESIDENT

BRIAN E. HICKEY
GENERAL SECRETARY-TREASURER

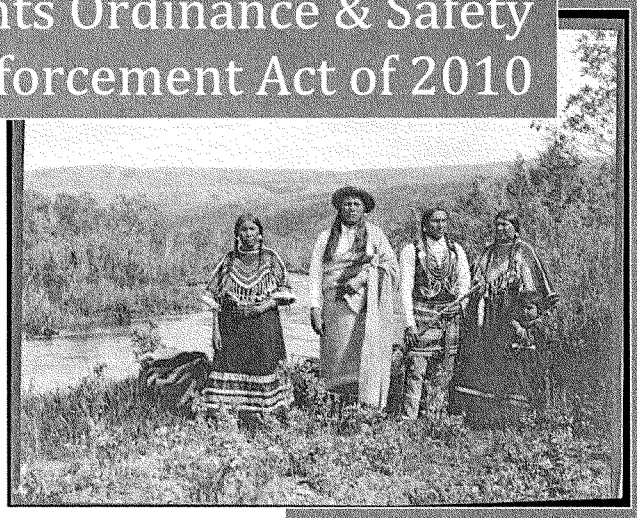
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GENERAL COUNSEL
BRIAN POWERS

2010

Blackfeet Tribal Employment Rights Ordinance & Safety Enforcement Act of 2010



Blackfeet Tribal Business Council 2010

Blackfeet Tribal Employment Rights Office, before the commencement of work, must approve this listing.

Approved key employees may be employed on the project whether or not they are local or non-Indian. A regular permanent employee is one who is and has been on the employer's or contractor's annual payroll for a period of one year continuously in a supervisory capacity, or is an owner of the firm. An employee who is hired on a project-by-project basis shall not be considered a key employee.

A key employee is one who is in a top supervisory position or performs a critical function such that an employer would risk likely financial damage or loss if that task were assigned to a person unknown to the employer. The fact that an employee has worked for the employer on previous projects shall not qualify that employee as a regular, permanent employee. The Blackfeet Tribal Employment Rights Office Representative, on a case-by-case basis, may grant exceptions for superintendents and other key personnel who are not permanent regular employees. Any employer or contractor filling vacant employment positions in its organization immediately prior to undertaking work pursuant to a contract to take place on the Blackfeet Indian Reservation shall set forth evidence acceptable to the Blackfeet Tribal Employment Rights Office Representative that its actions were not intended to circumvent these requirements.

Section 3-107: Unions

Unions are prohibited on the Blackfeet Indian Reservation.

[Additional submission by Mr. Scott follows:]

Remarks of Congressman Bobby Scott
Accreditation Full Committee Hearing
April 27, 2017

Good morning. I would like to thank Chairwoman Foxx for calling this hearing and I'd like to thank our distinguished witnesses for being here today.

The issue of quality in higher education is one that we address often here in Congress. The higher education system in the United States is one of, if not the best in the world, and we frequently spend our time debating how to increase access to the system or how to make college more affordable. And while these are topics that I'm sure we will continue debating, it is important that we take a step back and determine if we are ensuring that our higher education system maintains its high level of quality across all sectors for all students.

While the federal government and state authorizers both have important roles to play in assuring quality, accrediting bodies are the true arbiters of quality in our higher education system. Their thoughtful peer review process is designed to ensure that institutions are living up

to their educational mission—whether it's providing students with an education that will be the basis for a lifetime of learning or preparing them to excel in a specific field or career. The title of this hearing alludes to the fact that while students depend on accreditors, taxpayers do as well. Over $150 billion in federal student aid is disbursed every year, and it can only go to institutions of higher education that have been accredited by a federally recognized accreditor. As such, there are huge fiscal implications to the quality and rigor of accreditation reviews.

While the accreditation systems works well for many schools, it must be improved. We know that there were schools that were fully accredited up until the point that they closed their doors, leaving students out in the cold and taxpayers holding the bag. We also know there are schools that remain accredited while offering their students little chance to obtain a degree, or a credential that has little value in the marketplace. There is emerging research that shows in the worst cases, the outcomes at some fully accredited schools are so poor that students would have been better off going to no school rather than attending.

The federal government has begun to respond to these problems in accreditation. Over the last two years the Department of Education proposed actions to make the accreditation system more transparent, and provide more information on the standards that accreditors use to rate schools. Last year the National Advisory Committee on Institutional Quality and Integrity, (or NACIQI) derecognized the Accrediting Council for Independent Colleges and Schools (or ACICS), putting other accreditors on notice that subpar standards and a documented history of turning a blind eye to bad actors would not be tolerated.

