EXAMINING *OKLAHOMA v. CASTRO-HUERTA*: THE IMPLICATIONS OF THE SUPREME COURT'S RULING ON TRIBAL SOVEREIGNTY

OVERSIGHT HEARING

BEFORE THE

SUBCOMMITTEE FOR INDIGENOUS PEOPLES OF THE UNITED STATES

OF THE

COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTEENTH CONGRESS

SECOND SESSION

Tuesday, September 20, 2022

Serial No. 117–27

Printed for the use of the Committee on Natural Resources

Available via the World Wide Web: http://www.govinfo.gov
or
Committee address: http://naturalresources.house.gov

U.S. GOVERNMENT PUBLISHING OFFICE
48–655 PDF WASHINGTON : 2022

COMMITTEE ON NATURAL RESOURCES

RAÚL M. GRIJALVA, AZ, *Chair*
JESÚS G. "CHUY" GARCÍA, IL, *Vice Chair*
GREGORIO KILILI CAMACHO SABLAN, CNMI, *Vice Chair, Insular Affairs*
BRUCE WESTERMAN, AR, *Ranking Member*

Grace F. Napolitano, CA
Jim Costa, CA
Gregorio Kilili Camacho Sablan, CNMI
Jared Huffman, CA
Alan S. Lowenthal, CA
Ruben Gallego, AZ
Joe Neguse, CO
Mike Levin, CA
Katie Porter, CA
Teresa Leger Fernández, NM
Melanie A. Stansbury, NM
Mary Sattler Peltola, AK
Nydia M. Velázquez, NY
Diana DeGette, CO
Julia Brownley, CA
Debbie Dingell, MI
A. Donald McEachin, VA
Darren Soto, FL
Michael F. Q. San Nicolas, GU
Jesús G. "Chuy" García, IL
Ed Case, HI
Betty McCollum, MN
Steve Cohen, TN
Paul Tonko, NY
Rashida Tlaib, MI

Louie Gohmert, TX
Doug Lamborn, CO
Robert J. Wittman, VA
Tom McClintock, CA
Garret Graves, LA
Jody B. Hice, GA
Aumua Amata Coleman Radewagen, AS
Daniel Webster, FL
Jenniffer González-Colón, PR
Russ Fulcher, ID
Pete Stauber, MN
Thomas P. Tiffany, WI
Jerry L. Carl, AL
Matthew M. Rosendale, Sr., MT
Blake D. Moore, UT
Yvette Herrell, NM
.L.auren Boebert, CO
Jay Obernolte, CA
Cliff Bentz, OR
Connie Conway, CA
Vacancy

David Watkins, *Staff Director*
Luis Urbina, *Chief Counsel*
Vivian Moeglein, *Republican Staff Director*
http://naturalresources.house.gov

SUBCOMMITTEE FOR INDIGENOUS PEOPLES OF THE UNITED STATES

TERESA LEGER FERNÁNDEZ, NM, *Chair*
JAY OBERNOLTE, CA, *Acting Ranking Member*

Ruben Gallego, AZ
Darren Soto, FL
Betty McCollum, MN
Michael F. Q. San Nicolas, GU
Ed Case, HI
Jesús G. "Chuy" García, IL
Melanie A. Stansbury, NM
Raúl M. Grijalva, AZ, *ex officio*

Aumua Amata Coleman Radewagen, AS
Jerry L. Carl, AL
Matthew M. Rosendale, Sr., MT
.L.auren Boebert, CO
Cliff Bentz, OR
Vacancy
Bruce Westerman, AR, *ex officio*

CONTENTS

OVERSIGHT HEARING ON "EXAMINING *OKLAHOMA v. CASTRO-HUERTA*: THE IMPLICATIONS OF THE SUPREME COURT'S RULING ON TRIBAL SOVEREIGNTY"

Tuesday, September 20, 2022

U.S. House of Representatives

Subcommittee for Indigenous Peoples of the United States

Committee on Natural Resources

Washington, DC

The Subcommittee met, pursuant to notice, at 11:05 a.m., in room 1324, Longworth House Office Building, Hon. Teresa Leger Fernández [Chairwoman of the Subcommittee] presiding.

Present: Representatives Leger Fernández, Gallego, San Nicolas, Stansbury; Obernolte, Radewagen, Carl, and Rosendale.

Ms. LEGER FERNÁNDEZ. The Subcommittee for Indigenous Peoples of the United States will now come to order. The Subcommittee is meeting today to hear testimony on Examining *Oklahoma v. Castro-Huerta*: The Implications of the Supreme Court's Ruling on Tribal Sovereignty.

Under Committee Rule 4(f), any oral opening statements at hearings are limited to the Chair and the Ranking Minority Member or their designees. This will allow us to hear from our witnesses sooner and help Members keep to their schedules.

Therefore, I ask unanimous consent that all other Members' opening statements be made part of the hearing record if they are submitted to the Clerk by 5 p.m. today or the close of the hearing, whichever comes first. Hearing no objection, so ordered.

Without objection, the Chair may also declare a recess subject to the call of the Chair. Hearing no objection, so ordered.

As described in the notice, statements, documents, or motions must be submitted to the electronic repository at HNRCDocs@mail.house.gov. Members physically present should provide a hard copy for staff to distribute by e-mail.

Please note that Members are responsible for their own microphones. As with our fully in-person meetings, Members can be muted by staff only to avoid inadvertent background noise.

Finally, Members or witnesses experiencing technical problems should inform Committee staff immediately. I would also like to thank the Ranking Member for the change of time so that we could try to get the testimony in considering the votes we will be having this afternoon.

I will begin by recognizing myself for my opening statement.

STATEMENT OF THE HON. TERESA LEGER FERNÁNDEZ, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW MEXICO

Ms. LEGER FERNÁNDEZ. Good morning. Thank you all for joining us today at this important oversight hearing titled, "Examining *Oklahoma v. Castro-Huerta*: The Implications of the Supreme Court's Ruling on Tribal Sovereignty."

As many remember, the 2020 landmark U.S. Supreme Court ruling in *McGirt v. Oklahoma* recognized that Congress had never disestablished the Creek Reservation in Eastern Oklahoma, reaffirming that it remained Indian Country.

The *McGirt* ruling was a victory for tribes across the country as it indicated the Court's commitment to upholding treaty rights through historic legal precedent.

Unfortunately, 2 years later, the Court's ruling this summer in *Oklahoma v. Castro-Huerta* now serves as a sharp contrast to the *McGirt* ruling. In a 5-4 majority opinion, the Court determined that state governments maintain inherent concurrent criminal jurisdiction over Indian Country.

More importantly, for many, the *Castro-Huerta* case overturned almost 200 years of precedent that was known as the Marshall Trilogy.

I learned this when I first started practicing law because it is seen as the bedrock foundation of Indian law. I don't know how many times I cited the trilogy in my cases.

Worcester v. Georgia, the third case in the trilogy, was decided in 1832, which as Justice Gorsuch stated in his dissent, "established the foundational rule that Native American tribes retain their sovereignty unless and until Congress ordains otherwise."

The Marshall Trilogy of cases underpins not only recognition of tribal-state criminal relations, but many other foundational legal precedents governing tribal-state relationships in a wide range of circumstances. It is often cited not just for criminal law, but also very much, in fact, sometimes more often in the civil contest.

So, the *Castro-Huerta* case, understandably, sent shockwaves across Indian Country and in the legal community, which understood its potential vast implications.

The Missing and Murdered Indigenous Women and People Crisis, the aftermath of the *McGirt* case, and many other examples of the Federal Government's failure to recognize its trust responsibilities to investigate and prosecute crimes in Indian Country, are rooted in the Federal Government's failures to adequately fund and prioritize the safety of tribal communities.

Castro-Huerta has broad implications for Indian Country, implications that vary deeply amongst tribes. Until *Castro-Huerta*, states were largely excluded from Indian Affairs unless Congress provided otherwise.

Today, we are here to listen and to learn what this decision means from tribal leaders, from the Administration, and from experts in the field.

This is the beginning of our discussion on *Castro-Huerta*. This hearing is not to advocate a particular solution or a particular piece of legislation. It is meant to better understand the nuances and impacts of the decision.

The Court's expansion of state criminal jurisdiction may add greater uncertainty over whom tribal citizens may or should call in response to a public safety emergency, what police force may be allowed to respond, and what authority tribes and tribal victims may look to prosecute a case.

Prior to *Castro-Huerta*, existing jurisdictions in Indian Country were already complicated. The standard framework consisted of the Federal Government maintaining criminal jurisdiction, alongside tribal governments, depending on the offenses committed, and the legal status of both victim and the offender.

Exceptions to this framework, such as Public Law 280 states, existed. But, importantly, though, Congress, not the Supreme Court, enacted those exceptions. Congress retained the authority to decide how and when the state was authorized to operate within tribal lands.

So, *Castro-Huerta* has complicated this existing patchwork of jurisdictions by adding in state authorities, leading to uncertainties that I discussed earlier.

Tribal governments already face a variety of public safety crises, some of those issues we have discussed in this Committee.

There are concerns about the Murdered and Missing Indigenous People Crisis being run, the lack of jurisdictional authority to respond or prosecute because of *Oliphant*, and just the lack of resources for their judiciary branch and their police branches.

We know that the precise impacts of this case will look different for each tribe. That is why it is important for us to have this hearing today. Our witnesses hail from across the country and represent different legal perspectives, as well as different legal nations.

I am grateful that we will hear testimony from the Cherokee Nation, where the *Castro-Huerta* case originated, and from another Oklahoma tribe, the Muscogee Creek Nation, where the *McGirt* decision originated.

Supreme Court cases rarely confine their impact to the jurisdictions where they originate. Indeed, the Supreme Court's decision to take a case often is precisely because of the national impact. Tribes in P.L. 280 states and tribes in non-P.L. 280 states, who have fought intense battles within their states to protect tribal sovereignty from state intrusion are also present here today. We will hear also, finally, from legal experts, and in our first panel from the Administration, about the impacts that *Castro-Huerta* may have in Indian Country and more broadly.

Once again, I look forward to this discussion. I want to again thank the witnesses for their presence here today to share their expertise.

[The prepared statement of Ms. Leger Fernández follows:]

PREPARED STATEMENT OF THE HON. TERESA LEGER FERNÁNDEZ, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW MEXICO

Good morning. Thank you all for joining us today at this important oversight hearing titled, "Examining *Oklahoma v. Castro-Huerta*: The Implications of the Supreme Court's Ruling on Tribal Sovereignty."

As many remember, the 2020 landmark U.S. Supreme Court ruling in *McGirt v. Oklahoma* recognized that Congress had never disestablished the Creek Reservation in eastern Oklahoma, reaffirming that it remained Indian Country.

The *McGirt* ruling was a victory for tribes across the country, as it indicated the Court's commitment to upholding treaty rights through historic legal precedent.

Unfortunately, two years later the Court's ruling this summer in *Oklahoma v. Castro-Huerta* now serves as a sharp contrast to the *McGirt* ruling. In a 5–4 majority opinion, the Court determined that state governments maintain inherent concurrent criminal jurisdiction over Indian Country.

More importantly for many, the *Castro-Huerta* case overturned almost 200 years of precedent that was known as the Marshall Trilogy that is at the bedrock foundation of Indian law. *Worcester v. Georgia*, the third case in the trilogy, was decided in 1832, which as Justice Gorsuch stated in his dissent, established the foundational rule that Native American tribes retain their sovereignty unless and until Congress ordains otherwise.

The Marshall Trilogy underpins not only recognition of tribal-state criminal relations, but many other foundational legal precedents governing tribal-state precedent. This trilogy of cases also implicates Federal-state relationships in a wide range of circumstances.

Castro-Huerta, understandably, sent shock waves across Indian Country and in the legal community, which understood its potential vast implications.

The murdered and missing Indigenous peoples crisis, the aftermath of the *McGirt* case, and many other examples of the Federal Government's failure to recognize its trust responsibilities to investigate and prosecute crimes in Indian Country are rooted in the Federal Government's failures to adequately fund and prioritize the safety of tribal communities.

The implications of *Castro-Huerta* vary deeply amongst tribes. Until *Castro-Huerta*, states were largely excluded from Indian Affairs unless Congress provided otherwise.

Today, we are here to listen. To learn what this decision means from tribal leaders and experts themselves. This is the beginning of our discussion on *Castro-Huerta*. This hearing is not to advance particular solutions or legislation. It is to better understand the nuances and impacts of the decision.

The Court's expansion of state criminal jurisdiction may add greater uncertainty over whom tribal citizens may call in response to a public safety emergency, what police force may be allowed to respond, and what authority may prosecute a case.

Prior to *Castro-Huerta*, existing jurisdictions in Indian Country were already complicated. The standard framework consisted of the Federal Government maintaining criminal jurisdiction alongside tribal governments depending on the offenses committed and the political status of both the offender and victim.

Exceptions to this framework—such as Public Law 280 States—existed. Importantly, though, Congress, not the Supreme Court, enacted these exceptions.

Castro-Huerta has complicated this existing patchwork of jurisdictions by adding in state authorities, leading to uncertainty about who will address tribal public safety concerns on the ground.

Tribal governments already face a variety of public safety crises—the murdered and missing Indigenous peoples crisis being one—for which they lack jurisdictional authority to respond or prosecute because of *Oliphant*.

As I noted earlier, the precise impacts of this case will look different for each tribe. That's why it's important for us to have this hearing today. Our witnesses hail from across the country and represent different legal perspectives, as well as different tribal nations.

I am grateful that we will hear testimony from the Cherokee Nation, where the *Castro-Huerta* case originated, and from another Oklahoma Tribe, the Muscogee Creek Nation where the *McGirt* decision originated.

Supreme Court cases rarely confine their impact to the jurisdictions where they originate. Indeed, the Supreme Court's decision to take a case often is precisely because of the national impact. Tribes in P.L. 280 states and tribes in non-P.L. 280 states who have fought intense battles within their states to protect tribal sovereignty from state intrusion are also present here today. We will also hear from legal experts and the administration about the impacts that *Castro-Huerta* may have in Indian Country and more broadly.

I look forward to this discussion and want to again extend my thanks to the witnesses for being present today.

Ms. LEGER FERNÁNDEZ. I would now like to recognize Ranking Member Obernolte for his opening statement.

STATEMENT OF THE HON. JAY OBERNOLTE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. OBERNOLTE. Thank you very much, Madam Chair. And thank you for convening this hearing on what is really an extremely critical topic, the topic of whether or not states have criminal jurisdiction to prosecute crimes committed against Indians by non-Indians in Indian Country.

This *Huerta* decision really has the potential of attacking tribal sovereignty in a lot of different parts of the country. Certainly, it reaches far beyond just the territorial dispute that is going on in Eastern Oklahoma.

I think that a couple of things should guide our discussion when we are talking about this important topic. First of all, the respect for tribal sovereignty which I think is something that everyone on the Subcommittee shares.

But, also, a conviction to avoid the kind of legal chaos that resulted after the *McGirt* Supreme Court decision. We had thousands of cases that were refiled in tribal and Federal courts after that, on criminal convictions that had occurred years in the past. So, I think it is important that we think about the implications of decisions that we might make in that respect.

And I would also like to ask that we consider the feelings and the well-being of the victims of these crimes and of their families. Because when we allow a criminal case to be retried, we are essentially dragging all of those victims and their families through what, for many of them, was the worst experience of their life. So, I am hopeful that we can remember those victims when we have this discussion.

And I also would like to make the point that all of this legal chaos, from *McGirt* all the way to *Castro-Huerta*, could have been avoided had Congress done its job.

Our job as lawmakers is to be explicit when we write laws. And because of the ambiguity that has persisted surrounding this issue, we are having courts issuing conflicting opinions in different jurisdictions which is exactly the kind of thing that a nation who respects the rule of law should be trying to avoid.

And if you look at the *Castro-Huerta* decision, I mean it is really a fascinating exercise in exactly this problem. Because you have Supreme Court Justices on both sides of the issues, making what seemed to be very legitimate and well-reasoned arguments that completely contradict each other.

So, I am very glad we are having this hearing. I am hopeful that perhaps this can catalyze Congress to be explicit about what its intentions are toward the prosecution of crimes in Indian Country and explicit about what the boundaries of reservations are which could have avoided the chaos of *McGirt*, and what exactly the jurisdictions of states are to perform these criminal prosecutions which could have avoided now the chaos that we have in *Castro-Huerta*.

So, I want to thank all of the witnesses that we have here today. I think this is exactly the right way to go about having this discussion, to start by listening to the people who would be affected. I also am glad that we are being deliberate because, obviously, it has only been 12 weeks since the Supreme Court decision was handed

down. I think it is going to take some time for Congress to process this issue.

But I am hopeful that at the end of this discussion, we can come up with some concrete rules that will clarify this issue for everyone, which would be Congress doing its job and not allowing the throwing it open to interpretation by the courts, which I think is something that should be avoided. So, I want to thank you, Madam Chair. I yield back.

[The prepared statement of Mr. Obernolte follows:]

PREPARED STATEMENT OF THE HON. JAY OBERNOLTE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Good afternoon and thank you, Madam Chair. As you mentioned, the Subcommittee will be receiving testimony on the effect of the June 2022 U.S. Supreme Court ruling in *Oklahoma v. Castro-Huerta*.

In *Oklahoma v. Castro-Huerta*, the court held that states have inherent concurrent jurisdiction over non-Indians when they commit crimes against Indians in Indian Country. I'll note that I'm using the terms Indian, non-Indian, and Indian Country within their legal meanings here and do not intend them to be pejorative.

But I think we also need to be clear about what we are speaking about here during this hearing and use the proper legal terms when necessary. The *Castro-Huerta* decision mitigates the effects of the 2020 Supreme Court decision of *McGirt v. Oklahoma*.

That decision held that the Muscogee Creek reservation was never clearly disestablished by Congress.

Oklahoma courts then held that the Cherokee, Choctaw, Seminole, and Chickasaw reservations, along with the Muscogee reservation were never disestablished by Congress.

This had the legal effect of declaring that most of eastern Oklahoma is Indian Country, which had an immediate impact on what kind of criminal jurisdiction—federal, state, or tribal—existed, both going forward and looking back.

Many Oklahoma State criminal convictions are being challenged because of this change of the status of the land in eastern Oklahoma. And many convictions have also been dismissed from state jurisdiction and have been or are being refiled in federal and tribal courts.

Castro-Huerta obviously will practically affect what cases and convictions from Oklahoma must be retried in federal and tribal courts because of the *McGirt* decision. It is less clear how both Supreme Court decisions may impact other states and other tribes with lands outside of the eastern part of Oklahoma.

I look forward to hearing concrete, current examples of what some of our witnesses will have to say on that.

I'll also note that we are having this hearing less than 12 weeks after the *Castro-Huerta* decision was handed down.

Respectfully, I do not think that is enough time for the Five Tribes, the state of Oklahoma, other states and tribes to fully grapple with what is a way forward and what is the best solution for tribes, states, and victims of crime. And, through all these discussions and testimony today, I believe we should remember the practical effects on victims and families of victims that in many cases are now being asked to relive what likely was the worst day of their lives.

I want to thank our witnesses for being here today and look forward to their testimony.

Ms. LEGER FERNÁNDEZ. Thank you very much, Ranking Member Obernolte. Now I would like to transition to our first witness panel for today. Under our Committee Rules, oral statements are limited to 5 minutes, but you may submit a longer statement for the record if you choose.

When you begin, the on-screen timer will begin counting down, and it will turn orange when you have 1 minute remaining. I recommend that Members and witnesses joining remotely lock the timer on the screen.

When you go over the allotted time, I will tap my gavel and kindly ask you to please wrap up your statement. After your testimony is complete, please remember to mute yourself to avoid any inadvertent background noise.

The Chair now recognizes the Honorable Bryan Newland, who is the Assistant Secretary for Indian Affairs at the U.S. Department of the Interior. Assistant Secretary, the floor is yours.

