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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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