It seems like many accreditors got the message, and we have seen proposed reforms from accreditors based on recommendations from the previous administration. I know accreditors want to improve and theywant to ensure that their members are still providing a top-notch education. But we are at a crossroads. There is no guarantee that the new Administration is going to take as critical a view on the need to improve accreditation, and I worry that the improvements that we've seen of late could falter without the oversight of the federal government.

Accreditation can be a peer-based program designed to foster self-improvement **and** be responsive to data on student outcomes. It can meet the needs of vastly different institutions **but** still use common terms and actions. It can respect the internal decisions and choices of an institution **and** still be transparent. We can have the best accreditation system in the world for the best higher education system in the world, and hopefully our witnesses here today will provide perspective on how we can do just that. Thank you and I yield back the balance of my time.

[Additional submissions by Mr. Walberg follow:]

Statement from the Morongo Band of Mission Indians Regarding
H.R. 986, The Tribal Labor Sovereignty Act
March 29, 2017

Mr. Chairman and members of the Subcommittee on Health, Employment, Labor and Pensions, the Morongo Band of Mission Indians is pleased to provide you with the following statement for the subcommittee's record regarding the consideration of H.R. 986, the Tribal Labor Sovereignty Act of 2017.

Assuming that the National Labor Relations Board ("NLRB") has or should have any jurisdiction at all over tribal employers, the NLRB is intruding deeply into internal tribal governmental processes by disregarding the unique status of tribes as governments, denying them the same legislative rights as states and territories under Section 14(b) of the National Labor Relations Act. When the Morongo Band of Mission Indians executed its original Class III gaming compact with the State of California in September, 1999, the NLRB had never asserted jurisdiction over a tribe engaged in authorized government gaming on Indian lands, as prescribed by the Indian Gaming Regulatory Act ("IGRA"). However, the State insisted, at the request of organized labor, that the compact include the following provision, set forth in Section 10.7:

> Notwithstanding any other provision of this Compact, this Compact shall be null and void if, on or before October 13, 1999, the Tribe has not provided an agreement or other procedure acceptable to the State for addressing organizational and representational rights of Class III Gaming Employees and other employees associated with the Tribe's Class III gaming enterprise, such as food and beverage, housekeeping, cleaning, bell and door services, and laundry employees at the Gaming Facility or any related facility, the only significant purpose of which is to facilitate patronage at the Gaming Facility.

Having no choice but to accede to the State's demand, Morongo and numerous other California Tribes negotiated directly with the California Labor Federation, facilitated by the State's Director of the Office of Personnel Management and the President Pro Tempore of the State Senate, and reached agreement on the terms of a model Tribal Labor Relations Ordinance ("TLRO"), which was the only "agreement or other procedure" acceptable to the State. The TLRO tracks the National Labor Relations Act ("NLRA") in many of its key provisions (*e.g.*, secret ballot elections, free speech, preservation of the right to strike, definitions of unfair labor practices), gives labor organizations greater access to potential bargaining unit employees than does the NLRA, but also respects tribal sovereignty by giving the tribal government a role in resolving certain disputes and establishing a statewide tribal labor panel to oversee representation elections and resolve certain other kinds of disputes.

As required by its Compact, Morongo duly enacted its TLRO, which now has been in effect for more than 17 years. In all of that time, no labor organization ever has sought to avail itself of the rights conferred, and to which organized labor in California agreed. In fact, in one instance, when Morongo invited the UNITE-HERE union to exercise its rights under the TLRO, the union expressly disclaimed interest in exercising those rights, and since then has repudiated its agreement to accept the TLRO. More recently, another union seeking to

organize a small number of Morongo's casino employees declined to proceed under the TLRO, and instead successfully petitioned the NLRB for a representation election. Despite the fact that the only federal Court of Appeals to have considered the question whether a Tribe may enact and enforce a right to work ordinance held that the Tribe has such a right, the NLRB now is asserting that Morongo's 2009 "Right to Work" ordinance, which bars union security agreements, constitutes an unfair labor practice, on the premise that Morongo's power to enact such an ordinance is preempted by the NLRA. The Morongo Tribal Council does not have the power to repeal an ordinance that was enacted by Morongo's General Membership, but the NLRB is unwilling to defer issuing a complaint in order to give the Tribal Council the opportunity to submit the question of repealing the ordinance to the General Membership, thus directly intruding into the Morongo Band's internal governance.