STATEMENT OF THE HONORABLE BRYAN NEWLAND, ASSISTANT SECRETARY FOR INDIAN AFFAIRS, U.S. DEPARTMENT OF THE INTERIOR, WASHINGTON, DC

Mr. NEWLAND. Thank you, Madam Chair. And good morning, Ranking Member, and members of the Committee. My name is Bryan Newland. I have the privilege of serving as Assistant Secretary for Indian Affairs at the Department of the Interior. I appreciate the invitation and the opportunity from the Committee to appear here this morning to share our views on this important case.

Throughout the history of this country, criminal jurisdiction in Indian Country has proven to be quite complex. A number of variables determine whether a tribe, the Federal Government, or the state have jurisdiction to prosecute crimes committed in Indian Country.

These include the tribal affiliation of the offender, the tribal affiliation of the victim, as well as the land status of the crime scene. Any change in one of these variables will change who exercises criminal jurisdiction.

And this complex maze was developed largely through judicial decisions, and it has made it difficult for tribal governments to police tribal communities.

Congress, working with the executive branch and tribes, has legislated to clarify criminal jurisdiction in Indian Country. And in the past half-century, the trend in these statutes has been to affirm tribal sovereignty and to strengthen the ability of tribal governments to protect communities in their reservations.

In fact, Congress has acted on at least seven different occasions in the last half-century to strengthen and affirm tribal criminal jurisdiction within Indian Country, often in response to Supreme Court decisions.

The Court's decision in *Castro-Huerta*, for the first time in the history of this country, gave states criminal jurisdiction over crimes committed against Indian people by non-Indians within every reservation in every state. The *Castro-Huerta* opinion creates uncertainty across Indian Country.

State prosecutors may now accept or decline cases involving crimes committed by non-Indians against Indians in Indian Country without getting the consent of the tribe. This invites further conflict, and it diminishes the ability of tribes to coordinate with Federal agencies on public safety priorities within their communities.

The Department is reviewing the effects of this decision in determining how to further our trust obligations to protect tribal sovereignty, self-determination, and how to strengthen tribal jurisdiction.

Centuries of interactions between tribes and states have shown that a delicate relationship exists between the two. Under Public Law 280, we have seen the difficulty of concurrent Federal and state jurisdiction in Indian Country. Tribes in P.L. 280 states have repeatedly told the Department that state resources don't always make it to their communities. Many tribes have built up their own law enforcement capacity and have successfully retroceded from Public Law 280, reinstating concurrent Federal and tribal jurisdiction.

Castro-Huerta not only disrupts the process that Congress established for allocating criminal jurisdiction between tribes and states, but it has the potential to spread these challenges to tribes located in non-Public Law 280 states. Tribes have repeatedly proven that they can best meet the public safety and justice needs of their reservations. Congress has agreed and has affirmed the principle of tribal self-determination repeatedly in the last half-century.

In the 2013 and 2022 bylaw reauthorizations, Congress created a path for tribes to exercise criminal jurisdiction in certain cases over non-Indians. And it is a Federal trust obligation to assist tribes in meeting VAWA standards for expanded criminal jurisdiction.

It is also important to note that Congress has paired its legislation affirming tribal jurisdiction and sovereignty with increased investments in tribal law enforcement agencies and tribal courts. This includes an additional $62 million in funds to support tribes in Oklahoma after the *McGirt* decision. Recent increases in funding have strengthened Federal and tribal law enforcement capacity across Indian Country.

Next week, the Department of the Interior and the Department of Justice are hosting two listening sessions with tribes to discuss the Supreme Court's *Castro-Huerta* decision. We are seeking comments on a number of questions related to the outcome of the case.

As trustee to tribes, the Department will continue to prioritize and reinforce tribal sovereignty, tribal self-determination, and tribal jurisdiction to ensure public safety can be realized across Indian Country.

So, Madam Chair, Mr. Ranking Member, and members of the Subcommittee, I want to thank you again for the opportunity to be here today to provide the Department's views. I am happy to answer any questions you may have.

[The prepared statement of Mr. Newland follows:]

PREPARED STATEMENT OF BRYAN NEWLAND, ASSISTANT SECRETARY FOR INDIAN AFFAIRS, UNITED STATES DEPARTMENT OF THE INTERIOR

Good afternoon, Chair Leger Fernández, Ranking Member Obernolte, and Members of the Subcommittee. My name is Bryan Newland, and I serve as the Assistant Secretary for Indian Affairs at the U.S. Department of the Interior (Department). Thank you for the opportunity to present the Department's testimony at this important oversight hearing, "Examining *Oklahoma v. Castro-Huerta*: The Implications of the Supreme Court's Ruling on Tribal Sovereignty."

Background

Throughout the history of the United States, the jurisdictional framework between Indian Tribes, the federal government, and states has proved to be complex, especially as it relates to criminal jurisdiction. Both Congress and the courts have tied criminal jurisdiction in Indian Country to variables such as the type of crime perpetrated, the Tribal affiliation of the criminal defendant, the Tribal

membership status of the victim, and the landownership status of the crime scene. All of these variables must be determined before it is known whether a Tribal government, the federal government, a state, or some combination of these entities, may exercise criminal jurisdiction.

Congress, working with the Executive Branch and Tribes, has legislated to affirm, assign, or clarify criminal jurisdiction in Indian Country. In the past half-century, the trend in these statutes has been to affirm Tribal sovereignty and clarify and strengthen the ability of Tribal governments to protect public safety within their reservations. Those enactments include:

- the 1968 amendments to Public Law 83-280 (Public Law 280), which allows States to obtain criminal jurisdiction in Indian Country only with the consent of an Indian Tribe through a special election;
- the 1991 amendments to the Indian Civil Rights Act, which affirm the Tribes' inherent criminal jurisdiction over non-member Indians;
- the 2010 Tribal Law and Order Act, which enhanced the criminal sentencing authority of Tribal courts;
- the 2013 reauthorization of the Violence Against Women Act, which recognized and affirmed Tribes' inherent jurisdiction to prosecute non-Indians for certain crimes committed in Indian Country;
- the 2019 enactment of Savanna's Act, which closed gaps in law enforcement investigations and data reporting to improve the ability of federal and Tribal agencies to address instances of missing and murdered Indigenous people;
- the 2019 enactment of the Not Invisible Act to create a Commission to study and report on improving intergovernmental coordination for Tribal, federal, and state law enforcement and strategies to improve resources for survivors and victims' families ; and
- the 2022 reauthorization of the Violence Against Women Act, which expanded the recognition and affirmation of Tribes' inherent jurisdiction to prosecute non-Indians for additional crimes committed in Indian Country and authorized an Alaska pilot program under which the Attorney General may designate participating tribes to exercise criminal jurisdiction over non-Indians who commit covered crimes.

In addition, President Biden issued Executive Order 14053, Improving Public Safety and Criminal Justice for Native Americans and Addressing the Crisis of Missing or Murdered Indigenous People on November 15, 2021, to improve the coordination of federal agencies' work with Tribes to improve public safety in Tribal communities.

Castro-Huerta

On June 29, 2022, the U.S. Supreme Court decided *Oklahoma v. Castro-Huerta*, 142 S.Ct. 2486 (2022). The decision drastically altered the status quo, overturning nearly 200 years of law enforcement practice nationwide where federal jurisdiction over crimes committed by non-Indians against Indians in Indian Country has always been exclusive of state jurisdiction. In *Castro-Huerta*, the Court upended settled law, holding for the first time, "that the federal government and states have concurrent jurisdiction over crimes committed by non-Indians against Indians in Indian Country." *Id.* at 2504.

According to the *Castro-Huerta* decision, because of *McGirt v. Oklahoma*, 591 U.S. ___, 140 S.Ct. 2452 (2020)—a recent Supreme Court decision which held that the Creek reservation remained intact and was never disestablished—the "classification of eastern Oklahoma as Indian Country has raised urgent questions about which government or governments have jurisdiction to prosecute crimes committed there." *Castro-Huerta*, 142 S.Ct. at 2492. The Court granted certiorari to decide *Castro-Huerta* "[i]n light of the sudden significance of this jurisdictional question for public safety and the criminal justice system in Oklahoma." *Id*.

While *McGirt*'s impacts were limited to Oklahoma, *Castro-Huerta* has national implications, altering the previously-settled understanding of state jurisdiction throughout Indian Country.

Castro-Huerta has introduced additional complexities for Tribal governments and Indian victims as they seek to determine who is responsible for ensuring public safety on Tribal lands. The Department is working to understand the implications of this decision, and to determine how to continue our work to fulfill our treaty, trust, legal, and moral obligations to promote Tribal sovereignty, Indian self-determination, and strengthen Tribal jurisdiction.

Impact of *Castro-Huerta* on Public Safety in Indian Country

The *Castro-Huerta* opinion injects uncertainty into Indian Country. State prosecutors may now accept or decline cases involving crimes committed by non-Indians against Indians in Indian Country without obtaining consent from the Tribe, as Congress explicitly required for states to exercise such jurisdiction under the Public Law 280 framework. If state prosecutorial activity conflicts with the exercise of Tribal and federal jurisdiction and public safety goals, that conflict will come at the expense of communities on Indian reservations. State actions at odds with Tribal and federal public safety needs and priorities will confuse the public, add conflict to the already fragile relationships between Indian Tribes and states, and abet increased crime in Indian Country.

Tribal-State Relationships

Tribal nations are pre-existing sovereigns over which states have historically lacked authority. One of the roles of the federal government, since the time of this Nation's founding, has been to protect Tribal nations from state regulation, intrusion, and overreach. Centuries of interactions between Indian Tribes and states have shown that a delicate relationship exists between the two. Under Public Law 280, the mechanism established by Congress for certain states to acquire criminal jurisdiction over parts of Indian Country, we have seen first-hand challenges with the exercise of state jurisdiction in Indian Country. At times, some states have limited or denied public safety services to Tribal communities, leaving Tribes without coverage. Tribes in the six mandatory Public Law 280 states (Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin) and in other states that Congress has allowed to exercise criminal jurisdiction in Indian Country have repeatedly told the Department that state resources do not always filter to their communities and that coordination of law enforcement is challenging and inadequate. Many Tribes in these states are dissatisfied with state jurisdiction over criminal matters on their lands. As a result, many Tribes have proactively built up their own law enforcement capacity and have worked with states to successfully retrocede from Public Law 280—limiting jurisdiction to that of the federal government and the Tribe with the state's support. *Castro-Huerta* not only disrupts the process Congress established for allocating criminal jurisdiction between Tribes and states, but it has the potential to spread the above enumerated challenges to Tribes located in non-Public Law 280 states.

Tribes are Their Own Best Stewards

Time and time again, Tribes have proven that they can best meet the public welfare and safety needs of communities on their reservations. To that end, the Department supports energized investment in Tribal justice systems, infrastructure, and law enforcement. In the 2013 and 2022 Violence Against Women Act (VAWA) reauthorizations, Congress created a path for Tribal justice systems to exercise criminal jurisdiction in certain cases over non-Indians. It is a trust and moral obligation for the United States to assist Tribes in achieving VAWA's necessary and complex prerequisites to be eligible for such jurisdiction.

Congress has paired its legislation affirming Tribal jurisdiction and sovereignty with increased investments in Tribal law enforcement agencies and Tribal courts in recent years. This includes an additional $62 million in funds for Bureau of Indian Affairs (BIA) to support Tribes in Oklahoma to enhance public safety in the wake of the *McGirt* decision. Recent increases in funding have increased the BIA's and Tribal law enforcement capacity in Indian Country to improve public safety in Indian Country.

Conclusion

The Department of the Interior and the Department of Justice are hosting two listening sessions with Indian Tribes to discuss the Supreme Court's *Castro-Huerta* decision on September 26 and 27, 2022. Specifically, the Departments are seeking comments on the impact of the decision on Tribal law enforcement and justice systems, whether the decision impacts standing cooperative agreements or processes with state or federal agencies, and what the Tribal-specific reactions are to the decision, including views about concurrent state criminal jurisdiction in Indian Country.

As a trustee to Indian Tribes, the Department of the Interior continues to prioritize and reinforce Tribal sovereignty and self-determination, including working to protect Indian territorial integrity and ensure public safety can be realized across Indian Country.

Chair Leger Fernández, Ranking Member Obernolte, and Members of the Subcommittee, thank you for the opportunity to provide the Department's views. The Department looks forward to working with Congress to affirm Tribal sovereignty and public safety within the boundaries of Tribal lands. I look forward to answering any questions that you may have.

QUESTIONS SUBMITTED FOR THE RECORD TO HON. BRYAN NEWLAND, ASSISTANT SECRETARY FOR INDIAN AFFAIRS, U.S. DEPARTMENT OF THE INTERIOR

The Honorable Bryan Newland did not submit responses to the Committee by the appropriate deadline for inclusion in the printed record.

Questions Submitted by Representative Leger Fernández

Question 1. As Assistant Secretary for Indian Affairs, what is the agency's view of the Castro-Huerta ruling?

(1a). In addition to the listening sessions referenced in your testimony, how is the Department working to communicate with and assist tribal governments in the aftermath of the Castro-Huerta ruling?

Questions Submitted by Representative Grijalva

Question 1. Can you elaborate on how the Department of Interior is working with the Department of Justice to address the concerns of tribal leaders regarding the Castro-Huerta ruling?

Questions Submitted by Representative Westerman

Question 1. Lead Up: In your recent testimony before the Senate Committee on Indian Affairs, you mentioned that the Department was providing Technical Assistance on legislative efforts related to the Castro-Huerta decision.

(1a). Does the Department of the Interior support a legislative efforts that would alter the current criminal jurisdiction states possess in Indian Country post-Castro-Huerta?

(1b). What specific actions has the Department of the Interior taken since the Castro-Huerta decision was handed down in regard to public safety in Indian Country and what other actions are being contemplated for the future?

Question 2. How is the Department of the Interior coordinating with the Department of Justice on future actions that may be taken and policy recommendations for Congress to consider?

Ms. LEGER FERNÁNDEZ. Thank you so much for your testimony here today. I am going to remind Members that Committee Rule 3(d) imposes a 5-minute limit on questions. The Chair will now recognize Members for any questions they may wish to ask the witness. I will start by recognizing myself for 5 minutes.

Thank you again, Assistant Secretary. This is the second time you have been before the Committee in less than a week. We know we have a lot to cover. So, I wanted to pick up on the statement with regards to VAWA and Congress did give tribes additional authority to prosecute in those cases, right?

We have heard, and some of the testimony we believe we will be hearing later today, points out that in some states, they have already decided, or at least this was out of Oklahoma, that they are not being referred. That the tribes aren't getting referrals of our cases, of abuse against children, of abuse against women.

What have you heard out there regarding the immediate impact from the *Castro-Huerta* case in terms of those referrals which I think are key? Because as you pointed out, tribes, tribal leaders, tribal government is the closest to the family, the women, the children that are being impacted.

Mr. NEWLAND. Thank you, Madam Chair. The main thing that we have been hearing in light of this case is confusion and stories about the potential to create more conflict in public safety in Indian Country.

Prior to serving in this role, I served as an elected tribal leader and also as a tribal court judge. And tribal officials are often charged with setting policy for their communities on the reservation. And just like state legislatures and just like Congress, that is always based on conversation and feedback from constituents.

And in light of this case now, we see the ability of states to come in and exercise jurisdiction over cases like this without tribal consent. So, it disrupts the ability of tribal officials to set the public policy priorities within their reservations. And it removes the leverage that they have to cooperate with their neighboring communities and neighboring jurisdiction.

So, the themes that we have been hearing after this case are confusion and the potential for this case to invite more conflict.

Ms. LEGER FERNÁNDEZ. That is interesting, the point you are making about that. What we want to see is more opportunity for collaboration and cooperation. I mean we have seen that whenever different law enforcement agencies cooperate, Federal-state, tribal-Federal, state-local, it is the cooperation that often leads to the breakthrough, because a perpetrator is not necessarily going to stay within one jurisdiction.

So, you are saying that the worry is that this will now rather than enhancing, it will undermine. Is that correct?

Mr. NEWLAND. That is correct.

Ms. LEGER FERNÁNDEZ. Can you share with us? I do look forward to receiving feedback on your listening sessions. I am glad that we are all engaged in determining what the impacts are. But can you share with us any thoughts that the Department has with regards to providing additional law enforcement support and resources to tribal governments and how that might have changed your calculus after *Castro-Huerta*?

Mr. NEWLAND. Thank you, Madam Chair. We have been working with Congress and with Indian Country to increase funding for public safety across Indian Country and within tribal communities. In my work, in this role, far and away, the No. 1 thing I hear from tribal leaders is about the need to do better in working together on public safety issues in tribal communities. That has been a consistent theme no matter where I have visited in every region of the country.

So, we have been working again with Congress to increase that funding, to increase resources to tribal governments, and to also support them in the exercise of their criminal jurisdiction to ensure safe communities.

Ms. LEGER FERNÁNDEZ. Thank you. And in these listening sessions that you are going to be doing, will you be conducting

those as official government-to-government consultation or as listening sessions?

Mr. NEWLAND. Madam Chair, these are titled listening sessions and the distinction will allow us to hear also from scholars and legal advocates as well as tribal leaders. Of course, we always want to engage directly in a government-to-government relationship and that will be a part of these listening sessions.

Ms. LEGER FERNÁNDEZ. And I take it that after the listening sessions, have you already begun the work to provide guidance to tribal governments following *Castro-Huerta*?

Mr. NEWLAND. We have not. We want to hear from Indian Country first. Then, of course, we have to work together with the Department of Justice before proceeding.

Ms. LEGER FERNÁNDEZ. Well, I believe we all want to hear from the Department of Justice as well, and we look forward to having that opportunity in the future. So, thank you very much.

The Chair will now recognize the Ranking Member.

Mr. OBERNOLTE. Mr. Newland, it is very nice to see you again. It has only been a few days. It is great that the DOI is taking the step of conducting these listening sessions.

I wonder if you could fill us in on what contacts you have had from tribes outside of Oklahoma who are concerned about how the *Castro-Huerta* decision changes the jurisdiction of state prosecution of crimes.

Mr. NEWLAND. Thank you, Congressman. We have had meetings with tribal leaders from different regions of the country. In particular, we have had representatives from the Great Plains Tribal Chairman's Association tell us directly that they are worried about the impact of this decision and the potential for confusion in policing in their communities.

Mr. OBERNOLTE. And have you had contact with states that are now interested in pursuing criminal cases in Indian Country, I mean outside of the Public Law 280 instances that already exist?

Mr. NEWLAND. I have not.

Mr. OBERNOLTE. So, you obviously have a lot of experience in this issue. You have a good grasp of the cases, the decisions, and their implications. I am wondering if you could advise us in Congress as to what actions Congress should take in response to the *Castro-Huerta* decision. What would you advise us to do?

Mr. NEWLAND. Thank you, Ranking Member. Before I go so far as to recommend a path forward, I want to make sure we get feedback from Indian Country.

But on the whole, I think as we have tried to show in our testimony, we have had now since the self-determination era. Congress is led by both parties. Administrations from both parties have been very consistent in affirming the principle of self-determination and tribal sovereignty. And Congress has acted consistently to clarify and strengthen tribal jurisdiction within the boundaries of tribal reservations.

So, it will be in keeping with that trend and with the policy of self-determination for Congress, as you indicated in your opening remarks, to clarify and strengthen the ability of tribes to determine how public safety is protected in tribal communities. And the hallmark of that is consent.

And that is a law that Congress has already enacted more than 50 years ago, is to ensure that tribes have the ability to provide consent when other jurisdictions are acting within the boundaries of their reservations.

Mr. OBERNOLTE. OK. So, the issue of consent, I mean I think that is a great one. I mean, really, we already have that, right? Because when a tribe consents to have states bring criminal prosecutions in Indian Country, that is a completely different situation to a tribe that might want to try those cases itself.

So, how would we, in Congress, how would we act? What action would we take to strengthen the ability of tribes to consent and to protect tribal sovereignty in cases when they do not wish to?

Mr. NEWLAND. Again, Ranking Member, as part of our trust responsibility, I want to make sure that we are working with Indian Country to present solutions. I don't want to offer up specific solutions to the Subcommittee without first hearing from tribes. And I also want to make sure that when we do that, we have the Department of Justice at the table. They are going to be participating in these listening sessions.

But I think on the whole, again, Congress has been consistent in acting, many times in response to the Supreme Court, to defend its prerogative here to set the Federal Government's Indian Affairs policies. And in doing that, has worked with tribes and has worked with the executive branch in fulfilling those obligations.

Mr. OBERNOLTE. Right. Well, I completely agree with you on both of those issues. I do think that Congress needs to act deliberately, not immediately, but deliberately. And I applaud you for how thorough you have been in soliciting the input of everyone involved, and I think the DOJ also needs to be at the table.

And I also think that you brought up a very important point which is the protection of people should be at the forefront of the decisions that we make. And the worst thing that can happen is that crimes go unprosecuted. Crimes against Indians in Indian Country go unprosecuted. That is unacceptable. We absolutely cannot allow that to happen no matter what we do.

But I hope that the end of this process is Congress chooses to act. We do it deliberately. We do it fairly. And we do it explicitly so that we don't throw open the interpretations of the actions of Congress to the courts which I don't think serves anyone's interest. I want to thank you for your testimony. I yield back, Madam Chair.

Ms. LEGER FERNÁNDEZ. Thank you. The Chair will now recognize the gentleperson from Arizona, Representative Gallego.

Mr. GALLEGO. Thank you, Madam Chair. I want to start by thanking Chair Leger Fernández for calling this hearing, and by thanking our witnesses, especially the tribal leaders, for testifying.

Unfortunately, we are here today to examine yet another blow to tribal sovereignty in the form of the *Castro-Huerta* Supreme Court decision. On this Subcommittee, we spend much of our time righting past injustices and working toward a future where the Federal Government finally fully lives up to its trust responsibilities.

The *Castro-Huerta* decision makes this task even more difficult by undermining tribal sovereignty and unraveling hundreds of years of precedent around criminal jurisdiction in Indian Country.

Part of the Court's motivation for this decision appears to be that upholding tribal sovereignty, in this case, was an inconvenience. But we in this Committee know that upholding the trust responsibility isn't about convenience. It is about complying with the treaty obligations the United States is legally bound to do.

That is why I believe Congress must act swiftly to address *Castro-Huerta* before it is more harmful and disruptive, and its disruptive impacts can come to pass. I look forward today to hearing from tribal leaders directly about what they believe Congress' next steps should be in the wake of *Castro-Huerta*. With that, I have a couple of questions for our witnesses.

Assistant Secretary Newland, I appreciate that your written testimony spoke not only about clarifying the jurisdictional issues raised by *Castro-Huerta*, but also ensuring that tribes have the Federal support to build capacity for law enforcement and self-governance on their own land—a key element of combating the Missing and Murdered Indigenous Persons Crisis.

That is why later this week, I am planning to reintroduce the BADGES for Native Communities Act. The bill would support hiring personnel and resolving unmet needs for law enforcement in Indian Country. How is your department working to help build this capacity in Indian Country, especially post-VAWA reauthorization?

Mr. NEWLAND. Thank you, Congressman. And it is great to see you again. Secretary Haaland is passionate about this issue and has been forceful in directing us to work with the Department of Justice and under President Biden's Executive Order on public safety in Indian Country coordinating across agencies. And we know data is a key component to make sure that we have effective policing.

So, through the Not Invisible Act Commission and existing statutes that Congress has already enacted, we have been working with the Department of Justice to make sure that we are bridging those data gaps.

Mr. GALLEGO. A follow-up question, there is a concern that *Castro-Huerta*'s determination of concurrent state jurisdiction over major crimes committed in Indian Country will cause the Federal Government to pull out its law enforcement forces on tribal lands. Does the Department plan on doing this or have you heard of this concern?

Mr. NEWLAND. No. We don't plan to do that.

Mr. GALLEGO. Has there been any concern expressed by some of our tribal leaders in terms of have they expressed their concern to you?

Mr. NEWLAND. Not to me directly, Congressman. We don't have plans to pull out of Indian Country and let tribes fend for themselves on this, and I will defer to the tribal leader witnesses to share their views on that.

Mr. GALLEGO. Thank you. And, Assistant Secretary, just from my experience visiting tribal lands and visiting with our tribal law enforcement, you know there is a backlog even just in terms of tribal infrastructure, in terms of law enforcement buildings, for example, jails, prisons, as well as, of course, how hard it is to recruit these police officers to come and serve these communities that sometimes are far away from metropolitan areas.

So, of course, I just want to make sure I highlight that. Because you know they want and deserve security just like anybody else. And these types of court decisions really, I think, scare a lot of people into thinking that that may not happen.

With that, thank you, Madam Chair, and Ranking Member for hosting this.

Ms. LEGER FERNÁNDEZ. Thank you very much. The Chair will now recognize the gentleperson from the American Samoa, Representative Radewagen, for 5 minutes. Hello.

Mrs. RADEWAGEN. Thank you, Madam Chair. My question is for Mr. Newland as well. There have been some who have proposed ambitious legislative proposals and that action should be taken immediately, yet there are some tribes that have voiced restraint, and they are concerned about Congress acting too quickly.

What are your thoughts on the lack of unified position from tribes in Oklahoma and tribes throughout the United States?

Mr. NEWLAND. Thank you, Madam Congresswoman. I think it is important to affirm at the outset that while this case originated in Oklahoma, it is not confined to Oklahoma. That is why we are soliciting the views of tribal leaders and tribal attorneys and scholars across Indian Country on the best way to move forward.

I think that there needs to be deliberate and thoughtful action but, of course, with 576 federally recognized tribes, there is rarely uniformity on any one view. But it is going to be important that we get as much feedback as possible before recommending a path forward.

Mrs. RADEWAGEN. Thank you and I yield back the balance of my time.

Ms. LEGER FERNÁNDEZ. Thank you very much. Are there any other Members who wish to ask questions who have not asked questions? Seeing none, I would like to thank you very much for your testimony. We look forward to hearing feedback on your listening sessions and to continuing this conversation so that we can have deliberate, but actual congressional response.

We will now move on to our second witness panel. We will be transitioning to our second panel of witnesses today. And as they take their seats, I will remind non-Administration witnesses that they are encouraged to participate in the witness diversity survey created by the Congressional Office of Diversity and Inclusion. Witnesses may refer to their hearing invitation materials for further information.

Under our Committee Rules, oral statements are limited to 5 minutes, but you may submit a longer statement for the record if you choose. When you begin, the onscreen timer will begin counting down and will turn orange when you have 1 minute remaining.

I recommend that Members and witnesses joining remotely lock the timer on their screen. When you go over the allotted time, I will tap my gavel and kindly ask you to please wrap up your statement. After your testimony is complete, please remember to mute yourself to avoid any inadvertent background noise. I will allow the entire panel to testify before we begin the question portion of the hearing.

The Chair now recognizes the Honorable Jonodev Chaudhuri, who is the Ambassador for the Muskogee Creek Nation.

STATEMENT OF THE HONORABLE JONODEV CHAUDHURI, AMBASSADOR, MUSCOGEE CREEK NATION, OKMULGEE, OKLAHOMA

Mr. CHAUDHURI. [Speaking Native language.] Hesci.

Madame Chairwoman and members of the Committee, thank you for the opportunity to testify on the impacts of *Castro-Huerta* which are already manifesting themselves in numerous ways across all of Indian Country. My name is Jonodev Chaudhuri, and I am proud to serve as the Ambassador for the Muskogee Creek Nation, the fourth largest tribe in the United States.

I am joined today by our Attorney General, Geri Wisner, who is available to answer any questions here today or in QFRs related to public safety on our reservation.

Castro-Huerta requires immediate action. The risk of misapplication of the holding, either by the courts or important Federal agencies, is very high. And as a result, we need Congress to immediately signal its ongoing intent to adhere to honor its treaty and trust responsibilities.

As Justice Gorsuch noted in his dissent, when the founding framers drafted the Constitution, they took care to eliminate state power over tribes within their borders. The founding framers also saw fit to declare treaties, once signed by the President and ratified by the Senate, to be, "the supreme law of the land." The Constitution then tasked Congress with the exclusive role of managing relations with Tribal Nations.

As the Muscogee Creek Nation, we signed the very first treaty entered into under the Constitution as we know it today. In 1790, President George Washington gathered with Mvskoke leaders to sign the Treaty of New York. That treaty delineated the boundaries of the fledgling United States, as well as the duties, responsibilities, and obligations of the United States to my Nation.

The decision in *Castro-Huerta* dangerously infringes on Congress' ability to effectuate its treaty responsibilities and obligations to Tribal Nations.

In the modern era, Congress has in a consistent, bipartisan manner steadily worked to restore tribal sovereignty and secure tribal empowerment.

From the Indian Reorganization Act in 1934, to the Indian Child Welfare Act in 1978, from the 2010 Tribal Law and Order Act, to the 2013 and 2022 Reauthorization of the Violence Against Women Act, Congress' message has been clear.

The best and only real solution to addressing public safety in Indian Country is restoring tribal jurisdiction and sovereignty. *Castro-Huerta* undermines tribal jurisdiction and sovereignty by creating a false narrative that Native victims are best protected by the state. They are not.

And now post-*Castro-Huerta*, there is no law or mechanism requiring local county law enforcement agencies to inform Tribal Nations when they learn of crimes committed against Indian victims, even if the county agency ultimately declines to prosecute.

We are already receiving alarming reports that county officials are reluctant to do so. We will simply have no way to know about the crimes that are not being prosecuted. This is precisely the

public safety crisis Congress sought to avoid by passing VAWA 2022.

And although I know other voices testifying here today may tell you *Castro-Huerta* was necessary to address a public safety crisis, any actual crisis was entirely manufactured by the individual county sheriffs, prosecutors, and others who have not only refused to collaborate, but actively use criminal cases, and most disgustingly, victims as political proxies to create the illusions of a crisis.

The solutions to *Castro-Huerta* are clear. They are not new. Over a decade ago, the Tribal Law and Order Act Commission, created through bipartisan legislation and composed of bipartisan legal experts, traveled throughout Indian Country studying the public safety crisis and reported one overarching solution: restore tribal jurisdiction and authority.

The solution to the problems created by *Castro-Huerta* is not to study a problem we already understand. The solution is restoration of tribal jurisdiction and authority, plain and simple. Including the removal of outdated, misguided limitations imposed on the ability of Tribal Nations to ensure criminals receive sentences commensurate with the seriousness of the crimes they commit.

Following our victory in *McGirt*, the state spent millions, tens of millions of dollars to file over 30 cert petitions and hired multiple PR firms to create the perception that *McGirt* created a public safety crisis.

And as the Atlantic reported in an article published on April 26, 2022, the numbers backing up Oklahoma's public safety crisis claims have been nothing but hyperbole.

The Court's decision in *Castro-Huerta* constitutes an outcome determinative decision designed to appease one governor's misleading and false PR campaign against tribal sovereignty. The decision, however, has implications that extend far beyond Oklahoma.

As the Nation that has fought to preserve Indian Country's historic victory in *McGirt*, we understand what's at stake when states attempt to usurp Congress' exclusive management of Indian affairs.

The Court's misreading of the General Crimes Act and disregard for clear congressional intent only fans the flames of an already existing public safety issue throughout all of Indian Country.

We are asking Congress to take action.

[Speaking Native language.] Mvto.

I am available to answer questions.

[The prepared statement of Mr. Chaudhuri follows:]

PREPARED STATEMENT OF JONODEV CHAUDHURI, AMBASSADOR OF THE MUSCOGEE (CREEK) NATION

Hesci. Jonodev Osceola Chaudhuri Cvhecefkvtos. Hvsvketvmvset, Epofvnkv, Vmvlkvt Pormetvs.

Madame Chairwoman and members of the committee, thank you for the opportunity to testify on the impacts of *Castro-Huerta*, which are already manifesting themselves in numerous ways. My name is Jonodev Chaudhuri, and I am proud to serve as the Ambassador for the Muscogee (Creek) Nation, the fourth largest tribe in the United States.

The Court's decision in *Castro-Huerta* requires immediate action. The decision misinterprets congressional intent in the General Crimes Act, purports to overturn Indian law's most foundational precedent, *Worcester v. Georgia*, and threatens to

usurp Congress' constitutional role in legislating over Indian affairs. The risk of misapplication of the holding, either by courts or important federal government agencies, is very high, and as a result, we need Congress to immediately signal its ongoing intent to adhere to its trust responsibility to empower tribal nations in the wake of the Court's harmful and erroneous decision.

As Justice Gorsuch noted in his dissent, the Articles of Confederation originally reserved legislative authority over Indian affairs to the States. This, however, quickly proved chaotic and problematic, and so when our founding fathers drafted the Constitution, they took care to eliminate the Articles' carveout for state power over tribes within their borders. Our U.S. Constitution was deliberately drafted to grant Congress the exclusive power to legislate over the United States' sovereign-to-sovereign relationship with tribes. The founding fathers also saw fit to declare treaties, once signed by the President and ratified by the Senate, to be the "supreme Law of the Land." The Constitution, then, tasks Congress with the incredibly important task of ensuring that federal Indian law comports with the "supreme Law of the Land," or what we commonly refer to as the federal government's treaty trust duty and responsibility to empower tribal nations and tribal self-determination.

At the Muscogee (Creek) Nation, we know a little something about how and why the founding fathers assigned Congress this critical role in the Constitution. Indeed, the very first treaty entered into under the Constitution as we know it today was with the Muscogee (Creek) Nation. In 1790, President George Washington gathered with Mvskoke leaders in his own home to sign the Treaty of New York. That treaty delineated the boundaries of the fledgling United States, as well as the duties, responsibilities and obligations of the United States to my nation.

But the Court's decision in *Castro-Huerta* dangerously infringes on Congress's ability to exercise its constitutional authority and effectuate its treaty trust duties and responsibilities to tribal nations. Although United States history is replete with examples of federal Indian law and policy that undermine tribal sovereignty, in the modern era, Congress has—in a consistent bi-partisan manner—steadily worked to restore tribal sovereignty and secure tribal empowerment. From the Indian Reorganization Act in 1934, to the Indian Child Welfare Act in 1978, from the 2010 Tribal Law and Order Act to the 2013 and 2022 reauthorizations of the Violence Against Women Act, Congress' message has been clear: Congress is working steadily to restore the inherent sovereign authority of our tribal nations because Congress understands that the best and only real solution to addressing the public safety crisis in Indian Country is empowering tribal nations to ensure they are able to protect *everyone* within their borders, regardless of an individual's tribal citizenship status.

In VAWA 2022, Congress made very clear that no sovereign has a greater interest in protecting Indian children from non-Indian abusers than the child's tribal nation. And yet, despite the fact that Congress had recently restored this jurisdiction to tribal nations, the Court decided that states should be the ones to exercise this jurisdiction. Now, within the borders of our Reservation, certain local and county law enforcement agencies have decided that the Court's decision in *Castro-Huerta* means that they do not have to report crimes committed against our children to our Attorney General's Office for prosecution at the Muscogee (Creek) Nation. We are aware of District Attorneys who have authored memos stating that, because of *Castro-Huerta*, VAWA cases need not be referred to tribes, even if county prosecution is ultimately declined. It is our understanding that states will not be required to inform the United States Attorneys' Offices either. This is precisely the public safety crisis Congress sought to avoid by passing VAWA 2022.

The solutions to *Castro-Huerta* are clear. They are not new. Over a decade ago, the Tribal Law and Order Act Commission, created through bi-partisan legislation and composed of bi-partisan federal Indian law experts, traveled throughout Indian Country studying the public safety crisis and reported one overarching solution: restore tribal jurisdiction and authority. In 2013, the Commission reported that when tribal governments "are supported—rather than discouraged—from taking primary responsibility over the dispensation of local justice, they are often better, stronger, faster, and more effective in providing justice in Indian Country than their non-Native counterparts located elsewhere."

The solution to the problems created by *Castro-Huerta* is not to study a problem we already understand. It is not another commission. The solution is restoration of tribal jurisdiction and authority, full stop. Plain and simple. Including the removal of outdated, misguided limitations imposed on the ability of tribal nations to ensure criminals receive sentences commiserate with the seriousness of the crimes they commit.

Two years ago, the Supreme Court affirmed that when Congress passed legislation to make Oklahoma a state, Congress declined to destroy our Reservation.

Because of the Supreme Court's decision in *McGirt*, our Reservation remains in existence today. It is no secret that that the state of Oklahoma has sought to overturn our victory in *McGirt* since the day the decision came out. Initially, Oklahoma sought legislation in Congress that would have either disestablished our Reservation, or, significantly diminished our authority to exercise jurisdiction over it. Oklahoma's efforts failed. This Congress has repeatedly refused to abdicate its trust duties and responsibilities to protect and preserve the "supreme Law of the Land" as declared in our Treaty of 1866, and the hundreds of other treaties signed by the United States and tribal nations.

When Oklahoma could not convince Congress to eliminate our reservation, Oklahoma returned to the Court. The state spent tens of millions of dollars to file over thirty cert petitions and hired multiple PR firms to create the perception that *McGirt* created a public safety crisis. And, as the Atlantic reported in an article published on April 26, 2022, Oklahoma has dramatically inflated the number of convicted defendants Oklahoma claims to be releasing as a result of the Court's decision in *McGirt*. Ultimately, Oklahoma's numbers were demonstrated to be baseless, nothing but hyperbole. The real public crisis is not *McGirt*. It is Oklahoma's refusal to respect the sovereignty of tribal nations and cooperate with them when it comes to intergovernmental agreements and shared reporting.

And although the Supreme Court did decline Oklahoma's invitation to revisit its decision in *McGirt*, the Court's decision in *Castro-Huerta* constitutes an outcome determinative decision designed to appease one governor's misleading and false PR campaign against tribal sovereignty.

The decision, however, has implications that extend far beyond Oklahoma's borders. As the Nation that has fought to preserve Indian Country's historic victory in *McGirt*, we understand what is at stake when states attempt to usurp Congress' exclusive management of Indian affairs. As my colleagues on today's panel will explain, the *Castro-Huerta* Court's misreading of the General Crimes Act and disregard for clear congressional intent only fans the flames of an already existing public safety crisis throughout all of Indian Country. We are asking Congress to take action. Mvto.

QUESTIONS SUBMITTED FOR THE RECORD TO HON. JONODEV CHAUDHURI, AMBASSADOR, MUSCOGEE CREEK NATION

Questions Submitted by Representative Stansbury

Question 1. What can Congress do to hear from Tribal Nations in order to find a reasonable consensus in Indian Country to respond to Castro-Huerta?

Answer. Conversations have been happening all across Indian Country to understand the implications of the *Castro-Huerta* decision and discuss potential solutions for moving forward and it has become clear that a majority of Indian Country believes that legislation is urgently needed. Many are rallying around the attached Legislative Proposal to Improve Public Safety in Indian Country. This proposal is rooted in the decade old findings of the bipartisan Tribal Law and Order Act Commission, which concluded that empowering tribes is the best and only viable solution to improving public safety in Indian Country.

Consensus does not require unanimity. The proposed legislation would restore the voluntary mechanism that tribes fought for in the 1968 amendments to PL-280, resulting in a mechanism through which tribal nations could choose to exercise jurisdiction or to hand it off to the state or to exercise it concurrently. No tribe will be obligated to do anything they don't wish to do. As such, no tribe or group of tribes should be granted veto authority to prevent other nations from receiving this sovereign choice.