Despite the fact that the NLRB is exercising jurisdiction over tribal gaming facilities, and despite the fact that certain elements in organized labor have repudiated the agreement reached with California's tribes in 1999, recent new or amended Class III gaming compacts in California have included a new TLRO that radically alters the dynamics of labor-management relations for those Tribes that have accepted the new TLRO as the price for legislative ratification of their compacts. The new TLRO preserves secret ballot elections, but curbs the parties' free speech rights, enables a union that has not been certified to represent any employees to deprive those employees of the right to strike and petition the NLRB, establishes an unrealistically short time limit for negotiating an initial collective bargaining agreement, and empowers an unelected and unaccountable "mediator" to impose a contract on the parties. The only "meaningful consideration" that the State has given to some of the Tribes that have accepted the new TLRO has been extension of the compact term and partial relief from financial terms that, under the *Rincon v. Schwarzenegger* decision, the State never had the right to demand, and in other instances an extension of the compact term and a modest increase in the number of Class III slot machines authorized (in some instances, the new compacts actually *reduced* the number of slot machines the Tribes could operate).

Since enacting its TLRO in 1999, Morongo has kept its word about protecting its employees' organizational and representational rights, even as the original legal premise for requiring enactment of the TLRO (lack of NLRB jurisdiction) ceased to exist. Enacting the Tribal Labor Sovereignty Act will not deprive Morongo's gaming employees of the rights they enjoy under the TLRO, but have never sought to exercise. It will, however, accord Morongo and other recognized Tribes the status as governments on which IGRA is premised, and that various other federal statutes, such as the Tribal Governmental Tax Status Act, the Clean Air Act, etc. also accord.

In conclusion, to give Tribes true parity with states and territories in being excluded from the definition of "employer" under the National Labor Relations Act, Congress should provide that the TLSA preempts any state law or tribal-state agreement that prescribes or requires that a tribe enact a specific labor-management relations regime.

Thank you for your attention to the concerns of the Morongo Band of Mission Indians.

TESTIMONY OF HON. LARRY ROMANELLI
OGEMA, LITTLE RIVER BAND OF OTTAWA INDIANS
ON H.R. 986, THE TRIBAL LABOR SOVEREIGNTY ACT OF 2017
BEFORE THE
HOUSE COMMITTEE ON EDUCATION AND THE WORKFORCE
SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR AND PENSIONS
APRIL 5, 2017

My name is Larry Romanelli and I am the Ogema for the Little River Band of Ottawa Indians. I am honored to submit this testimony in strong support of H.R. 986, the proposed Tribal Labor Sovereignty Act of 2017.

The Little River Band of Ottawa Indians is a tribal government enjoying a government-to-government relationship with the United States. Our ancestors entered into seven treaties with the United States, from 1795 to 1855, all recognizing the Michigan Ottawa (or Odawa) bands as sovereign governments. In 1994 Congress reaffirmed our Band's governmental status in the Little Traverse Bay Bands of Odawa Indians and Little River Band of Ottawa Indians Act. *See* Pub. L. 103-325, 108 Stat. 2156, *codified at* 25 U.S.C. §§ 1300k-1300k-7.

Our Tribe is located within our ancestral homelands in Michigan's Lower Peninsula, along Lake Michigan's eastern shore and within what are today Manistee, Mason, Wexford and Lake counties. As Congress has recognized, the Band has continuously existed as a distinct political and cultural community within our ancestral homeland "from treaty times to the present."[1] We are governed by a Constitution that was adopted pursuant to section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. § 476, and approved by the Secretary of the Interior pursuant to that same Act. Under the Band's Constitution we are governed by three branches of government: a legislative branch acting through the office of the Tribal Council; an executive branch directed by the office of the Tribal Ogema; and a judicial branch comprised of the Band's Tribal Court and Tribal Court of Appeals. Pursuant to the Band's Constitution, the Band exercises jurisdiction over its members, its territory, and all persons who come upon the Band's territory or whose activities pose a direct threat to the health or welfare of our tribal community. In so doing, the Band enjoys and exercises the same privileges and immunities accorded to every other federally recognized tribal government in the United States.

The Band's federally-approved Constitution empowers the Tribal Council "[t]o exercise the inherent powers of the . . . Band by establishing laws . . . to govern the conduct of members of the Little River Band and other persons within its jurisdiction." Pursuant to this federally-approved authority, the Council in 2005 enacted a Fair Employment Practices Code to govern a variety of employment and labor matters arising within the Band's jurisdiction on tribal lands, including rights and remedies for employment discrimination, family medical leave, minimum wages, and other matters. In 2007, the Council added Article XVI to the Band's Fair

[1] *See* H.R. Rep. No. 103-621 at 7 (1994) ("Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians Act"); S. Rep. No. 103-260 at 5-6 (1994) ("Reaffirming and Clarifying the Federal Relationships of the Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians as Distinct Federally Recognized Indian Tribes"). *See also* 25 U.S.C. § 1300k(4) (referring to Band's "ancestral homeland" in Michigan).