The legislative process in Congress is established to create consensus. Your recent oversight hearing was an excellent and beneficial first step. Immediate introduction of the *Legislative Proposal to Improve Public Safety in Indian Country* will provide a framework for tribal nations to offer input and feedback to negotiate the content and direction of the legislation as we move quickly to prevent agencies and courts from using the *Castro-Huerta* decision to worsen existing problems in Indian Country.

Questions Submitted by Representative Grijalva

Question 1. If you are able to, can you describe the Muscogee Creek Nation's relationship with Oklahoma's State government?

Answer. The relationship between the Muscogee (Creek) Nation (MCN) and the State of Oklahoma could be best characterized as unsteady depending upon the agency or entity involved. In some instances, MCN officials maintain deep relationships that facilitate coordination, particularly among fellow law enforcement officers. However, at the structural and policy level, the State's Governor has not only been uncooperative, but openly hostile to tribal nations exercising their inherent sovereignty. Rather than negotiate and coordinate, the Governor has studiously avoided cooperation and actively sought to leverage crime victims as props in a political campaign to overturn tribal jurisdiction. The environment created by his actions have caused others to follow his lead. Some District Attorneys have released prisoners into society instead of properly notifying tribes to ensure a secure transfer. We have seen similar impacts with a few law enforcement agencies. Historically, the government of Oklahoma has sought to eradicate the Muscogee (Creek) Nation, as well as other tribal nations, and unfortunately the current Governor seems set on repeating the most regrettable aspects of Oklahoma history.

(1a). How do you anticipate this relationship to affect the delivery of public safety services on the Nation's lands following the Castro-Huerta ruling?

Answer. The State of Oklahoma illegally exercised jurisdiction over reservations in Oklahoma for decades, and its track record speaks for itself. The State did not prioritize crimes against Natives, it did not properly allocate resources, and many cases went unaddressed. All of this happened before the State's Governor was actively seeking to undermine tribal jurisdiction. So it would seem fantastical to expect that the State would improve its performance in this environment under jurisdiction granted by a court decision that does not require any coordination with the tribal governments. In fact, we have already seen District Attorneys offering guidance to withhold Violence Against Women Act (VAWA) cases from tribes that have authority to prosecute them. Moving forward, tribes will have no assurances that they will even be notified that VAWA cases exist, nor is there any mechanism in place to ensure tribes know whether the state is choosing to prosecute or not. Likewise, there is no way to ensure that United States Attorneys Offices and other federal agencies will be notified if and when District Attorneys decline to prosecute a VAWA case. This ignores congressional intent in expanding VAWA jurisdiction for tribes and leaves Native victims vulnerable to the whims of hostile state politicians.

These facts are the driving force behind measures in the *Inter-Tribal Proposal to Improve Public Safety* (attached), a proposal tribal nations have collaboratively drafted to change the mechanism by which states may exercise jurisdiction on Indian lands and require them to do so in collaboration with tribal governments. Codified collaborative cooperation improves public safety. The current patchwork jurisdiction exacerbated by *Castro-Huerta* promotes disunity, abets political public safety decisions, and creates perverse incentives for state or federal agencies to continue to exclude, defund and weaken tribal law enforcement agencies and courts. All of this comes at the expense of public safety.

Question 2. Although the facts of Oklahoma v. Castro-Huerta are rooted in Oklahoma, can you describe why you are certain that this ruling will impact tribal governments throughout Indian Country?

Answer. There are many reasons why the Court's decision in *Castro-Huerta* will bring negative consequences to public safety across Indian Country and outside of Oklahoma. First, the Court made clear that its decision applies on all Indian lands across the United States. The Supreme Court did not limit its decision to Oklahoma.

Because the Court's decision is national in scope, there is a high risk that other federal courts and federal agencies could misinterpret the Court's decision and apply it to limit tribal sovereignty, or expand state authority, outside of the criminal context. Many federal agencies continue to fail to fully and faithfully implement the Court's previous decision in *McGirt* v. Oklahoma. It is critical that Congress act immediately in order to ensure that federal agencies do not erroneously interpret *Castro-Huerta* as somehow limiting or alleviating their federal trust duties and responsibilities to tribal nations and their citizens.

History has shown us that in the few instances where Congress historically granted states criminal jurisdiction over tribal lands, public safety on tribal lands decreased, and the rate of violent victimization of Native people increased. This is because states do not have a trust relationship with tribal nations. The Constitution does not grant states any authority over tribal nations. There is nothing to

incentivize states to dedicate the resources necessary to protect Native lives on Native lives, and historically, they have not. Prior to *Castro-Huerta*, tribes located within PL-280 states, or in Kansas (where tribes are subject to state jurisdiction under the Kansas Act), had some of the highest rates of crime against Native people since these states did very little to investigate and prosecute violent crimes committed against Native people.

Likewise, there is significant risk that because states now have jurisdiction to prosecute crimes on Indian Country lands, the Federal Bureau of Investigation, the United States Attorneys Offices, and other federal agencies will decrease the amount of resources they dedicate to public safety in Indian Country, as they have done historically in PL-280 states.

It is clear this issue is not considered significant to the Department of Justice since not a single political appointee from the DOJ participated in the consultations with tribal nations that DOJ set up this past week. This lack of commitment from those exercise power and authority at DOJ is concerning.

Ultimately, the Court's decision in *Castro-Huerta* will decrease safety for Native women across the United States. As Professor Goldberg pointed out during her testimony, the Court's erroneous interpretation of PL-280 throws tribes in former PL-280 states across Indian Country into chaos, as the Court's decision calls into question the ability of tribes to obtain retrocession under existing mechanisms.

Castro-Huerta creates national chaos and demands a national solution.

ATTACHMENT

Legislative Proposal to Improve Public Safety in Indian Country

In 1991, after the Supreme Court's ruling in *Duro v. Reina*, 495 U.S. 676 (1990), Congress sought to clarify various jurisdictional issues created by the decision. This Congressional action is commonly referred to as the "Duro Fix." The way Congress enacted this language and the statutory placement of this clarifying language provides a helpful guide as to how Congress may address the new jurisdictional complications created by the Court's recent decisions. A summary of the Duro-related language is therefore provided for background purposes to provide context to the 2022 legislative proposal set forth below.

Duro Congressional Fix

Congress amended the Indian Civil Rights Act in 1991 to overturn the U.S. Supreme Court's decision in *Duro v. Reina*, 495 U.S. 676 (1990). The Court had held that tribal courts lack criminal jurisdiction over non-member Indians. Congress subsequently acted to restore tribal criminal jurisdiction over all Indians—including non-member Indians.

Congress overturned *Duro* by adding language to 25 U.S.C. § 1301, the definitions section that defines "powers of self-government." Prior to the *Duro* fix, that section read as follows:

> "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses . . . .

25 U.S.C. § 1301(2). Congress amended this definition to include that powers of self-government "means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." Thus, overturning SCOTUS's *Duro* decision and reaffirming that tribal governments possess the inherent power to exercise criminal jurisdiction over all Indians.

Amending the ICRA to Relax Restrictions and Remove Sentencing Limitations

The Indian Civil Rights Act should be amended to relax restrictions regarding tribal authority over non-Indian criminal activity and to remove sentencing limitations. These changes would ensure tribal nations are empowered to exercise criminal jurisdiction over any individual who commits a crime on tribal lands, regardless of whether they are Indian or non-Indian. In furtherance of this goal, the following preamble should be added to the ICRA:

It is the sense of Congress that Indian tribes, as sovereigns that pre-date both the United States and the United States Constitution, maintain their inherent sovereignty to govern and engage in self-government within their territorial borders.

It is the sense of Congress that the treaties the United States has signed with tribal nations, "according to the constitution of the United States, compose a part of the supreme law of the land." Worcester v. State of Ga., 31 U.S. 515, 531 (1832).

It is the sense of Congress that because the treaties the United States signed with tribal nations "have been duly ratified by the senate of the United States of America," and because they acknowledge tribal nations to be "sovereign nation[s], authorised to govern themselves, and all persons who have settled within their territory," tribal nations are therefore "free from any right of legislative interference by the several states composing [the] United States of America." Id. at 530.

Thus, it is the sense of Congress that state laws "are unconstitutional and void" when they seek to exercise jurisdiction over tribal lands absent legislation from Congress authorizing a state's exercise of jurisdiction since under the United States Constitution, that power "belongs exclusively to the Congress of the United States." Id. at 531.

Much like in the *Duro* fix, Congress should amend 25 U.S.C. § 1301 by adding the red language [italic for this printed hearing] as follows:

"powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all *persons, Indian and non-Indian, located on or within "Indian Country" as defined by 18 U.S.C. § 1151.*

25 U.S.C. § 1301 (proposed language).

Moreover, additional language should be added to ensure the protection of non-Indian defendants' due process rights. Suggested language is as follows:

Any tribal nation seeking to exercise criminal jurisdiction over non-Indian defendants not otherwise provided for by other independent statutory authority may only do so if the due process requirements set forth in 25 U.S.C. § 1302(c) are ensured.

ICRA should also be amended to remove sentencing limitations that restrict tribal nations to sentencing criminals up to three years for certain crimes, and when stacked using the Tribal Law and Order Act, nine years total. The following proposed amendments to 25 U.S.C. § 1302 would remove the limitations on tribal sentencing altogether:

(a) In general.—Title II of Public Law 90-284 (25 U.S.C. 1301 et seq.) (commonly known as the "Indian Civil Rights Act of 1968") is amended by undertaking the following:

Subparagraphs (B) through (D) of section 202(a)(7) and section 202(b) shall be eliminated in their entirety.

These amendments would delete the following subparagraphs of Section 202(a)(7) (provided below in purple [italic in this printed hearing]):

(B) except as provided in subparagraph (C), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 1 year or a fine of $5,000, or both;

(C) subject to subsection (b), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 3 years or a fine of $15,000, or both; or

(D) impose on a person in a criminal proceeding a total penalty or punishment greater than imprisonment for a term of 9 years;

These amendments would also delete Section 202(b) which provides:

(b) Offenses subject to greater than 1-year imprisonment or a fine greater than $5,000

A tribal court may subject a defendant to a term of imprisonment greater than 1 year but not to exceed 3 years for any 1 offense, or a fine greater than $5,000 but not to exceed $15,000, or both, if the defendant is a person accused of a criminal offense who—

(1) has been previously convicted of the same or a comparable offense by any jurisdiction in the United States; or

(2) is being prosecuted for an offense comparable to an offense that would be punishable by more than 1 year of imprisonment if prosecuted by the United States or any of the States.

Justice Gorsuch Proposed Amendment to Pub.L. 83-280 (18 U.S.C. § 1162)

As described in Justice Gorsuch's dissent, Pub.L. 83-280 must be amended to ensure that states, other than those six states with mandatory criminal jurisdiction under 18 U.S.C. 1162(a), have no criminal jurisdiction in Indian country unless they have first obtained tribal consent to that state criminal jurisdiction and, where necessary, have amended their state constitutions or statutes to permit that jurisdiction, all in compliance with procedures outlined in 25 U.S.C. § 1324. The following is suggested language to implement Justice Gorsuch's proposed amendment:

Section 2 of Public Law 82-280, as amended and codified at 18 U.S.C. 1162, is hereby further amended by adding at the end thereof the following new subsection (e):

(e) Lack of State Jurisdiction Absent Tribal Consent.

Except as provided in subsection (a) of Title 18, Section 1162, a State lacks criminal jurisdiction over crimes by or against Indians in Indian Country, unless the State complies with the procedures to obtain tribal consent outlined in 25 U.S.C. § 1321, and, where necessary, amends its constitution or statutes pursuant to 25 U.S.C. § 1324.

Questions Submitted by Representative Westerman

Question 1. Lead Up: Collaboration among tribal, state, federal, and local law enforcement and legal systems is needed to cover the complicated jurisdictional system that exists in Indian Country.

(1a). Could you provide examples of the best collaborative connection that your tribe has with non-tribal law enforcement, and how that may help inform discussion about public safety in Indian Country?

Answer. The Muscogee (Creek) Nation has had cross-deputization agreements in place since the late 1980s. These agreements imbue both tribal and nontribal jurisdictions to both agencies in the agreement. These agreements also enable coordination, information and asset sharing, collaborative investigations, and more. Since the *McGirt* decision, these cross-deputization agreements have been expanded to cover over 60 state and local agencies.

Cross deputization agreements are an informative example of the good that can come from a negotiated approach to collaboration. By contrast, the jurisdiction granted to states under *Castro-Huerta* contains no obligation or no mechanism for any such collaboration.

It is important to note that jurisdictional issues of *Castro-Huerta* extend well beyond law enforcement into the jurisdiction to prosecute, adjudicate and punish criminals. Indeed, District Attorneys are already giving staff guidance that VAWA cases—where Congress has made clear tribes have jurisdiction to prosecute—are to be kept with the state without indicating that tribal governments will be informed in cases where the state chooses not to prosecute.

It is historically proven that collaboration produces better public safety. Rather than foster collaboration, the *Castro-Huerta* decision, combined with outdated and unjustifiable restrictions on tribal jurisdiction, create a perverse incentive for disunity and noncooperation. This runs directly contradictory to the decade old report by the bipartisan Tribal Law and Order Act Commission that determined that the best path to increase public safety in Indian Country is through empowering tribes and fostering cooperation.

The *Legislative Proposal to Improve Public Safety in Indian County* seeks to empower tribes to contribute more to public safety by restoring the process by which states exercise jurisdiction on Indian lands to one that requires collaboration and

by removing restrictions that prevent tribes from stepping in to fill gaps between state and federal agencies.

(1b). Could you provide information and data about how plans to increase resources to the Muscogee Creek Nation's tribal court system have or have not changed both pre- and post- the McGirt decision, and also pre- and post- the Castro-Huerta decision, including staff increases, staff position additions, funding increases, and other similar metrics?

Answer. Ensuring public safety is the highest priority at the Muscogee (Creek) Nation. Since the *McGirt* decision the Muscogee (Creek) Nation has rapidly scaled up our operations. We multiplied our spending by the millions to meet the requirements of public safety. We have increased our number of prosecutors from one to now fourteen and police personnel from about 30 to near 90. We have filed over 4,000 cases in Muscogee (Creek) Nation courts since the *McGirt* decision with over 1,200 in the third quarter of FY 2022 alone. As a result of these increases, we have also increased our budget for incarceration to over $3.5 million annually.

Looking forward, our master plan demonstrates our continue commitment to public safety with planned growth in our public safety personnel and infrastructure.

Year FY 23

The Nation is in preliminary talks to acquire a medium security facility that will in year one allow the Nation to save its entire expense that it currently spends at Tulsa County Jail. Tulsa County leaders are charging rates that are equal to what they charge the U.S. Marshal Service.

The Nation is also looking at campus development on two new sites that are adequate for new construction in areas where the need for judicial services has been established. **Estimated cost $6 million for infrastructure**.

FY 24

The Nation will determine 3 other locations that are suitable for new construction of jail court and other ancillary government services throughout the reservation. **Estimated cost $18 million for infrastructure**.

FY 25

The Nation will determine 3 other locations that are suitable for new construction of jail court and other ancillary government services throughout the reservation. **Estimated cost $18 million infrastructure**.

Public Safety Infrastructure Investments:

Detention facilities—$80 million dollars are required for the construction of 8 regional tribal jails on the Reservation. These facilities are needed to incarcerate individuals at multiple locations geographically distributed across the Reservation to ensure convenient access for law enforcement officers and minimize the need for costly long distance prisoner transport.

Courthouses w/Police Station—$80 million dollars are required for the construction of 8 regional tribal courthouse facilities on the Reservation. These would likely be geographically paired with the regional jail facilities for efficiency and convenience.

Mental Health Facilities—$12 million dollars are required for the construction of 2 mental health facilities for the incarceration of individuals requiring mental health evaluation and treatment, both pre-trial and post-conviction. These facilities would also be available to provide training and support for our tribal police officers in violence interruption, de-escalation, and other techniques for increasing the likelihood of successful interactions with suspects/individuals with mental health problems.

Juvenile Detention Facilities—$24 million dollars are required for the construction of 4 juvenile detention facilities on the Reservation. These facilities are absolutely necessary to separate young offenders from older, hardcore criminals and to focus on the rehabilitation and diversion of youthful inmates away from crime and other destructive lifestyle choices.

Public Safety Recurring Expenses

Tribal Police Force—According to the Bureau of Indians Affairs, Office of Justice Services (OJS) and the American Community Survey estimates of the American Indian and Alaska Native population on the Reservation, the Muscogee Nation must maintain a police force of 312 full time equivalents (FTEs). To achieve

this level of operation, OJS estimates that nearly $34.4 million is required on a recurring basis for increased personnel, equipment, and other operational costs. These expenses are for recurring costs, however, and do not represent the one-time costs to build infrastructure or acquire existing infrastructure to support operations. Clearly, significant investments are necessary, because the MCN is responsible for all facets of law enforcement within a reservation that is larger than New Jersey and includes the second largest city in the state of Oklahoma.

Tribal Court System—Just as law enforcement needs have grown, so too have the needs of tribal courts. Using the OJS report, the MCN estimates that an additional $40 million is required to support expanded responsibilities of tribal courts. Since July 2020, the MCN has seen dockets in tribal court quadruple, without any additional funding to support efficient and professional disposition of cases that now must be adjudicated under tribal and Federal law.

Incarceration and Detention—We calculate that around $20.6 million will be need to cover the costs of the personnel and systems necessary to detain and incarcerate individuals.

Question 2. Lead Up: In Castro-Huerta, the Court held that "Under the Constitution, States have jurisdiction to prosecute crimes within their territory except when preempted (and preempted in a manner consistent with the Constitution) by Federal law or principles of tribal self-government.

(2a). Would you propose to limit state criminal jurisdiction over non-Indians in the absence of some measure of tribal consent be consistent with or violative of the Court's statement of the law?

Answer. The U.S. Constitution grants Congress plenary authority to determine policies related to tribal nations and Congress has the opportunity and the obligation to go beyond the consent problems created by *Castro-Huerta* to understand and address other problems exacerbated by the decision. The *Legislative Proposal to Improve Public Safety in Indian Country* does not seek to limit states' jurisdiction on Indian lands. Rather, it seeks to require a collaborative approach between tribes and states that would strengthen public safety for all.

Over a decade ago, the bipartisan Tribal Law and Order Act Commission concluded that empowering tribes is the best and only viable solution to improving public safety in Indian Country. Orderly cooperation produces safer communities. The existing patchwork systems of unilateral authority for states do not. At a time when crime is rising, there is no justification for artificially keeping additional police, courts, and prosecutors who meet all requirements for Constitutional protections from contributing to the process based solely on the fact they are "tribal".

Question 3. Lead Up: The Court also concluded that Oklahoma's exercise of criminal jurisdiction over a non-Indian who victimized a Native did not impermissibly infringe on Tribal self-government and would not harm the Federal interest in protecting Indian victims.

(3a). Given that is what the Court has said, what is the constitutional source of Congress's power to say otherwise?

Answer. The constitutional source of Congress's power to legislative over Indian affairs cannot be questioned.

The Supreme Court has repeatedly, and consistently, affirmed its "respect both for tribal sovereignty [] and for the plenary authority of Congress" over Indian affairs. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987) (citations and quotations omitted); *see also United States v. Mazurie*, 419 U.S. 544, 554 n.11 (1975) (referring to "Congress' exclusive constitutional authority to deal with Indian tribes."). To be sure, "[t]he plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself." *Morton v. Mancari*, 417 U.S. 535, 551–52 (1974).

Accordingly, "the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that [this Court has] consistently described as 'plenary and exclusive.'" *United States v. Lara*, 541 U.S. 193, 200 (2004); *see also Bay Mills Indian Cmty.*, 572 U.S. at 788 (The Court has "consistently described [Congress's authority] as plenary and exclusive to legislate [with] respect to Indian tribes.'") (citations and quotations omitted). Indeed, "proper respect . . . for the plenary authority of Congress in this area cautions that [the courts] tread lightly." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978).