Employment Practices Code to govern labor organizations and collective bargaining within its governmental departments, agencies, authorities, subordinate organizations, and commissions. Later amendments (including Article XVII) required the exhaustion of tribal remedies and prevented outside interferences with the Band's labor law processes.

Taken together, the Band's Fair Employment Practices Code was the result of considerable legislative process by the Tribal Council and reflected critically important policy choices necessary to ensure a fair balance between the needs of the tribal government—a public sector employer responsible to the Band's entire citizenry—and the interests of Band employees who wish to engage in collective bargaining.

The result of this balance are provisions which:

- define the rights and duties of employers, employees, and labor organizations within the Band's governmental operations with respect to collective bargaining, including the scope of the duty to bargain in good faith;
- require labor organizations engaged in activities within the Band's governmental operations to hold a tribal license;
- provide a process for defining appropriate bargaining units of employees;
- establish standards for union election campaigns;
- define procedures for union elections and methods for resolving disputes that could arise (including mediation, fact-finding and arbitration);
- establish procedures and remedies for alleged unfair labor practices;
- prohibit strikes against the Band's governmental operations; and
- create dispute and impasse resolution processes, including a waiver of tribal sovereign immunity for actions brought in tribal court.

In adopting Articles XVI and XVII, the Band considered public sector labor laws adopted by the Federal Government and many States to govern their own respective public employees.

For instance, the Band adopted a provision, not dissimilar from the labor regime in place for federal employees, prohibiting strikes. Under federal law, it is an unfair labor practice for any federal-employee union to call for or to condone a strike,[2] and it is even a crime for a federal employee to engage in a strike.[3] Many States and municipalities have similar anti-strike prohibitions, and under Michigan law "[a] public employee shall not strike."[4] A strike of public employees could bring government to its knees and stop the very functioning of government, which is why no-strike provisions are common in the public employment sector. The Band's Fair Employment Practices Code includes a no-strike provision. At the same time, it also includes a prohibition on public employer lockouts.

Similarly, the Band's Code bars collective bargaining over Band law, just as federal law likewise bars collective bargaining over federal law.[5] Thus, for instance, the Band's laws

[2] 5 U.S.C. § 7116(b)(7).
[3] 18 U.S.C. § 1918(3).
[4] Mich. Comp. Laws § 423.202.
[5] 5 U.S.C. § 7103(a)(14)(C).

regarding tribal member employment preferences in hiring and promotions, and regarding random drug testing, are not a proper subject for collective bargaining under the Band's Fair Employment Practices Code.

Since 2008, the Band has entered into several collective bargaining agreements, all with bargaining units that have selected the United Steel Workers Union to represent them. There has also been one unsuccessful decertification vote, one unsuccessful unionization vote, and three active drives which led to an insufficient number of signatures. Typical topics that would come up in union negotiations included health care costs, scheduling issues, and the handling of personnel grievances. As this early history demonstrated, the Band is certainly not anti-union.

Nonetheless, in March 2008, Local 406 of the International Brotherhood of Teamsters filed charges with the NLRB alleging that the mere existence of the Band's Fair Employment Practices Code was an unfair labor practice and a violation of the National Labor Relations Act (NLRA). The Board's General Counsel agreed, and so began an 8-year full scale attack on the Band's government and on our sovereignty.

The Board's General Counsel, and then the Board, took the position that Congress intended the NLRA to apply to sovereign Indian tribal governments, alone among all other sovereign government employers in the United States, including States, counties, cities, the District of Columbia, territories--even port authorities.[6] The Board's position was rooted in a sharply-divided 2004 Board decision[7] and a 2007 D.C. Circuit 3-judge panel decision (*San Manuel*),[8] but ignored a contrary 2002 full-court Tenth Circuit decision (*San Juan*).[9]

On appeal, a divided Sixth Circuit panel affirmed the Board's decision.[10] Dissenting Judge McKeague criticized the decision because it "contribute[s] to a judicial remaking of the law that is authorized neither by Congress nor the Supreme Court."[11] He added that "the majority's decision impinges on tribal sovereignty, encroaches on Congress's plenary and exclusive authority over Indian affairs, conflicts with Supreme Court precedent, and unwisely creates a circuit split." *Id.* Days later another Sixth Circuit panel considering a different Tribe's challenge to NLRB jurisdiction unanimously agreed with dissenting Judge McKeague, but that second panel was required to follow the *Little River* decision.[12]

All told, 13 federal appellate judges have concluded that Congress never intended the NLRA to apply to tribal governments, while 9 have taken the opposite position. This is precisely the kind of situation that cries out for Congress to makes its understanding clear. Congress wrote the law, and it is for Congress to clarify its intentions. And since the NLRA was written with the

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[6] 361 NLRB No. 45 (2014), *adopting* 359 NLRB No. 84 (2013).
[7] 341 NLRB 1055.
[8] *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306 (D.C. Cir. 2007).
[9] *NLRB v. Pueblo of San Juan*, 276 F.3d 1186 (10th Cir. 2002) (en banc). *See also Dobbs v. Anthem Blue Cross & Blue Shield*, 600 F.3d 1275 (10th Cir. 2010) ("Congressional silence exempted Indian tribes from the National Labor Relations Act").
[10] *NLRB v. Little River Band of Ottawa Indians Tribal Government*, 788 F.3d 537 (6th Cir. 2015).
[11] *Id.* at 561.
[12] *Soaring Eagle Casino & Resort v. NLRB*, 791 F.3d 648 (6th Cir. 2015).

express purpose of regulating "private industry,"[13] and not governmental employers, the law should be clarified to make perfectly clear that Indian tribes, as much as any other government, are excluded from the Act's coverage. Among other things, this is a matter of basic fairness and parity.

The NLRB's campaign in recent years represents a direct attack on our Tribe's sovereignty and the sovereignty of all Indian tribes in the Nation. The Federal government has a duty to protect and enhance tribal institutions, not to undermine and destroy them. Yet absent congressional intervention, the NLRB will continue attacking sovereign tribal governments located outside of the Tenth Circuit, forcing Tribes to negotiate over their own civil service systems, their tribal laws and customs, their judicial remedies, their sovereign immunity, and even their levels of tribal appropriations. A few employees will be able to hold an entire government and its citizenry hostage to their demands, on pain of a strike that would bring the very wheels of government to a halt—a result President Roosevelt called "unthinkable and intolerable."[14] This unabashed discrimination against tribal governments cannot be permitted to continue.

It has been argued that Congress's omission in not specifically listing tribal governments as excluded employers means Congress must have meant to include them within the Act's scope. This is nonsense. In 1935, the general view of the law was that Indian tribes were instrumentalities of the federal government itself.[15] Indeed, the 1934 Indian Reorganization Act[16] and the 1936 Oklahoma Indian Welfare Act[17] make it abundantly clear that Congress in 1935 understood Indian tribes to be sovereign governments. Between 1935 and 2004—that is, for nearly 70 years—the Board consistently treated Indian tribes as exempt employers,[18] just as it consistently placed under the government exclusion all manner of other government employers never specifically mentioned in the Act's section 2(2) exclusion.[19]

Only when it comes to Indian tribes did the Board suddenly make an about-face in 2004, and then only because at that point some tribal governments had become successful in raising revenues to fund critical government services despite the absence of any meaningful tax base. But raising revenue is a quintessential function of government, without which government itself could not exist, which is precisely why the Supreme Court has repeatedly rejected the view that

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[13] *NLRB v. Catholic Bishop*, 440 U.S. 490, 504 (1979).

[14] Franklin D. Roosevelt, "Letter on the Resolution of Federation of Federal Employees Against Strikes in Federal Service" (Aug. 16, 1937), available at http://www.presidency.ucsb.edu/ws/?pid=15445.

[15] *Washington v. Confederated Tribes*, 447 U.S. 134, 183 n.8 (1980) (Rehnquist, J., concurring in part and dissenting in part) (describing cases from 1910s and 1920s); *see also McClanahan v. State Tax Comm'n*, 411 U.S. 164, 169 (1973) (collecting cases).

[16] 25 U.S.C. §§ 461-479.

[17] 25 U.S.C. §§ 501-509.

[18] *See, e.g., Fort Apache Timber Co.*, 226 NLRB 503 (1976).