Furthermore, since the inception of the United States, interactions between the United States and tribal nations have been vested exclusively in the federal government. *Worcester v. Georgia.*, 31 U.S. 515, 557 (1832) ("The treaties and laws of the United States contemplate . . . that all intercourse with [Indian tribes] shall be

carried on exclusively by the government of the union."). Indeed, the supremacy of congressional regulation is necessary to protect tribal nations from states, whose actions have historically threatened tribal self-governance and their continued existence. *See United States v. Kagama*, 118 U.S. 375, 383–84 (1886) (concluding that this exclusively federal authority "is within the competency of congress" in part because Indian Tribes "owe no allegiance to the states, and receive from them no protection"). Consequently, "tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987).

In addition to deriving from the text of the Constitution, Congress's exclusive authority to regulate Indian affairs also derives, in significant part, from the unique trust relationship between tribal nations and the United States. *See, e.g., United States v. Mitchell*, 463 U.S. 206, 225 (1983) (recognizing "a general trust relationship between the United States and the Indian people."). The Supreme Court has reaffirmed that management of this trust relationship is assigned to Congress. *See United States v. Jicarilla Apache Nation*, 564 U.S. 162, 175 (2011) ("Throughout the history of the Indian trust relationship, [the Court] ha[s] recognized that the organization and management of the trust is a sovereign function subject to the plenary authority of Congress."); *see also Blackfeather v. United States*, 190 U.S. 368, 373 (1903) ("The moral obligations of the government toward the Indians, whatever they may be, are for Congress alone to recognize.").

Furthermore, the United States's trust relationship with tribal nations has no counterpart in any relationship between tribal nations and individual states. *See Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 501 (1979) ("States do not enjoy this same unique relationship with Indians . . . ."). The trust relationship between Indian tribes and the United States, therefore, is "an instrument of federal policy[,]" and Congress has the authority to "invoke[]its trust relationship to prevent state interference with its policy toward the Indian tribes." *Jicarilla Apache Nation*, 564 U.S. at 180 & n.8. When it comes to regulation of Indian affairs related to tribal government, sovereignty, and safety for Native women and children, only Congress has the necessary constitutional authority to complete the task.

Ms. LEGER FERNÁNDEZ. Thank you very much for your testimony.

The Chair now recognizes the Honorable Kevin Killer, who is the President of the Oglala Sioux Tribe.

STATEMENT OF THE HONORABLE KEVIN KILLER, PRESIDENT, OGLALA SIOUX TRIBE, PINE RIDGE, SOUTH DAKOTA

Mr. KILLER. Thank you, Chairwoman.

[Speaking Native language.] That is our traditional greeting in Lakota. I shake your hand with a warm and good heart. My Lakota name is Close to Earth. My English name is Kevin Killer, and I am the President of the Oglala Sioux Tribe.

Thank you for the opportunity to testify about the Supreme Court's *Castro-Huerta* decision. This decision held for the first time that states have criminal jurisdiction over crimes committed by non-Indians against Indians in Indian Country.

This extension of state jurisdiction in Indian Country without tribal consent is an affront to tribal sovereignty and a violation of our treaty rights, which Congress can and should have rectified by legislation.

With the exception of P.L. 280, the legislative and judicial history of the United States shows the effort by both tribal governments and the Federal Government to keep states out of Indian Country. Indian tribes have a government-to-government relationship with the United States.

As for my Tribe, we entered several treaties with the United States. Our treaties have long addressed matters of jurisdiction to resolve disputes and address those who would encroach on the rights of the Tribe or our citizens.

In particular, our 1868 Treaty says if bad men among whites, or subject to the authority of the United States, shall commit a wrong on the person or property of an Indian, the United States will proceed at once to cause the offender to be arrested and punished in accordance with the laws of the United States.

Our treaties do not allow the state to come on our reservation and apprehend and take non-Indians accused of committing crimes against a tribal member or other Indians or another Indian on the reservation, then try that person before a non-Indian jury. And the South Dakota Enabling Act and Constitution says that Indian land shall remain under the absolute jurisdiction and control of the Congress of the United States.

The majority in the *Castro-Huerta* decision was solely focused on one particular state in developing its decision. We reiterate that the majority got it wrong, but we also make it clear that *Castro-Huerta* is a violation of our treaties, which per Constitution, are the supreme law of the land.

It also violates the tribal consent provision of the Indian Civil Rights Act. We support Congress stepping up to rectify this poor decision for all Tribal Nations. The *Castro-Huerta* decision gives rise to major areas of practical concern in Indian Country including: (1) a potential lack of prosecution of non-Indians in Indian Country generally, as the state and Federal prosecutors point the finger at each other; (2) the potential for chaos arising from conflicting tribal, state, and Federal laws regarding different standards when charging and prosecuting crimes; (3) the potential application of *Castro-Huerta* to civil matters and efforts to extend state policymaking onto tribal lands; and finally, (4) unending and costly litigation about the application and reach of the decision. *Castro-Huerta* adds the maze of criminal jurisdiction in Indian Country which complicates the prosecution of crimes in Indian Country.

The solution to this jurisdictional maze is not to grant unconstitutional powers to the states. Instead, it is to fix the jurisdictional gap following the Court's decision in *Oliphant* which held that tribes lacked criminal jurisdiction over non-Indians. Any such fix must include the funding required to carry out that authority.

With this, the Oglala Sioux Tribes ask Congress to: (1) repeal all existing civil and criminal jurisdiction limits on tribes and allow tribes the option of fully asserting their inherent right for civil and criminal jurisdiction through our territories; and (2) provide adequate appropriations to tribes to develop our court, law enforcement, and infrastructure throughout Indian Country.

If Congress chooses not to address the jurisdictional gaps following the Supreme Court's decision in *Oliphant* at this time, it should, at a minimum, restore the pre-*Castro-Huerta* decision status quo by clarifying that states lack criminal jurisdiction over crimes committed by non-Indians.

Thank you for holding this hearing, Madam Chair. The Oglala Sioux Tribe stands ready to work with you to help right the ship on this criminal jurisdiction in Indian Country. And we will stand by for questioning. Thank you.

[The prepared statement of Mr. Killer follows:]

PREPARED STATEMENT OF KEVIN KILLER, PRESIDENT, OGLALA SIOUX TRIBE

My name is Kevin Killer, and I am the President of the Oglala Sioux Tribe of the Pine Ridge Indian Reservation. Thank you to the Subcommittee for this important opportunity to provide testimony regarding the potentially devastating effects of the U.S. Supreme Court's recent decision in *Oklahoma v. Castro-Huerta*.[1] Prior to becoming President of my Tribe, I served in state government as a South Dakota State Representative for eight years and a South Dakota State Senator for over two years. I am deeply familiar with the complex jurisdictional issues that arise in Indian Country,[2] from the perspective of both Tribal and state governments. Communication and coordination between separate sovereigns are key to effective governance, but central to those efforts must be an understanding of and respect for Tribal sovereignty.

As a sovereign nation preexisting the federal and state governments, we continue to assert our inherent right to make our own laws and have our people and reservation lands be governed by them. The extension of state criminal jurisdiction in Indian Country without tribal consent in *Castro-Huerta* is an egregious affront to tribal sovereignty and violation of our treaty rights, which Congress can and should rectify by legislation.

I. *Castro-Huerta* Misapplies Basic Principles of Federal Indian Law

The majority in *Castro-Huerta* held for the first time that states have criminal jurisdiction, concurrent with the jurisdiction of the federal government (and in some cases involving domestic violence, concurrent with the jurisdiction of tribal governments[3]), over crimes committed by non-Indians against Indians in Indian Country.[4] The majority was wrong. As the dissent pointed out, "truly, a more ahistorical and mistaken statement of Indian law would be hard to fathom."[5]

The majority's novel interpretation contravened centuries-old precedent. The majority's approach was so egregious, in fact, that Justice Gorsuch writing in dissent questioned the ability of the present Court to carry out the duties of the United States Government. He stated that "[o]ne can only hope the political branches and future courts will do their duty to honor this Nation's promises even as we have failed today to do our own."[6] I come before you today to ask this Congress to do just that.

As Committee Chairman Raúl Grijalva aptly summarized:

> The majority decision in *Castro-Huerta v. Oklahoma* is outright colonialism. It brazenly overwrites foundational Federal Indian law that has consistently reinforced tribal governments' inherent right to self-governance. The ruling contends that tribes cannot be trusted to exercise their sovereign authorities over criminal matters, an offensive argument that reeks of paternalism.[7]

Chairman Grijalva called on "colleagues on both sides of the aisle" to "heed Justice Gorsuch's urging to 'honor this nation's promises' to tribes."

---

[1] 597 U.S. ___, slip op. (2022).

[2] The definition of Indian Country in 18 U.S.C. § 1151(a) includes "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation."

[3] *See* 25 U.S.C. § 1304 (recognizing and affirming that the inherent powers of self-government of participating Tribes include "the inherent power . . . to exercise special [domestic] violence criminal jurisdiction over all persons").

[4] 597 U.S. at 24–25 (majority opinion).

[5] *Id*. at 12 (Gorsuch, J., dissenting).

[6] *Id*. at 42 (Gorsuch, J., dissenting).

[7] Press Release, Representative Raúl Grijalva, Chair of the House Natural Resource Committee, Chair Grijalva Statement on SCOTUS Decision in Castro-Huerta v. Oklahoma (June 30, 2022).

This decision is an alarming and unsupported expansion of state power in Indian Country by judicial fiat.[8] The Constitution itself—to which the states agreed to adhere as a condition of admission to the United States—makes clear that states have no role in Indian affairs. Since 1790, beginning with the Trade and Intercourse Acts, Congress has time and again reinforced these constitutional limits, shielding Tribes from state interference. In the Cherokee cases of the 1830s, the Supreme Court held that states have no jurisdiction in Indian Country.[9] In the 1886 case of *United States v. Kagama*, which upheld the Major Crimes Act, the Supreme Court noted this about the states: "Because of the local ill feeling, the people of the States where [Indian tribes] are found are often their deadliest enemies."[10]

Only during the "termination era" of the 1950s and the passage of Public Law 83-280 (P.L. 280) in 1953 did Congress—for the first time—grant special permission to a small group of states to exercise jurisdiction in Indian Country. P.L. 280 allowed additional states the option of assuming jurisdiction, but in 1964, the Oglala Sioux Tribe and other tribes of the Great Sioux Nation united to defeat a South Dakota referendum asserting state jurisdiction over our reservations under P.L. 280 by a 3 to 1 margin.[11] The Oglala Sioux Tribe, Rosebud Sioux Tribe, Cheyenne River Sioux Tribe, and Standing Rock Sioux Tribe preserved that victory in federal court when the State sought to assert jurisdiction over state highways running through our reservations.[12] Congress amended P.L. 280 in 1968 to prevent states from assuming jurisdiction without tribal consent.[13] This amendment reflected a shift in national policy away from "termination" and toward policies promoting tribal self-government and self-reliance, free from state interference and control. Thus, with the exception of P.L. 280, the legislative and judicial history of the United States shows a concerted effort by both Tribal Governments and the Federal Government to keep states out of Indian Country.

Indian tribes are "self-governing political communities that were formed long before Europeans first settled in North America."[14] Indian tribes retain the sovereign status of "domestic dependent nations,"[15] and continue to "possess[] attributes of sovereignty over both their members and their territory."[16] Indian tribes have a government-to-government relationship with the United States,[17] but they are in no way "dependent on" or "subordinate to" the states.[18]

In *McGirt v. Oklahoma*,[19] the Court did its job and got it right. In *McGirt*, the Court held that the state of Oklahoma lacked criminal jurisdiction over offenses committed by a non-Indian on the Muscogee (Creek) Reservation.[20] While the *McGirt* decision was limited to major crimes committed in Indian Country, its reasoning was grounded in the fact that Congress agreed to a treaty with the Muscogee (Creek) Nation that explicitly stated that "no portion" of the Muscogee

---

[8] It should be pointed out that Congress knows how to use its constitutional authority to expand state criminal jurisdiction on Indian reservations. *See* 18 U.S.C. § 3243, which provides as follows:

> Jurisdiction is conferred on the State of Kansas over offenses committed by or against Indians on Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State.
>
> This section shall not deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations.

The *Oklahoma v. Castro-Huerta* decision is a usurpation of Congress' authority in this regard.

[9] *See, e.g., Worcester v. Georgia*, 31 U.S. 515 (1832) (holding that a Georgia criminal statute applied to non-Indians on an Indian reservation was unconstitutional).

[10] 118 U.S. 375, 384 (1886).

[11] South Dakota Secretary of State, Ballot Question Titles and Election Returns 1890–2020, *South Dakota Political Almanac*, 42, https://www.sdsos.gov/elections-voting/assets/BallotQuestions.pdf (last visited Sep. 15, 2022).

[12] *Rosebud Sioux Tribe v. South Dakota*, 900 F.2d 1164 (1990), *cert. denied*, 500 U.S. 915 (1991).

[13] 25 U.S.C. § 1326.

[14] *Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 851 (1985).

[15] *Oklahoma Tax Comm'n v. Citizen Band, Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991). *Accord, Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

[16] *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1982), quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975). *Accord, Worcester v. Georgia*, 31 U.S. at 557.

[17] This relationship has been recognized in treaties, statutes, Executive Orders, and otherwise. *See, e.g.*, 25 U.S.C. §§ 3601(1), 3701(1); Executive Order 13175, 65 F.R. 67249 (Nov. 9, 2000); Executive Memorandum, 59 Fed. Reg. 22951 (April 29, 1994).

[18] *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 154 (1980).

[19] 591 U.S. ___, slip op. (2022).

[20] *Id.* at 36 (majority opinion).

(Creek) Reservation "shall ever be embraced or included within, or annexed to, any Territory or State."[21] That language, the Court in *McGirt* correctly held, was an "assur[ance]" that the Muscogee (Creek) Nation has a "right to self-government on lands that would lie outside both the legal jurisdiction and geographic boundaries of any State."[22] Ultimately, the Court in *McGirt* did what the Court in *Castro-Huerta* failed to do: it respected its own precedent, the authority of Congress to legislate on Indian affairs, and tribal sovereignty and self-governance.[23]

The State of Oklahoma, we understand, filed more than 60 cases to get the U.S. Supreme Court to revisit *McGirt*. As the dissent in *Castro-Huerta* dutifully noted we are here because "[w]here [the Court's] predecessors refused to participate in one State's unlawful power grab at the expense of the Cherokee, today's Court accedes to another's."[24]

Congress must recognize the Court's failure in *Castro-Huerta* and respond swiftly and conclusively—as it has the authority to safeguard against the severe injustices and negative ramifications created by this decision and the mountains of hardship and litigation that it will cause.

II. *Castro-Huerta* Violates Our Treaties and Other Federal Law

The Oglala Sioux Tribe has an established nation-to-nation relationship with the federal government. Our treaties have long addressed matters of jurisdiction to resolve disputes and address those who would encroach on the rights of our Tribe or our citizens.

Article 4 of the 1825 Treaty between the Sioune (Cuthead Yantonai) and Oglala Bands of Sioux Indians provides in part as follows:

> [T]he Sioune and Ogallala bands bind themselves to extend protection to the persons and the property of the traders, and the persons legally employed under them, whilst they remain within the limits of their particular district of country. And the said Sioune and Ogallala bands further agree, that if any foreigner or other persons, not legally authorized by the United States, shall come into their district of country, for the purposes of trade or other views, they will APPREHEND such person or persons, and deliver him or them to some United States' superintendent, or agent of Indian affairs, or to the commandant of the nearest military post, to be dealt with according to law.[25]

Other Sioux tribes also have their own 1825 treaties with identical language.

Article 1 of the 1868 Fort Laramie Treaty also provides in part as follows:

> If bad men among the whites, or subject to the authority of the United states, shall commit a wrong on the person or property of an Indian, the United States will, upon proof being made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished in accordance with the laws of the United States, and also to re-imburse the injured person for the loss sustained.[26]

The above treaty provisions are still valid under existing law,[27] and when read together, clearly vest authority in the Oglala Sioux Tribe to apprehend and deliver bad white men over to the superintendent or agent of Indian affairs. Tribes have long had our own ways of addressing crime,[28] and our treaties were meant to honor and protect those ways of governing our lands.

Our treaties do not allow the State of South Dakota to come onto our reservation and apprehend and take non-Indians accused of committing a crime against a tribal member or other Indian on the reservation, then try that person before a non-Indian jury.

Under the U.S. Constitution, treaties are the supreme law of the land, yet the Supreme Court has now purported to wash away these treaty provisions unilaterally, undermining not only tribal sovereignty, but the roles of both the Legislative and Executive branches of the U.S. Government.

---

[21] *Id.* at 6 (majority opinion) (quoting art. IV, 11 Stat. [699]).
[22] *Id.* at 6 (majority opinion).
[23] *Id.* at 1 (majority opinion) ("Because Congress has not said otherwise, we hold the government to its word.")
[24] 597 U.S. at 2 (Gorsuch, J., dissenting).
[25] 7 Stat. 252.
[26] 15 Stat. 635.
[27] *See* 25 U.S.C. § 71 and 25 U.S.C. § 5128.
[28] *See, e.g., Ex parte Crow Dog*, 109 U.S. 556 (1883).

Further, the 1889 South Dakota Enabling Act expressly disclaims any and all authority of the state over our Tribe. Specifically, it states:

> That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States[.][29]

There is no ambiguity here, and the State of South Dakota agreed to this provision set forth by Congress in order to be welcomed into the United States. Nearly identical language is included in the South Dakota Constitution.[30]

Additionally, as discussed above, South Dakota was not a mandatory P.L. 280 state,[31] and Sioux tribes were able to organize and defeat state jurisdiction over criminal causes of action in a state-wide referendum vote in 1964.[32] Moreover, under a 1968 amendment to P.L. 280 contained in the 1968 Indian Civil Rights Act, states can no longer assume criminal jurisdiction on Indian reservations without the consent of the affected Tribes in a referendum vote held by the Secretary of Interior.[33]

We also note that in 1977, the American Indian Policy Review Commission (AIPRC), which Congress created to examine the problem of United States Indian policy and make recommendations for change, began its report with a discussion of policy for the future, which stated:

> The fundamental concepts which must guide future policy determinations are:
>
> That Indian tribes are sovereign political bodies, having the power to determine their own membership and power to enact laws and enforce them within the boundaries of their reservations . . ..[34]

The poorly reasoned *Castro-Huerta* decision flouts this wise policy guidance, creating an urgent need for Congress to help tribes protect their governmental authority against state encroachment.

Quite interesting is that the Majority in *Castro-Huerta* quickly states that the treaties at hand in the case were supplanted by that state's enabling act. Notably, the Majority was solely focused on one particular state in developing its decision. We reiterate that the Majority got it wrong, but we also make clear that nothing has supplanted our treaties. Our treaties reign, and the *Castro-Huerta* decision violates them, specifically the aforementioned extradition provisions. *Castro-Huerta* also violates the tribal consent provision of the Indian Civil Rights Act. The decision should be barred from applying on our Reservation as the Court wholly failed to factor in our unique scenario and relevant documents. This holds true for other Sioux Nation tribes and we have to think for many other Tribal Nations as well. We support Congress stepping up to rectify this poor decision for all Tribal Nations.

III. The Consequences of the Supreme Court Legislating from the Bench

The consequences of letting *Castro-Huerta* stand are dire. The Supreme Court has not only overstepped its authority by legislating from the bench—it has done so with a very limited and narrow focus on the particularities of Oklahoma. This has created bad policy for Oklahoma and everywhere else.

Perhaps most significantly, states have been empowered to extend their policy-making onto tribal lands. For example, Tribes, states, and the federal government can have significant differences in policy regarding what behaviors should be criminalized. Such concerns are particularly pronounced post-*Dobbs v. Jackson Women's Health Organization*,[35] with states empowered to legislate in ever-broader areas of American life.

---

[29] 25 Stat. 676, Sec. 4.
[30] S.D. Const. art. XXII.
[31] *See* 18 U.S.C. § 1162(a).
[32] South Dakota Secretary of State, Ballot Question Titles and Election Returns 1890–2020, *South Dakota Political Almanac*, 42, https://www.sdsos.gov/elections-voting/assets/BallotQuestions.pdf (last visited Sep. 15, 2022).
[33] 25 U.S.C. § 1326.
[34] U.S. Congress, Final Report of the American Indian Policy Review Commission, vol. 1, at 4 (1977).
[35] 597 U.S. ___, slip op. (2022).

Additionally, since *Castro-Huerta*, Oklahoma tribes have been advised that federal prosecutions are being referred to the state. We fear the same will happen elsewhere in Indian Country. This should not stand. To Tribes, it appears that federal prosecutors have already been shirking their responsibilities in recent years due to the overwhelming number of criminal cases arising in Indian Country and inadequate funding and staffing to meet these challenges.

From the tribal point of view, the *Castro-Huerta* decision has resulted in major areas of concern thus far in Indian Country at large:

1. Extension of state policymaking onto tribal lands.
2. A visible decrease in prosecutions by the federal government, which has responsibility for the prosecution of Major Crimes on reservations.
3. A potential lack of prosecution of non-Indians in Indian Country generally as state and federal prosecutors point their fingers at each other.
4. A failure to notify Tribes of domestic violence incidents where the Tribe has concurrent jurisdiction to prosecute a non-Indian.
5. The potential application of *Castro-Huerta* to civil matters, although *Castro-Huerta* was only about criminal jurisdiction over non-Indians.

Historically, tribal law and judicial services have been woefully underfunded by Congress. Unfortunately, our Tribe suffers from an inordinate lack of resources for law enforcement and our court system. Federal funding and priorities for prosecutions aimed at reducing non-Indian crime in Indian Country has been equally lacking. Now it would appear some federal authorities serving Indian Country may begin to defer to their state counterparts, resulting in greater danger and less justice for our reservation communities.

The Court's holding in *Castro-Huerta* that states have concurrent jurisdiction further adds to the maze of criminal jurisdiction in Indian Country that the Court has created, complicating the prosecution of crimes in Indian Country. We are concerned that *Castro-Huerta* will result in the potential for chaos arising from conflicting tribal, state, and federal laws regarding differing standards when charging and prosecuting crimes. Already, the hodgepodge of criminal jurisdictional authority has harmed, and will continue to harm, tribal communities. According to a report by the U.S. Attorney's Office, at least [Seventy] percent of violent crimes generally committed against AI/ANs involve an offender of a different race. This statistic includes crimes against children twelve years and older . . . [I]n domestic violence cases, 75 percent of the intimate victimizations and 25 percent of the family victimizations involve an offender of a different race. Furthermore, national studies show that men who batter their companion also abuse their children in 49 to 70 percent of the cases.[36]

The solution to this jurisdictional maze is not to grant unconstitutional power to the states. Rather, it is to fix the jurisdictional gap following the Court's decision in *Oliphant v. Suquamish Indian Tribe*,[37] which held that tribes lacked criminal jurisdiction over non-Indians.

The jurisdictional gap following *Oliphant* fueled non-Indian crime in Indian Country, which was eventually addressed in part in 2013 when Congress reauthorized the Violence Against Women Act and included special jurisdictional provisions for qualifying tribes to prosecute non-Indians for certain acts of domestic or dating violence.[38] Because the Court has once again issued a decision upending matters of criminal jurisdiction in Indian Country, we again come to Congress seeking a fix. Any such fix must include not only the necessary authorities to undo the jurisdictional maze but also the funding and resources required to carry out those authorities.

Although the majority in *Castro-Huerta* declined to revisit its holding in *McGirt*,[39] the State of Oklahoma is nonetheless using the *Castro-Huerta* decision to attempt to reverse *McGirt* by arguing that it has presumptive jurisdiction in Indian Country.[40] Without the intervention of Congress, it is possible that the Court will

---

[36] U.S. Attorney General's Advisory Committee on American Indian/Alaska Native Children Exposed to Violence, *Ending Violence So Children Can Thrive*, November 2014, https://www.justice.gov/sites/default/files/defendingchildhood/pages/attachments/2015/03/23/ending_violence_so_children_can_thrive.pdf (last visited Sep. 15, 2022).

[37] 435 U.S. 191 (1978).

[38] 127 Stat. 54, *codified at* 25 U.S.C. § 1304.

[39] 591 U.S. at 11 (Gorsuch, J., dissenting).

[40] Brief of Amicus Curiae State of Oklahoma in Support of Appellee City of Tulsa and Affirmance at 5–9, *Hooper v. City of Tulsa*, No. 22-5034 (10th Cir. Aug. 8, 2022).

entertain this argument and unconstitutionally expand the scope of state jurisdiction further.

Moreover, it is conceivable that Oklahoma and other states will continue to find new ways to weaponize the *Castro-Huerta* decision to undermine tribal self-determination and the decisions and intent of Congress. These actions will lead to intensive, drawn-out, and costly litigation, all of which can be avoided by Congress stepping up and telling the Court that the role of legislating is the role of Congress, not the courts.

IV. Congress' Constitutional Obligation to Correct the Court

For all the reasons herein, I am asking Congress to fulfill its constitutional role—as well as its federal treaty obligations and trust responsibilities—and take swift action to address the disastrous *Castro-Huerta* decision. When one branch of government oversteps its authority in contravention of well-established law, it is incumbent on the other branches to protect the country's constitutional balance of power.

Specifically, the Oglala Sioux Tribe asks Congress to:

1. Repeal all existing civil and criminal jurisdictional limitations on Indian Tribes, whether imposed by statute or common law, and allow Tribes the option of fully asserting their inherent civil and criminal jurisdiction throughout our territories;
2. Pass new appropriations designated for the development and enhancement of Tribal court and law enforcement infrastructure throughout Indian Country (including code development, construction, equipment, policies and program development); detention and rehabilitation facilities; intervention and diversion services; training; and staffing (judges, prosecutors, public defenders, clerks, officers, and other necessary positions); and
3. For the transition period during which Tribal governments will be developing their infrastructures, provide Tribes and federal prosecutors the funding and authorization necessary to prosecute and reduce non-Indian crimes committed in Tribal communities, fostering a stronger government-to-government relationship between the United States and Tribes.

The Oglala Sioux Tribe is a part of and supports the Coalition of Large Tribes (COLT) and The Great Plains Tribal Chairmen's Association (GPTCA) in their statements on this matter.

Should Congress choose not to address the jurisdictional gaps following the Supreme Court's decision in *Oliphant* at this time, it should at a minimum restore the pre-*Castro-Huerta* status quo by clarifying that states lack criminal jurisdiction over crimes committed by non-Indians against Indians in Indian Country.

Conclusion. The relationship between our Tribe and the federal government is a bilateral one, and it is enshrined in our Treaties. We urge Congress to enact an *Oliphant* and *Castro-Huerta* fix that would restore jurisdictional authority to Tribes and jurisdictional boundaries on states. Tribal sovereignty must include, at a minimum, the ability to protect our own people from non-Indian predators, and it must be shielded from an extension of state power onto our Pine Ridge Indian Reservation.

We look forward to working with this Subcommittee and Congress overall to address these matters and to ensure that the long-standing nation-to-nation relationship between our governments continues.

Thank You.

QUESTIONS SUBMITTED FOR THE RECORD TO KEVIN KILLER, PRESIDENT, OGLALA SIOUX TRIBE

Questions Submitted by Representative Leger Fernández

Question 1. Does the State of South Dakota provide support or resources to public safety services on tribal lands?

Answer. No, the State of South Dakota does not provide support or resources to public safety services on our tribal lands unless formally requested to do so on a particular case. Oglala Lakota and Pennington Counties each provide one officer who address non-Indian crime only.

(1a). Since the Castro-Huerta ruling, has the State government communicated with the Oglala Sioux Tribe about the expected impacts?

Answer. No, the State of South Dakota has not communicated with the Oglala Sioux Tribe about the expected impacts of the Castro-Huerta ruling.

Question 2. If you are able to, can you provide a rough comparison of the resources available to the Oglala Sioux Tribe for public safety services and the resources at the disposal of the State of South Dakota for its own public safety services?

Answer. The comparison is stark. The public safety resources we have available to our Tribe are at a level that is well below the level of need. Our Tribe's Pine Ridge Indian Reservation is roughly 3.1 million acres, which is approximately the size of the States of Rhode Island and Delaware combined. Our Reservation is vast, rural and remote; it covers much of the southwest portion of the State of South Dakota and a small piece of Nebraska. Our Tribe has more than 46,000 enrolled members overall. In excess of 40,000 people reside on or conduct business on our Reservation, all of whom are dependent on federally funded law enforcement officers to protect them and their on-reservation property. Among these are Oglala Sioux Tribal Members, non-member Indians, and non-Indians who reside on or enter our Reservation on a regular basis or are under the criminal jurisdiction of our officers holding Special Federal Law Enforcement Commissions. These individuals comprise the law enforcement service population of our Reservation.

The Department of Interior has determined that a basic law enforcement program needs a minimum of 2.8 officers per 1,000 people, which is the national average for rural areas in the United States with less than 10,000 people living in a low crime rate area with clustered communities, according to the Bureau of Indian Affairs' Office of Justice Services' "Report to the Congress on Spending, Staffing, and Estimated Funding Costs for Public Safety and Justice Programs in Indian Country" (dated September 12, 2017; May 2, 2018; March 1, 2020; July 2020) (OJS TLOA Reports), available at https://www.bia.gov/bia/ojs/documents-and-forms.

Nonetheless, the Oglala Sioux Tribe is only provided enough funding from the United States for 33 law enforcement officers and 7 criminal investigators to cover our approximate 40,000-person law-enforcement-service population and 52 communities. That comes out to less than one law enforcement officer per 1000 people and less than 6 officers per shift Reservation-wide. Our Department of Public Safety responded to 133,755 service calls on our Reservation in 2021.

In comparison, Rapid City, South Dakota (the closest urban area to our Reservation) has a budget of $19.6 million and 176 officers. https://www.rcgov.org/departments/police-department.html. In 2021, its police department responded to 114,816 police calls, which is well below the amount of calls our officers responded to despite our having approximately nineteen percent (19%) of the total number of officers.

Additionally, Aberdeen, South Dakota has 47 officers for a population of 28,495 per the 2020 Census. https://data.census.gov/cedsci/profile?g=1600000US4600100; https://www.police1.com/law-enforcement-directory/police-departments/aberdeen-police-department-aberdeen-sd-OaFyvyRIjagW0iH7/.

Finally, the State of Connecticut, which is about the same size geographically as the Pine Ridge Indian Reservation (as stated above) has 6,534 municipal police officers. https://www.cga.ct.gov/2022/rpt/pdf/2022-R-0025.pdf.

Questions Submitted by Representative Stansbury

Question 1. What can Congress do to hear from Tribal Nations in order to find a reasonable consensus in Indian Country to respond to Castro-Huerta?

Answer. Congress has taken the correct first step through this Subcommittee's Oversight Hearing to hear from Tribal Nations about the impacts of the *Castro-Huerta* decision and the need for Congress to address it. At the hearing, the Subcommittee heard the overwhelming majority of the witnesses state their disagreement with the decision the U.S. Supreme Court made in *Castro-Huerta*. Only two witnesses agreed with the decision—one Oklahoma District Attorney and one Oklahoma City attorney that was present in his individual capacity. But, the Tribal Leaders who testified, along with the Indian law academic witnesses, expressed disagreement with the decision.

What Tribal Nations need is for Congress to pass legislation to fix the jurisdictional maze of criminal jurisdiction in Indian Country, which the *Castro-Huerta* decision complicated further. The Supreme Court legislated from the bench in the *Castro-Huerta* decision, usurping Congress's constitutional role. Thus, it is incumbent on Congress to protect this country's constitutional balance of power by stepping into its rightful role to pass legislation to address the severely problematic *Castro-Huerta* decision.

It is Congress's role to act and it is our understanding that Congress has the backing of Tribal Nations to act, but, perhaps, with an open question about when to act. As stated in my testimony, in the wake of *Castro-Huerta*, my Tribe asks Congress to act swiftly to (1) repeal all existing civil and criminal jurisdictional limits on Tribes, and allow Tribes the option of fully asserting their inherent civil and criminal jurisdiction throughout our territories; and (2) provide adequate appropriations to Tribes to develop our court and law enforcement infrastructure throughout Indian Country. As further stated in my written testimony, if Congress chooses not to address the jurisdictional gaps following the Supreme Court's decision in *Oliphant* at this time, it should at a minimum restore the pre-*Castro-Huerta* status quo by clarifying that states lack criminal jurisdiction over crimes committed by non-Indians against Indians in Indian Country.

While I am not convinced it is necessary, if the Subcommittee believes it needs additional input from Tribal Nations, it could host a roundtable specifically to discuss solutions. I have to think all Tribal Nations would stand strong on protecting and upholding tribal sovereignty, uncomplicating criminal jurisdiction in Indian Country, and clarifying that states lack criminal jurisdiction over crimes committed by non-Indians against Indians in Indian Country. If the Subcommittee were to have such a roundtable, I strongly urge you to hold it as soon as possible so that there would still be time in this Congress for Congress to act to effectively address the *Castro-Huerta* decision.

Questions Submitted by Representative Grijalva

Question 1. How many BIA-funded law enforcement officers is the Oglala Sioux Tribe being provided?

Answer. Despite the fact that Department of Interior has determined that a basic law enforcement program for a low crime rate rural area of less than 10,000 persons needs 2.8 officers per 1,000 people as stated in the Bureau of Indian Affairs' OJS TLOA Reports, the Oglala Sioux Tribe is only provided enough funding from the United States for 33 law enforcement officers and 7 criminal investigators to cover our 40,000-person law-enforcement-service population and our approximate 3.1-million-acre Reservation with our 52 communities. In plain numbers, that is less than one officer for every 1000 people.

(1a). How has this impacted the delivery of public safety services on the Tribe's lands?

Answer. The lack of BIA-funded law enforcement officers for our Tribe to cover our vast, remote Pine Ridge Indian Reservation has been devastating. Again, our Tribe is provided only enough funding for 33 law enforcement officers and 7 criminal investigators. This equates to a total Reservation-wide 6–8 officers per shift to cover our approximate 3.1-million-acre Reservation and our 40,000-person law-enforcement-service population. It is untenable. Between July 4, 2022 and September 7th of this year, the Tribe has responded to: five homicides, four shootings, four stabbings, three sexual assaults, and five violent assaults alone, and this is after responding to an additional 58 missing persons reports and 159 calls for domestic violence in July 2022 alone.

The lack of law enforcement officers causes extraordinary danger to the law enforcement officers who are working unreasonable amounts of overtime, patrolling alone, and responding to dangerous calls for service without proper backup. In 2021, our Department of Public Safety received 133,755 E-911 calls for service on the Pine Ridge Reservation. These 2021 calls for services included 794 calls involving an assault, 1,463 domestic violence calls, 522-gun related calls, 541 drug/narcotic calls, and calls reporting 541 missing persons, most of which required immediate attention to protect life, health, and safety. On-Reservation deaths, homicides, drug sales, police-involved accidents, and overdoses have continued to increase significantly. The volume of E-911 calls, combined with an inadequate number of police officers, is forcing police officers to drive from call to call at high speeds, endangering both the officer and the public. Police officers operate alone, with backup often being over 30 miles away, even in calls involving guns or weapons.

Thus, police officers are often placed in unnecessary danger.

The lack of adequate law enforcement has had and is continuing to have serious consequences for the Tribe and its citizens. Significantly, many E-911 calls for police service are abandoned, are not being responded to in the time required to ensure public safety, or are not being properly investigated or prosecuted because there simply are not enough police officers. When calls are responded to, police response time often exceeds 30 minutes, even in cases of domestic violence, gun activities,

and other imminent threats of harm. This can and often does add to the harm suffered by crime victims on the Reservation.

Additionally, often due to the lack of an adequate amount of law enforcement officers, criminal investigators, and resources, crimes are not timely or adequately investigated, and witness statements and other evidence are not collected promptly, thereby endangering federal and tribal prosecutions and convictions. Sadly, our Tribal citizens are often scared to venture out of their homes at night, especially because gunshots are heard throughout our Reservation on a frequent and re-occurring basis.

The Tribe is also adversely impacted by the lack of law enforcement officers and resources in a variety of other ways. For instance, the Tribe operates numerous tribal on-Reservation schools, health facilities, Tribal programs, and several Tribally-owned businesses whose safe operation is compromised by the lack of law enforcement services. Some families no longer feel safe sending their children to school, especially without School Resource Officers present. Some students also feel unsafe on school grounds because of the gang violence on our Reservation, which often involves other juveniles, and the lack of law enforcement services to respond to threats. Tribal health care costs have increased because of the increased number of overdoses and injuries sustained from assaults, domestic violence, and other crimes. Also, the Tribal economy is negatively impacted as new businesses are not attracted to high crime areas. The businesses that are located on our Reservation must spend additional funds to protect their employees and property. Some have even chosen not to remain open at night.

As described above, our lack of law enforcement officers and resources has had a significant negative impact on our law enforcement officers, our Tribal citizens, and our efforts toward economic development.

Questions Submitted by Representative Westerman

Question 1. Lead Up: Collaboration among tribal, state, federal, and local law enforcement and legal systems is needed to cover the complicated jurisdictional system that exists in Indian Country.

(1a). Could you provide examples of the best collaborative connection that your tribe has with non-tribal law enforcement, and how that may help inform discussion about public safety in Indian Country?

Answer. South Dakota, like many western states with large land-based tribes who are located in non-Public Law 83-280 jurisdictions often consider policing on the reservation to be a federal/tribal issue and expect the federal government to pick up the costs. This is why the State Police does not come onto the Pine Ridge Indian Reservation unless the Tribe specifically asks it to. My Tribe also considers policing on our Reservation to be a federal/tribal issue per our nation-to-nation relationship with the United States, our Treaties, and the South Dakota Enabling Act.

The best collaborative connection that our Tribe has with non-tribal law enforcement is with the federal government through the Bureau of Indian Affairs and the Department of Justice. Despite our adamant, correct position that the federal government has not and is not living up to its treaty obligations and trust duties to ensure that law enforcement services provided to the Tribe are adequately funded, as a practical matter, we work with the Bureau of Indian Affairs and Department of Justice on on-the-ground public safety issues.

As for working with other non-tribal law enforcement, the current Bureau of Indian Affairs (BIA) Office of Justice Services (OJS) rules currently prohibit a two-party Memorandum of Understanding (MOU), other than an assistance agreement, when the BIA is funding the law enforcement officers. This is the case unless the OJS's own specific provisions are included in the MOU and unless the Department of the Interior is a party to that MOU. These proposed federal agreements often boil down to an issue of tort claims coverage, and liability and insurance issues—which is an area that Congress can look into and address. Tribes have worked out decent agreements that DOI has refused to approve.

Additionally, state law often controls what authority a local Chief of Police or Police Board employed by a local non-Indian government has to enter into a policing agreement with a tribal government—some such state statutes require state legislation in order to execute such agreements.

(1b). Can you explain whether the Castro-Huerta decision has had any impacts on your tribe's relationship with local, state, or federal law enforcement and could you provide an example of how those relationship have changed, if they have?