[19] 29 C.F.R. §102.7 (1935) ("[t]he term State as used in [§ 152(2) to] include the District of Columbia and all States, Territories, and possessions of the United States," although none are listed in section 2(2) of the Act); *Chaparro-Febus v. Int'l Longshoremen Ass'n*, 983 F.2d 325, 329-30 (1st Cir. 1992) (commercial instrumentality of Puerto Rico); *Virgin Islands Port Auth. v. S.I.U. de P.R.*, 354 F.Supp. 312, 313 (D.V.I. 1973), *aff'd on other grounds*, 494 F.2d 452, 453 n.2 (3d Cir. 1974) (commercial instrumentality of Virgin Islands); *Brown v. Port Auth. Police Superior Officers Ass'n*, 661 A.2d 312, 315-16 (N.J. Super. Ct. App. Div. 1995) (Port Authority of New York and New Jersey created by interstate compact).

tribal government immunities vanish when tribes successfully raise revenues to fund "core government functions," specifically including through gaming operations.[20] The NLRB's inventive interpretation of the NLRA disregards all this. Indeed, it punishes tribes for their success in becoming more self-governing and independent.

In the course of legislating on the topic of tribal gaming, Congress could not have been clearer in the Indian Gaming Regulatory Act that tribal gaming activities are a governmental function.[21] After all, tribes can only conduct Class III gaming through an intergovernmental compact with the surrounding State, just as the Band has done with the State of Michigan. Our tribal government has the sole proprietary interest in and responsibility for gaming activities on our federal tribal trust lands, and all revenues generated from those activities fund the Band's governmental services. These revenues support a wide array of government services, including health care; counseling and support for families and children; natural resource management; public safety; our tribal judiciary; and our prosecutorial services. Our Band's gaming revenues account for 81% of the budget for our Judiciary and our prosecutor's office; 80% of the budget for mental health and substance abuse services at our clinic; 78% of the budget for our Department of Family Services; and 75% of the budget for our Department of Public Safety.

Congress, the Supreme Court, and our actions on the ground all show that tribal gaming is a quintessential government activity without which our government simply would not function. For the Board to now try and cleave these government functions off from the rest of our government, declaring one part subject to the NLRA, and the other part possibly not, represents nothing less than an unsanctioned seizure of agency authority that Congress never conferred on the Board.

And here I should be clear. Contrary to some mis-statements, the Board has never said that the Act does not apply when Indian tribes are engaged in purely intramural or treaty-protected activities; it has merely said that it will consider, in its sole discretion, whether to apply the Act's private sector regime in such cases on a case-by-case basis, weighing the interests of labor law against federal Indian law. With a stroke of a pen the Board in 2004 suddenly became a self-appointed expert on federal Indian policy—all without a hint that Congress ever imagined such a role for the Board.

In our battle with the Board over our Band's Fair Employment Practices Code, the Board targeted three provisions involving licensing, drug and alcohol testing, and strikes. Yet each of these provisions is vital to our tribal government operations, and to securing the Band's future. Let me discuss each one in turn.

For instance, our Code required licensure of unions and individuals seeking to organize at our casino because licensure is critical to maintaining the integrity of the Tribe's gaming operations. The Indian Gaming Regulatory Act's legislative history (including subsequent hearings) details at length the need to prevent the infiltration of organized crime into tribal

[20] *Michigan v. Bay Mills Indian Cmty.*, 34 S. Ct. 2024, 2043 (2014).
[21] 25 U.S.C. §§ 2701-2721.

gaming operations.[22] One key tool to address this threat is to require licensure and background checks of key parties conducting any activity within casino property. This is similar to the "certification" requirement imposed upon unions in several States, including Michigan, Nevada and Pennsylvania. Licensure is simply good policy and fulfills Congress's interest in ensuring that organized crime never infiltrates Indian gaming. Yet, the NLRB attacked this very policy as an unfair labor practice. If that is the case, then Nevada's, Michigan's and Pennsylvania's comparable certification policies are equally offensive and should be struck down. But the Board isn't interested in parity among governments; its goal instead appears to be to discriminate against tribal governments.

Our Code also prohibited collective bargaining over our Band's alcohol and drug testing policies. At Little River our policy is clear: you must be drug and alcohol free if you want to work for the Band. This decision was based on the all-too-well-known devastating impacts drugs and alcohol have had in tribal communities, and on our tribal government's decision to stem this tide by enacting strict testing requirements. Our laws were consistent with federal law requiring that all tribes maintain a drug free work place. It would be difficult, if not unlawful, for the Band to have one law in place to comply with federal law for one set of our public workforce, and have a different law in effect to comply with the NLRB's demands for a different part of our workforce. Yet that is precisely where we now stand, and the Board has put the Band's compliance with the Federal drug free work place laws in jeopardy, together with the significant federal funds we receive that are tied to that federal prohibition.