Answer. At present, our Tribe is continuing to carry out our law enforcement as usual. However, as stated in my testimony, the *Castro-Huerta* decision gives rise to major areas of practical concern in Indian Country, including the following:

1. A potential lack of prosecution of non-Indians in Indian Country generally as state and federal prosecutors point their fingers at each other.
2. The potential for chaos arising from conflicting tribal, state, and federal laws regarding differing standards when charging and prosecuting crimes.
3. The potential application of *Castro-Huerta* to civil matters and efforts to extend state policymaking onto tribal lands.
4. Unending and costly litigation about the application and reach of the decision.

The *Castro-Huerta* decision adds to the maze of criminal jurisdiction in Indian Country, which complicates the prosecution of crimes in Indian Country. The solution to the jurisdictional maze is not to grant unconstitutional power to the states. Instead, it is to fix the jurisdictional gap following the Court's decision in *Oliphant*, which held that tribes lacked criminal jurisdiction over non-Indians. Any such fix must also include the funding required to carry out that authority. With this, the Oglala Sioux Tribe asks Congress to:

1. Repeal all existing civil and criminal jurisdictional limits on Tribes, and allow Tribes the option of fully asserting their inherent civil and criminal jurisdiction throughout our territories;
2. Provide adequate appropriations to Tribes to develop and enhance our court and law enforcement infrastructure throughout Indian Country.

If Congress chooses not to address the jurisdictional gaps following the Supreme Court's decision in *Oliphant* at this time, it should at a minimum restore the pre-*Castro-Huerta* status quo by clarifying that states lack criminal jurisdiction over crimes committed by non-Indians against Indians in Indian Country.

Ms. LEGER FERNÁNDEZ. Thank you very much, President Killer, for your testimony.

The Chair now recognizes the Honorable Cheryl Andrews-Maltais, who is the Chairwoman of the Wampanoag Tribe of Gay Head Aquinnah. You are now recognized for 5 minutes.

STATEMENT OF THE HONORABLE CHERYL ANDREWS-MALTAIS, CHAIRWOMAN, WAMPANOAG TRIBE OF GAY HEAD, AQUINNAH, MASSACHUSETTS

Ms. ANDREWS-MALTAIS. Thank you. And good morning, Madam Chairwoman, and members of the Committee. Thank you for the opportunity to testify on the impacts of the *Castro-Huerta* decision.

My name is Cheryl Andrews-Maltais, and I am the Chairwoman of the Wampanoag Tribe of Gay Head Aquinnah located on the island of Martha's Vineyard off the coast of Massachusetts. I am currently serving in my fourth term.

My Tribe is part of the great Wampanoag Nation known as the People of the First Light. We have occupied our lands and our homelands since time immemorial. Our ancestors were the signatories to the first treaty in this hemisphere, the 1621 Treaty of Peace between the Wampanoag Nation and King James I of England. This Treaty recognized and respected the sovereignty of our two Nations to govern ourselves.

Like other tribes who were among the first Tribal Nations to encounter European explorers and settlers, we endured centuries of warfare, disease, loss of our aboriginal lands, discrimination, and forced acculturation. However, like so many of Indigenous Peoples of the United States, we maintain our culture, heritage, and our tribal government.

However, four centuries later, we find ourselves still struggling to retain and regain our rights and sovereignty, that we freely exercised before the settlement of the colonists, the atrocities of colonialism, and before the establishment of the United States.

The erosion of tribal sovereignty and our rights has led to unimaginable crimes perpetrated against us. No one was protecting our vulnerable populations, not even us, because we were stripped of that right. It has been a free-for-all for non-Natives to commit crimes against us because no one would prosecute them.

Up until the passage of the TLOA, the Tribal Law and Order Act, in 2010, non-Native perpetrators essentially got away with any crimes they chose to commit against our people in our homelands. After years of fighting for inclusion, in 2013, Indian Country was finally included in the Violence Against Women Act, in order to have standing to begin to have criminal jurisdiction over non-Indians who committed crimes against Native women and children.

Think about it. We have only had the ability to actually protect our vulnerable citizens for 9 years, less than a decade. Do we now go back, so non-Natives can come onto our homelands, commit horrible crimes against us, and we have no recourse? Who, except for us, should be protecting our people?

It is tantamount to going back to the 1600s when our women were raped and murdered, our children were stolen from us and often sold off, in what would be now considered child trafficking. How long do we, as Indigenous people of these lands, have to pay while the privileged hurt our people and take our lands, resources, and our rights away again?

If this isn't fixed, do we go back to sitting by to wait for help, help that we don't necessarily need if we were ensured the jurisdiction we were entitled to exercise as sovereign nations?

We know how to protect our people. We have always had our own traditional forms of justice. We know how to protect the public. We have competent professionals within our tribal governments. As in our case, with regard to public safety, we know how to write and enforce building codes, public safety ordinances and regulations. We have the capacity to protect our people and others who choose to come into our homelands.

We don't need another layer of bureaucracy to add to an already complicated system. All we need is the state and local jurisdictions to get out of our business and out of our way. Otherwise, where will the erosion of our tribal rights and sovereignty end?

Like a Marshall Plan for Indian Country, the United States owes us both the financial and human resource support for us to rebuild our Tribal Nations. We have paid dearly. We have paid it forward with the lives of our ancestors, our lands, and our natural resources. We are owed the right to self-determination and self-governance.

If you went to any other country or any sovereign lands and committed a crime, you are subject to their laws. You are processed through their legal system. If you engage in trade and commerce or construction, you are subject to their laws.

Every sovereign government has the right to provide for the safety of its people and the public who choose to enter our lands. Are we to believe that Congress feels that we are so much less

worthy, inadequate, or incapable of performing the governance and jurisdiction we have exercised since time immemorial?

Without clear and unambiguous laws that articulate that tribes are sovereign nations with the right of full jurisdiction and governance over ourselves, our people, and others who come to our land, there is, and will continue to be, conflict.

These bad court decisions allow states to interpret silence or ambiguity as a void of our rights and authority, and they feel empowered to fill over the rights of tribes, which they do not have. Only Congress can fill that void.

The erosion of our jurisdiction and the erosion of our sovereignty is just another breach of the United States' trust and treaty obligations to us. States and local municipalities do not, and should not, have any role or oversight in jurisdiction in Indian Country. To dilute any tribe's sovereignty and jurisdiction is to dilute all tribes' rights and sovereignty and jurisdiction.

We were here as thriving sovereign nations when the Pilgrims landed. And while some on the Supreme Court may have forgotten this important fact, as Justice Gorsuch stated, "the ball is back in Congress' court." So, we urge you to lead this body back to the principles that respect tribal governments, tribal rights, and tribal sovereignty, and codify them in Federal law.

Thank you for your commitment to seeing justice in Indian Country. And thank you for the opportunity to testify here today. I am available to answer any questions if you have any. Thank you.

[The prepared statement of Ms. Andrews-Maltais follows:]

PREPARED STATEMENT OF CHERYL ANDREWS-MALTAIS, CHAIRWOMAN, WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH)

Madame Chairwoman and members of the committee, thank you for the opportunity to testify. My name is Cheryl Andrews-Maltais. I am the Chairwoman of the Wampanoag Tribe of Gay Head Aquinnah, located on the Island of Martha's Vineyard, seven miles off the coast of Massachusetts. I am serving in my fourth term as Chairwoman. I also serve on the Board of Directors of the United South and Eastern Tribes (USET), the Eastern Region Delegate on the BIA Tribal Self-Governance Advisory Committee, the IHS Office of Self-Governance Advisory Committee, the Tribal-Interior Budget Council (TIBC), and the Health and Human Services Secretary's Tribal Advisory Committee (HHS-STAC), the Homeland Security Advisory Council (HSAC) and the Government Accountability Office—Tribal Advisory Committee (GAO-TAC).

The Wampanoag Tribe of Gay Head Aquinnah is part of the Great Wampanoag Tribal Nation, known as *The People of the First Light*. We have occupied our homelands since time immemorial. Our ancestors were signatories to the 1621 Treaty of Peace between the Wampanoag Nation and King James I of England. This treaty recognized and respected the sovereignty of the two nations. Like other New England Tribes who were among the first Indian Nations to encounter European settlers and explorers, we endured centuries of warfare, disease, loss of our aboriginal lands, discrimination and forced acculturation. However, like all Indigenous peoples of the United States, we maintained our cultural and religious practices, language, heritage, and Tribal government.

In the wake of the Supreme Court's decision in *Oklahoma v. Castro-Huerta*, much has been said about the negative impacts that this ruling will have. While it is true that this decision will result in some very specific harms, it is important to note that *Castro-Huerta* itself is a manifestation of a larger problem that has been ongoing for decades across Indian Country—unjustifiable laws that prevent Tribal Nations from exercising jurisdiction over its lands to protect all citizens and to exercise our right of self-determination. My Tribe, the Wampanoag Tribe of Gay Head (Aquinnah) is the poster child for what could and does happen when state and local jurisdictions are allowed to interfere in the decisions of the Tribe as it pertains to

the exercise of our governmental authority over our lands. My testimony will touch on both the impacts on tribal criminal jurisdiction and tribal civil regulatory authority.

First, current laws prevent tribal governments from prosecuting non-Indians who commit crimes on their reservations. Other laws that place arbitrary three-year sentencing caps on tribal governments often prevent tribal courts from delivering the full measure of justice that reflects the severity of the crimes committed. Such laws have left Native communities at the mercy of overworked, underfunded and often inattentive agencies that are not able or willing to prioritize public safety on Indian lands. And in the worst instances, are simply disinterested in seeing justice served for our Tribal communities.

The consequences of this system have been as terrible as they were predictable. Today, our Native women, girls, and Two Spirit relatives are more likely to be murdered or go missing than any other segment of the United States population. On some reservations, Native women are murdered at rates ten times the national homicide rate. And the Department of Justice has reported that a majority of Native victims have been victimized by a non-Indian perpetrator. But instead of restoring the inherent tribal jurisdiction of Tribal Nations to prosecute these crimes against our own citizens, the Supreme Court, in *Castro-Huerta*, gave it to the States. This situation not only undermines our sovereignty and the authority of our Tribal Courts, perpetrators rely on the fact that most states are not readily willing to prosecute crimes committed on Tribal Lands, which gives them license to commit these heinous crimes.

In creating previously non-existent jurisdiction for states over tribal lands, the *Castro-Huerta* decision furthers the divisive checkerboard approach to jurisdiction and creates perverse incentives for governments to shift desperately needed funds away from tribal governments to other agencies.

Improving public safety in Indian Country should be a process of addition not subtraction; a process of collaboration, not disunity. Tribal Governments know best how to protect our own citizenry and we know all too well the value of intergovernmental collaborations.

At a time when crime is on the rise and both states and the federal governments are stretched to respond, we should be seeking ways to increase the contributions of Tribal Nations, not arguing over ways to limit them.

As such, I respectfully suggest that it would be in the interest of public safety for Congress to act immediately to address the root causes of *Castro-Huerta*. First, I would encourage Congress to protect its Constitutionally mandated and absolute plenary authority to make meaningful Indian policies for the United States and to move quickly to remove unjustifiable restrictions that prevent tribal governments from prosecuting any and all violators who commit crimes on our lands. Second, Congress should immediately move to align tribal sentencing authorities to mirror with those of the federal government for tribes that meet objective public safety standards. Last, it is well-known that cooperation and coordination among governments and agencies produces superior public safety results. So, Congress should put into place measures that require States seeking to exercise jurisdiction in Indian Country to collaborate and coordinate with Tribes through a constitutionally codified process, ensuring concurrence and not simply "box checking".

For decades, Tribal Nations have been treated as second class sovereigns. Laws that arbitrarily limit the ability of our Tribal Governments to protect the public space within our borders are not rooted in public safety. They are rooted in ignorance and bias against Tribal Nations. It is long past time for these laws to change. Congress has the responsibility to correct this injustice; to affirm and ensure the sovereignty of Tribal Nations and Governments and our rights to protect our People. Our Women, Children and Two-Spirit citizens deserve no less protections than any other citizens or vulnerable people. I respectfully urge Congress to use the *Castro-Huerta* decision as a catalyst to rise to this occasion, meet this moment, and address the challenges created by decades of misguided and inadequate federal policies.

Second, as I mentioned above, our Tribe has also been on the receiving end of a state and local government's continued efforts to suppress our Tribe's right to exercise authority over our lands. In 1987, after prolonged litigation, we reached a land claims settlement agreement with the United States, the Commonwealth of Massachusetts, and the Town of Gay Head (now Aquinnah). As part of that land settlement agreement, under duress, we were forced to agree to comply with the zoning regulations of the Town and to agree that we would "not exercise any jurisdiction over any part of the settlement lands in contravention of this Act, the civil regulatory and criminal laws of the Commonwealth of Massachusetts, the town of Gay Head, Massachusetts, and applicable Federal laws." Public Law 100-95, August 18, 1987. As a practical matter this requirement has allowed the Town to stymie

any and all development of our settlement lands—including delaying the building of our community center, limiting the expansion of our housing authority, and even the siting of a small shed next to our water lab.

It was only after litigating to the Supreme Court, were we able to clarify that the Indian Gaming Regulatory Act does apply to us. However, even that win was challenged and today, we are required to comply with the permitting requirements of the Town if we are to construct a gaming facility on our tribal settlement lands. We are not alone in this, other tribes with similar land settlement agreements have faced similar challenges by their surrounding jurisdictions with similar results. While the impacts of *Castro-Huerta* are most clearly applicable to criminal jurisdiction, I fear that the astonishing dicta in the majority opinion will inflame those around us who are dedicated to suppressing the exercise of tribal governance generally. While we agree that the sky is not yet falling, I do fear that this is a tipping point and call upon Congress to act in its plenary authority to clarify that states do not have jurisdiction—criminal or civil—over tribal lands.

As Justice Gorsuch stated in his dissent, "Tribes are not private organizations within state boundaries . . . Tribes are sovereigns." We predate the formation of the United States, we predate the Constitution, we predate the Articles of Confederation. In fact, our tribe, the Wampanoag people, were here as thriving as a sovereign nation when the Pilgrims landed on this continent. While some on the SCOTUS may have forgotten this important fact, as Justice Gorsuch also stated, "the ball is back in Congress' court" and we urge you to lead this body back to the principles that respect Tribes and tribal sovereignty.

QUESTIONS SUBMITTED FOR THE RECORD TO HON. CHERYL ANDREWS-MALTAIS, CHAIRWOMAN, WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH)

The Honorable Cheryl Andrews-Maltais did not submit responses to the Committee by the appropriate deadline for inclusion in the printed record.

Questions Submitted by Representative Leger Fernández

Question 1. In your opinion, how does the Castro-Huerta ruling create "incentives" for the Federal Government to move public safety funds away from tribal governments and to other agencies?

Questions Submitted by Representative Stansbury

Question 1. What can Congress do to hear from Tribal nations in order to find a reasonable consensus in Indian Country to respond to Castro-Huerta?

Questions Submitted by Representative Westerman

Question 1. Lead Up: Collaboration among tribal, state, federal, and local law enforcement and legal systems is needed to cover the complicated jurisdictional system that exists in Indian Country.

(1a). Could you provide examples of the best collaborative connection that your tribe has had with non-tribal law enforcement, and how that may help inform discussion about public safety in Indian Country?

(1b). Can you explain whether the Castro-Huerta decision has had any impacts on your tribe's relationship with local, state, or federal law enforcement? And could you provide an example of how those relationship have changed, if they have?

Ms. LEGER FERNÁNDEZ. Thank you very much, Chairwoman Maltais, for your testimony.

The Chair now recognizes the Honorable Whitney Gravelle, who is the President of the Bay Mills Indian Community.

STATEMENT OF THE HONORABLE WHITNEY GRAVELLE, PRESIDENT, BAY MILLS INDIAN COMMUNITY, BRIMLEY, MICHIGAN

Ms. GRAVELLE. Thank you, Madam Chair.

[Speaking Native language.] Aanii boozhoo. My name is the Woman who Stands in the North. My English name is Whitney Gravelle, and my voice first sounded at Place of the Pike, also known as Bay Mills Indian Community, which is an Ojibwe Tribal Nation located on Lake Superior in Michigan's Upper Peninsula.

Bay Mills Indian Community has signed multiple treaties with the United States. And in 1936, was federally recognized and has maintained civil and criminal jurisdiction with the Federal Government on behalf of its citizens.

I am appearing before this Subcommittee in my capacity as President to speak on behalf of the questions, concerns, and issues we have already encountered due to the U.S. Supreme Court ruling in *Oklahoma v. Castro-Huerta*, and to encourage the United States to work together to resolve the issues presented by this ruling.

As discussed by others providing testimony today, the Supreme Court in *Castro-Huerta* caused reverberating shocks throughout Indian Country as it overturned long-held legal precedent. Without question, it is important to start with the premise that any Tribal Nation's first duty since time immemorial has always been to protect and safeguard our citizens, our people.

A crime against one person is an offense against the people and the sovereign laws of our government. Our sovereignty and duty to protect operates in large part to safeguard the political integrity, economic security, and the health and welfare of our Tribal Nation.

Nothing is more important or vital to the health and survival of our people than each Tribal Nation retains and exercises those powers in order to enforce our internal criminal and civil laws.

In pursuit of this, Bay Mills Indian Community has executed Cross Deputation Agreements, such Law Enforcement Cards with the Bureau of Indian Affairs, and executed a formal agreement with the Chippewa County Jail nearby in order to meet the goals on behalf of our Nation.

However, we all know that Tribal Nations, although make up a small percentage of the population, continue to suffer disproportional rates of crime. And this is partly due to the fact that the history of violence against Native people is convoluted by the complex jurisdictional scheme that exists for Tribal Nations in the United States.

The ruling in *Castro-Huerta* did little to solve these complex jurisdictional schemes and only contributes to this problem. It also adds an additional barrier for Tribal Nations to navigate and overcome.

More so, the implications of *Castro-Huerta* go much further and now casts doubt on any Federal law that exists including its application in Indian Country. This may include permitting requirements and regulations, control of land or natural resources, and most of all, our Tribal Nations will continue to seek justice for our citizens.

This ruling subsumes us to litigation to determine what applies and what doesn't. The concrete example that we are concerned

about in the Great Lakes that could implicate criminal and non-criminal matters.

Concerning businesses like extractive industries, where Tribal Nations are targeted and exploited, in the Great Lakes region, both Bay Mills Indian Community and the Bad River Band of Lake Superior Chippewa are involved in litigation against a private corporation, Enbridge Energy, in which the Line 5 dual pipelines and proposed tunnel project may impact treaty lands and reservation lands.

Because business practices should take into consideration the standards of Tribal Nations, without adherence to those set standards, Tribal Nations and development projects like this may lead to more violence and conflict and take advantage of land held by Tribal Nations for another's profit.

What was once previously Federal or tribal standards are now too questioned by *Castro-Huerta*.

There has been one solution presented in which a Tribal Nation could look at another set of agreements with a local county to authorize the appointment of a qualified tribal prosecutor to assist in prosecuting state offenses committed within that Tribal Nation's reservation.

However, that solution also raises more concerns. Because despite these agreements, a Tribal Nation would still continue to rely on their sovereignty for execution. And it does not come without the questions of if a state prosecutes a crime in Indian Country, do they too pay for the cost? Do they pay for the jail fees? Does the tribe in seeking justice for their Nation? How would each sovereign hold one another accountable?

Furthermore, in order to pursue such an agreement as the one described, it would require a good working relationship with any party which is not always determined by any set person. For example, in the state of Michigan, local county sheriffs and county prosecutors are carved out as an independent state actor, and thus not subject to review or guidance by the Governor or Attorney General.

In closing remarks, Tribal Nations have negotiated treaties with the United States of America and not the several states. The United States should not stay silent and let states set domestic policy with Tribal Nations. I humbly ask that the U.S. Congress develop a *Castro-Huerta* fix.

Thank you, Madam Chair and Subcommittee, for the opportunity to speak and share these concerns with you today. I am available for further questions.