Finally, our Code prohibits strikes because strikes represent a direct and existential threat to our very government. A strike against the Band's gaming operations is a direct assault on our tribe's sovereignty. A strike would mean the cessation of most essential government functions, including our courts and prosecutor's office, putting our citizenry at grave risk. The Band's decision to prohibit strikes in all its operations is no different from the decisions of many States and local governments that prohibit strikes, including New York's prohibition against strikes at its off-track betting facilities, and Massachusetts's prohibition against strikes by its lottery employees. Like many other public employers, our government balanced the need to fairly resolve workplace impasses with our government's need to ensure its revenue operations remain open. Although strikes were barred, we allowed binding arbitration to fairly address workers' interests while government operations remain open.

Our no-strike provision was particularly critical in our rural Michigan setting, because in the event of a strike we could never find sufficient licensed and qualified workers to call in as replacements. There can therefore be no doubt that a strike would shutter the casino. For this reason, even the threat of a strike would place our government in an untenable position and force the Band to capitulate to any union's demands. The public at large -- our tribal citizenry -- would be hostage to the unions. Good faith negotiations would be impossible given the enormous leverage a union would wield. In this very real way, the Band would lose its power to govern itself. If federal protection of tribal sovereignty means anything, it means a federal responsibility to keep this from happening.

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[22] See generally, *Gaming Activities on Indian Reservations and Lands*, S.Hrg. 100-341; *Hearing on S. 2230, Indian Gaming Regulatory Act Amendments Act of 1994*, S.Hrg. 103-874.

For now, the Board has prevailed and we have complied with the Board's Order. At this point it is perfectly plain that the only way to stop the Board, the only way to restore our authority to govern ourselves and to protect the interests of our citizens, the only way to restore parity between us and all other governments within this great Nation, is for Congress to act now and enact H.R. 986. This bill will make unmistakably clear what everyone understood for the first 70 years of the NLRA's implementation: that all governments, including tribal governments, are excluded from the NLRA.

Thank you for the opportunity to submit this testimony for the record on behalf of the Little River Band of Ottawa Indians.

[Questions submitted for the record and their responses follow. Mr. Cladoosby's responses were not submitted at the time of printing.]

MAJORITY MEMBERS:

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May 23, 2017

Mr. Brian Cladoosby
President
National Congress of American Indians
Embassy of Tribal Nations
1516 P Street, NW
Washington, DC 20005

Dear Mr. Cladoosby:

Thank you for testifying at the Subcommittee on Health, Employment, Labor, and Pensions hearing entitled "H.R. 986, Tribal Labor Sovereignty Act of 2017." I appreciate your participation.

Please find enclosed additional questions submitted by a Committee member following the hearing. Please provide written responses no later than June 6, 2017, for inclusion in the official hearing record. Responses should be sent to Callie Harman of the Committee staff, and she can be contacted at (202) 225-7101.

Thank you, again, for your contribution to the work of the Committee.

Sincerely,

Tim Walberg
Chairman
Subcommittee on Health, Employment, Labor, and Pensions

Enclosure

CC: The Honorable Gregorio Kilili Camacho Sablan
Ranking Member, Subcommittee on Health, Employment, Labor, and Pensions

Rep. Sablan (Northern Mariana Islands)

1. The Blackfeet Tribe in Montana adopted the "Blackfeet Tribal Employment Rights Ordinance" which states in Section 3-107: "Unions are prohibited on the Blackfeet Indian Reservation."

    a. Does this language create a "union free zone" on Blackfeet tribal lands?

    b. If H.R. 986 were enacted, could the Blackfeet Indians maintain this "union free zone" with legal certainty?

    c. Would H.R. 986 make it possible for other Indian tribes to create or amend existing tribal labor ordinances which create union free zones at commercial enterprises on tribal lands?

    d. Do any of the other 567 recognized Indian tribes have ordinances which prohibit unions or union activity on a tribe's lands? Please provide a list of such ordinances and the name and location of the tribe which issued such ordinance.

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CAROL SHEA-PORTER, NEW HAMPSHIRE
ADRIANO ESPAILLAT, NEW YORK

May 23, 2017

Mr. John Gribbon
California Political Director
UNITE HERE International Union, AFL-CIO
243 Golden Gate Ave
San Francisco, CA 94102

Dear Mr. Gribbon:

Thank you for testifying at the Subcommittee on Health, Employment, Labor, and Pensions hearing entitled "H.R. 986, Tribal Labor Sovereignty Act of 2017." I appreciate your participation.

Please find enclosed additional questions submitted by a Committee member following the hearing. Please provide written responses no later than June 6, 2017, for inclusion in the official hearing record. Responses should be sent to Callie Harman of the Committee staff, and she can be contacted at (202) 225-7101.

Thank you, again, for your contribution to the work of the Committee.

Sincerely,

Tim Walberg
Chairman
Subcommittee on Health, Employment, Labor, and Pensions

Enclosure

CC: The Honorable Gregorio Kilili Camacho Sablan
Ranking Member, Subcommittee on Health, Employment, Labor, and Pensions

Rep. Sablan (Northern Mariana Islands)

1. In your oral testimony, you stated "Title VII of the Civil Rights Act of 1964 has been held not to apply to Indian tribes. The only way employees of tribal enterprises subject to harassment and other forms of discrimination may speak out about them with any degree of safety is through the NLRA. It would also repeal Davis-Bacon for the building and construction trades on Tribal lands."

    a. Since Title VII does not apply to Indian tribes, please explain how the NLRA serves as a backstop for employees facing harassment or discrimination?

    b. Can you clarify your statement regarding Davis Bacon on tribal lands?

2. Your testimony pointed out that the majority of employees at tribal casinos are not members of Indian tribes, or enrolled members of the tribe operating the casino. Please provide examples where this is the case.

Mr. Gribbon response to questions submitted for the record follow:]

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June 5, 2017

The Honorable Gregorio Kilili Camacho Sablan
Ranking Member, Subcommittee on Health, Employment, Labor and Pensions
U.S. House of Representatives
2176 Rayburn House Office Building
Washington, DC 20515-6100

Dear Ranking Member Sablan,

I am responding to your post hearing questions dated May 23, 2017 regarding my testimony on H.R. 986 "Tribal Labor Sovereignty Act of 2017" which I gave to the Subcommittee on March 29, 2017.

Your questions (in italics) and my responses are below:

Question 1: *In your testimony, you stated 'Title VII of the Civil Rights Act of 1964 has been held not to apply to Indian tribes. The only way employees of tribal enterprises subject to harassment and other forms of discrimination may speak out about them with any degree of safety is through the NLRA. It would also repeal Davis-Bacon for the building and construction trades on Tribal lands.'*

a. Since Title VII does not apply to Indian tribes, please explain how the NLRA serves as a backstop for employees facing harassment or discrimination?
b. Can you clarify your statement regarding Davis Bacon on tribal lands?

Answer 1: a. As you note, Title VII nondiscrimination protections do not apply to Indian tribes. Under the NLRA, workers are protected from retaliation if they join together to raise concerns with employers regarding discrimination or sexual harassment. It is an unfair labor practice for employers to discriminate or coerce workers who are raising such concerns through collective action. Although some tribes have Tribal Labor Relations Ordinances (TLRO) that accomplish protections similar to the NLRA, many tribes either do not have TLROs or have TLROs that do not protect workers free speech, freedom of association, or right to engage in concerted activity. For example, a tribe in Montana expressly prohibits unions on its lands in its TLRO, and this legislation would ensure that it could maintain union free zone.

b. During my oral testimony, I offered an unclear response regarding the impact of this proposed legislation regarding the Davis Bacon Act on tribal lands. What I meant to say, and what this response clarifies, is that without NLRA protections, workers would have fewer protections to raise concerns regarding the misapplication of the Davis Bacon Act, such as underpaying the prevailing wage or fringe benefit rates.

D. TAYLOR, PRESIDENT
GENERAL OFFICERS: Gwen Mills, Secretary-Treasurer • Peter Ward, Recording Secretary
Jo Marie Agriesti, General Vice President • Maria Elena Durazo, General Vice President for Immigration, Civil Rights and Diversity

Question 2: *Your testimony pointed out that the majority of employees at tribal casinos are not members of Indian tribes, or enrolled members of the tribe operating the casino. Please provide examples where this is the case.*

Answer 2: Examples of the enrolled memberships of some of the federally recognized tribes in California which are operating some of the largest casino enterprises in the state (based on recently available data):

- Yoche Deha Band of Wintun Indians with 36 enrolled members operate a casino in Yolo County, California employing over 2,000 workers.
- The San Manuel Band of Mission Indians in Riverside, California has an enrolled membership of 21 adults. San Manuel Band operates a casino employing more than 2,500 workers.
- The United Auburn Indian Community in Northern California has an enrolled membership of 170. Their Thunder Valley Casino and Resort in Placer County, California employs over 2,500 workers.
- The Agua Caliente Band of Cahuilla Indians with an enrolled membership of 410 operates 2 casinos in Palm Springs, California employing over 2,500 workers.

As the numbers demonstrate, the vast majority of employees at these casinos are not enrolled members of the owner tribe.

Please let me know if you need any further information.

Sincerely,



Jack Gribbon
California Political Director

[Whereupon, at 11:51 a.m., the subcommittee was adjourned.]

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