[The prepared statement of Ms. Gravelle follows:]

PREPARED STATEMENT OF THE HONORABLE WHITNEY B. GRAVELLE, PRESIDENT, BAY MILLS INDIAN COMMUNITY

Introduction

Aanii boozhoo, (hello, greetings)! My name is Whitney Gravelle, and I currently serve as the President of Gnoozhekaaning, Place of the Pike, or Bay Mills Indian Community, which is an Ojibwe Tribal Nation located on Lake Superior in Michigan's Upper Peninsula. Bay Mills Indian Community was federally recognized in 1936 and has maintained civil and criminal jurisdiction with the federal government on behalf of its citizens since that time.

I am appearing before the Subcommittee in my capacity as President to speak on behalf of the questions, concerns, and issues we have encountered due to the U.S. Supreme Court ruling in *Oklahoma v. Castro-Huerta* (*Castro-Huerta*), and encourage the federal government to work together to resolve the issues presented by this ruling.

Background

As discussed by others providing testimony today, the Supreme Court in *Castro-Huerta* ruled that the Federal Government, Tribal Nations, and the States have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian Country. The Court indicated that the opinion applies to all states, which caused reverberating shocks throughout Indian Country, as it overturned long held legal precedent.

Without question, it is important to start with the premise that any Tribal Nation's first duty since time immemorial has always been to protect and safeguard its citizenry, the people. Our sovereignty and duty to protect operate in large part to safeguard the political integrity, economic security, and the health and welfare of our community.

In pursuit of this, Bay Mills Indian Community has executed Cross Deputation Agreements with Chippewa County, obtained Special Law Enforcement Cards with the Bureau of Indian Affairs, and executed a formal agreement with the Chippewa County Jail in order to meet these goals on behalf of our people and our Nation.

The facts and the landscape across Indian Country is anything but what was described by the Court in *Castro-Huerta*, especially here in the State of Michigan, and ultimately any solution will turn on resources, communication, coordination, respect, sovereignty, and the continued empowerment of Tribal Nations to seek justice for their citizens, lands, and resources.

Problem

Across Indian Country, Tribal Nations make up a small percentage of the population, yet our citizens continue to suffer disproportional rates of crime—domestic violence, murder, stalking, rape, and sexual assault. This is partly due to the fact that the history of violence against native people is convoluted by the complex jurisdictional scheme that exists for Tribal Nations in the United States. For more than forty years, Tribal Nations have been denied the ability to prosecute non-Indian perpetrators and a lack of resources impedes investigation, which prevents Tribal Nations from providing our citizens the protection and help they deserve.

Bay Mills Indian Community was one of the first Tribal Nations in the United States to complete our Missing and Murdered Indigenous People Tribal Community Response Plan. In preparation of that plan, we learned important questions we had to ask ourselves as well as our nearby law enforcement partners as well. We learned that we needed to communicate expectations and information. We also learned it was important we take the steps beforehand, implementing policy or regulatory frameworks to stop the steps that lead to the final horrific act that harms our loved ones, but this also means we must empower Tribal Nations in resolving issues related to and within Indian Country.

The ruling in *Castro-Huerta* does little to solve these complex jurisdictional schemes contributing to this problem, but instead adds an additional barrier for Tribal Nations to navigate and overcome.

More so, the implications of *Castro-Huerta* go much further beyond criminal jurisdiction by stating instead a State's jurisdiction in Indian Country may be preempted (1) by "federal law under ordinary principles of federal preemption" in which the federal act must have "clear statutory language" stating so, or (2) when the exercise of state jurisdiction would unlawfully infringe on tribal self-government. These two requirements now cast doubt on any federal law that exists and its application in Indian Country: permitting requirements and regulations, control of land or natural resources, and most of all how to seek justice for our citizens.

This could implicate criminal and non-criminal matters concerning businesses like extractive industries where Tribal Nations are targeted and exploited. In the Great Lakes Region, both Bay Mills Indian Community and the Bad River Band of Lake Superior Chippewa are involved in litigation involving Enbridge Energy, Inc.'s Line 5 dual pipelines and proposed tunnel project. Because business practices affect almost all human rights, including the right to a clean environment, personal security, community security, and economic stability, governmental officials and community members must observe the impact these practices have within the community. Without adherence to set standards by the impacted community or Tribal Nation, development projects will lead to violence and conflict, and take advantage

of land held by Tribal Nations for another's gain or profit. Once previous federal or tribal standards are now too questioned by *Castro-Huerta*.

Solution

One solution presented by the Pascua Yacqui Tribal Nation in the State of Arizona is to look at another set of agreements with a local County/Counties to authorize the appointment of a qualified tribal prosecutor to assist in prosecuting state offenses committed within that Tribal Nation's reservation, as well as to help coordinate and clarify the responsibilities of the Tribal Nation and County government for any crime committed.

This position would help address any jurisdictional uncertainty, reduce regional crime, decrease the prevalence of violent crime, combat sexual and domestic violence on reservation lands, and help combat Missing and Murdered Indigenous Persons and Women.

However, these agreements rely on a Tribal Nation's sovereignty for execution and do not come without unanswered questions and unidentified issues as well. If a State prosecutes a crime in Indian Country do they too pay the prosecution costs and jail fees? Does the Tribe in seeking justice for their Nation? How would each sovereign hold one another accountable?

Furthermore, in order to pursue an agreement such as the one described, it would require a good working relationship with the local County/Counties, which is not always determined by any set party or person. For example, in the State of Michigan's Constitution local county sheriffs and county prosecutors are carved out as an independent state actor, and thus not subject to review or guidance by the Governor or Attorney General.

Tribal Nations should not be left to answer to the determinations of individuals, or the fragility of relationships that change with each election season.

Improving safety in the day-to-day lives of the residents of Indian Country is the responsibility of a broad range of justice institutions both within and outside of Indian Country. Apart from the grant of state authority to prosecute non-Indians for crimes committed against Indians in Indian Country, the long-term impact of the decision in *Castro-Huerta* is unclear at this time without any real guidance from the federal government. We cannot wait to address the issues presented by this ruling. Any uncoordinated exercise of state authority could infringe on a Tribal Nation's right to self-government, could disrupt the prosecution of non-Indian cases, could cause unclear regulatory parameters for projects, and could cause additional jurisdictional uncertainty.

Tribal Nations negotiated treaties with the United States of America not the several states. The United States should not stay silent and let states set domestic policy with Tribal Nations. I humbly ask that the U.S. Congress develop a *Castro-Huerta* fix.

QUESTIONS SUBMITTED FOR THE RECORD TO HON. WHITNEY GRAVELLE, PRESIDENT, BAY MILLS INDIAN COMMUNITY

The Honorable Whitney Gravelle did not submit responses to the Committee by the appropriate deadline for inclusion in the printed record.

Questions Submitted by Representative Leger Fernández

Question 1. What are the civil jurisdictional impacts related to the Castro-Huerta ruling?

Questions Submitted by Representative Stansbury

Question 1. What can Congress do to hear from Tribal Nations in order to find a reasonable consensus in Indian Country to respond to Castro-Huerta?

Questions Submitted by Representative Westerman

Question 1. Lead Up: Collaboration among tribal, state, federal, and local law enforcement and legal systems is needed to cover the complicated jurisdictional system that exists in Indian Country.

(1a). Could you provide examples of the best collaborative connection that your tribe has with non-tribal law enforcement, and how that may help inform discussion about public safety in Indian Country?

(1b). Can you explain whether the Castro-Huerta decision has had any impacts on your tribe's relationship with local, state, or federal law enforcement? And could you provide an example of how those relationship have changed, if they have?

Ms. LEGER FERNÁNDEZ. Thank you very much, President Gravelle.

The Chair now recognizes the Honorable Teri Gobin, who is the Chair of the Tulalip Tribes.

STATEMENT OF THE HONORABLE TERI GOBIN, CHAIRWOMAN, TULALIP TRIBES, TULALIP, WASHINGTON

Ms. GOBIN. Madam Chair and members of the Committee, thank you for the opportunity to testify on the public safety crisis created by the Supreme Court's decision in the *Castro-Huerta* case.

[Speaking Native language] is my tribal name. Teri Gobin is my English name. And I proudly serve as the Chairwoman of Tulalip Tribes.

As one of the very first tribes to implement tribal jurisdiction that Congress restored to Tribal Nations in the 2013 VAWA, and as a tribe that has had to endure the harmful consequences of P.L. 280 in the state of Washington, Tulalip offers a unique perspective on how and why the Court's decision will dramatically determine public safety throughout all of Indian Country.

P.L. 280 is a law Congress enacted in 1953, during the Termination Era of Federal Indian policy, that divested criminal and civil jurisdiction from the tribes and allowed states to unilaterally assume this jurisdiction, Washington State P.L. 280, to accept jurisdiction over certain criminal and civil matters in the late 50s and early 60s.

The *Castro-Huerta* case couldn't be more wrong with its underlying assumption that states will do a better job of protecting our children or that by adding a layer of jurisdiction will do no harm. From a P.L. 280 tribe, with decades of experience with the state having this jurisdiction on our reservation, we are here to tell you that there is great harm. It simply doesn't work.

When Tulalip began exercising jurisdiction over non-Indians for domestic violence crimes under the VAWA tribal provision, children were present and physically harmed in over half the incidences we prosecuted, yet the state did not prosecute a single case against a non-Indian for these crimes against our children.

Aside from the chaos and confusion that occurs when a state has jurisdiction over tribal lands, that jurisdiction is rarely exercised. And if the state does exercise this authority, there is often biased treatment, discrimination, and an insensitivity toward the tribal victim and their families.

This leads to extreme distrust and no confidence in the law and justice, making prosecution in Indian cases extremely difficult. And crimes go unpunished. Adding a layer to the state jurisdiction also becomes an impediment to the fulfillment of Federal trust responsibilities.

Cases and people fall through the cracks of this jurisdictional complexity as both state and Federal law enforcement step back in favor of the other's jurisdiction.

This is why we work hard to secure a partial retrocession of the jurisdiction granted to the state of Washington, but the decision injects uncertainty into P.L. 280. Is the state jurisdiction now resurrected or could it be? Does the state now have jurisdiction without P.L. 280?

Ultimately, the Court's decision restricts the ability of Tribal Nations to seek self-sufficiency and build strong governments. And it disregards the connection between sovereignty and safety for Native children, threatening to obscure the critical work this Congress has done to restore our inherent right to protect our children.

With the Supreme Court's consideration of *Brackeen v. Haaland* in the upcoming term, the opportunity for misinterpretations with regards to the inherent sovereignty of our Tribal Nation calls for the Court's immediate correction. We desperately need Congress to act and correct the Court's decision.

And thank you again for taking this time to hear my testimony.

[The prepared statement of Ms. Gobin follows:]

PREPARED STATEMENT OF TERI GOBIN, CHAIRWOMAN, TULALIP TRIBES

Madame Chairwoman and members of the committee, thank you for the opportunity to testify on the public safety crisis created by the Supreme Court's decision in *Castro-Huerta*. My name is Teri Gobin, and I am proud to serve as the Chairwoman for the Tulalip Tribes. The Tulalip Indian Reservation is a 22,000 acre reservation located east of the Interstate 5 corridor, 35 miles north of Seattle. As one of the very first tribes to implement the tribal jurisdiction that Congress restored to tribal nations in the 2013 reauthorization of the Violence Against Women Act, and as a tribe that has had to endure the harmful consequences of PL-280 in the state of Washington in the Pacific Northwest, Tulalip offers a unique perspective on how and why the Court's decision in *Castro-Huerta* will dramatically undermine public safety throughout all of Indian Country. We urge Congress to take action.

Public Law 280

It is important to understand the *Castro-Huerta* decision in the context of Public Law 280 (18 U.S.C. § 1162, 28 U.S.C. § 1360). Public Law 280 is a transfer of Indian Country jurisdiction from the federal government to state governments. Prior to the enactment of Public Law 280, only the federal government and the tribes had jurisdiction to prosecute crimes committed by Indians within Indian Country. In enacting Public Law 280, Congress gave six states (California, Minnesota, Nebraska, Oregon, Wisconsin, and Alaska) extensive criminal and civil jurisdiction over tribal lands within the affected states (the so-called "mandatory states"). Public Law 280 also permitted the other states to acquire jurisdiction at their option. Washington assumed Public Law 280 jurisdiction by accepting requests from Indian tribes to assume jurisdiction on the reservation. Later, Washington enacted a law in 1963 that assumed partial Public Law 280 jurisdiction over Indian reservations without the consent of the tribes. Wash. Rev. Code § 37.12.010.

A common misconception about Public Law 280 is that it transferred jurisdiction from tribes to state governments. Rather, it transferred federal authority to the states to exercise jurisdiction over certain matters within Indian Country but did not impair tribal concurrent authority. Retrocession of Public Law 280 reduces state authority on Indian reservations by relinquishing part or all of the state authority obtained under Public Law 280 back to the federal government. This has the practical effect of returning primary responsibility to the tribes for prosecuting crimes committed by Indians on tribal lands that are not prosecuted under federal law. In the years since Public Law 280 was enacted, many if not most tribes in Public Law 280 states that have developed or expanded tribal justice systems have done so as part of a Public Law 280 retrocession process.

Washington State jurisdiction prior to retrocession—RCW 37.12.010 and .021

Washington State's assumption of Public Law 280 jurisdiction depended on land status and the subject matter of the criminal or civil action. Wash. Rev. Code § 37.12.010. For offenses committed by Indians on trust land within a tribe's reservation, the State assumed criminal and civil jurisdiction only as to eight subject matter areas: compulsory school attendance, public assistance, domestic relations, mental illness, juvenile delinquency, adoption proceedings, dependent children, and operation of motor vehicles. On reservation lands held in fee, the State assumed complete criminal and civil jurisdiction for offenses committed by or against Indians. When considered alongside the jurisdiction the State already had over crimes involving only non-Indians on reservation land, Washington had the same jurisdiction on fee lands within Indian reservations as it had anywhere else in the State.

In addition to the assumption of jurisdiction on fee land and as to the eight subject areas on trust land discussed above, Washington State also established a process for Indian tribes to petition the State to take full civil and criminal jurisdiction even on trust land within a reservation. Tulalip petitioned the State to assume full Public Law 280 criminal and civil jurisdiction on the Reservation in 1958.

As stated above, prior to retrocession, the State had full Public Law 280 criminal and civil jurisdiction over all lands on the Tulalip Reservation. In 2001, Washington State retroceded its Public Law 280 jurisdiction over Tulalip trust land (except as to the eight enumerated areas in RCW 37.12.010). The retrocession at Tulalip means the State no longer has jurisdiction over crimes committed by Indians on trust or restricted fee lands, regardless of the status of the victim. The State continues to exercise civil and criminal jurisdiction on fee land within the reservation concurrently with the Tulalip Tribes.

This checkerboard jurisdiction based on land status is one of the reasons that Tulalip found it beneficial to enter into a mutual law enforcement agreement with Snohomish County and obtain state general authority peace officer certifications for tribal officers. This allows Tribal and County law enforcement to cooperatively conduct law enforcement duties throughout the Tulalip Reservation and later refer matters to the appropriate jurisdiction for prosecution based on determinations of the status of the defendant and the lands where the crime occurred.

While some cases with Indian defendants who committed crimes on fee land are investigated and charged in County court, the Tulalip Prosecutor's office has always been able to transfer those cases of which they have become aware into Tribal court with the cooperation of County prosecutors.

Challenges to State Jurisdiction on Reservation Lands

At Tulalip, forty percent of our reservation is currently owned by non-Indians, and we are home to a significant number of non-Indian residents, as well as visitors from Seattle and other nearby populated cities and regions. The large number of non-Indian residents on the Tulalip Indian Reservation, the geographic location of the reservation, and the economic activity of the reservation generated by the Tulalip Tribes have all contributed to an increased number of crimes committed against members of the Tulalip Tribes, including missing tribal members and human trafficking. A large number of these crimes are committed by non-Indians residents who live on or travel through our reservation.

For this reason, Tulalip took immediate action when Congress reauthorized VAWA in 2013 and restored tribal criminal jurisdiction over non-Indian crimes of domestic violence, dating violence, and violations of protective orders, and became one of four pilot project tribes to implement the restored criminal jurisdiction. From 2014 through the present day, Tulalip brought charges against 46 non-Indian defendants. Tulalip has a victims' rights code and robust victim services that allow us to respond quickly, effectively, and consistently to DV victims in a way the state never has. VAWA has made our community safer.

However, upon exercising jurisdiction under VAWA 2013 we quickly discovered glaring jurisdiction gaps. These jurisdictional gaps were the result of the Supreme Court's decision in *Oliphant* that stripped tribal jurisdiction over many violent crimes committed against our citizens, including child abuse, sexual assault, sex trafficking, and all drug related crimes. At Tulalip, the most glaring jurisdictional gap was the inability to prosecute non-Indians for crimes committed against children. Crimes of domestic violence do not happen in a vacuum. Children are often in the home during these incidents, and are the first responders to a domestic violence victim, either coming to the aid of their mother or being used as a physical pawn during a physical altercation. In fact, from 2013–2021, over half of our

domestic violence cases also involved crimes committed against children. Tulalip had no jurisdiction to prosecute, and although the State of Washington *could* have prosecuted these crimes by non-Indians against children, they did not, and never have during this time frame. With competing priorities, limited resources, and inherent bias, state prosecutions for crimes against our tribal community members don't happen as often as they should.

The Court's decision in *Castro-Huerta* involved a crime of child abuse, committed by a non-Indian against an Indian child on a reservation. The Court's decision to grant Oklahoma jurisdiction over crimes committed against our children on our lands has damaging consequences for public safety across all of Indian Country. This past March, Congress restored the inherent jurisdiction of our nation to prosecute non-Indian crimes of violence committed against Indian children on reservation lands under VAWA 2021. Underlying the Court's decision in *Castro-Huerta* is the assumption that states will do a better job of protecting our children than our own tribal governments.

Moreover, the Court acts like adding a layer of jurisdiction is no big deal, and that doing so does no harm. From a PL 280 tribe with a reservoir of experience with the state having jurisdiction on our reservation, we are here to tell you that there is great harm. It simply does not work. Aside from the chaos and confusion, when a state has jurisdiction over tribal lands, that jurisdiction is rarely exercised. And if the state does exercise this authority, there is often bias treatment, discrimination, insensitivity toward the tribal victim and families, and abuse. This leads to extreme distrust and diminishment of confidence in law and justice, making prosecution in Indian cases extremely difficult. At Tulalip victims were afraid of the state system, and subsequently victims did not report crimes pre-retrocession. Tulalip has often been described as a place of lawlessness pre-retrocession. And while there have been some improvements, distrust of outside law enforcement remains with our tribal citizens. Adding a layer of state jurisdiction also becomes an impediment to the fulfillment of the federal trust responsibility. From 1985 until 2001, we worked tirelessly to secure a partial retrocession of the jurisdiction granted to the state of Washington because of these reasons. In our experience, concurrent jurisdiction doesn't translate to better access to justice or community safety but the opposite: cases and people fall through the cracks of jurisdictional complexity as both state and federal law enforcement step back in favor of the other's jurisdiction.

The Court's decision in *Castro-Huerta*, injects more uncertainty for tribes under PL 280. Before *Castro-Huerta*, the procedures created by Congress to grant jurisdiction to states, as well as to retrocede it, were clearly spelled out in PL-280. But the *Castro-Huerta* Court's reading of PL-280 calls all of that into question and diminishes the value of retrocession. Justice Kavanaugh concluded that states have this jurisdiction over tribal lands regardless of whether a state has followed the procedures outlined in PL-280. Does our work with Washington to retrocede specific categories of jurisdiction meet the specificity in the Bracker test when the Court concluded that the actual text of PL-280 did not meet the test, according to Justice Kavanaugh? Our goal was to remove state jurisdiction on our Indian lands, is state jurisdiction now resurrected, or could it be? It seems now the state may have jurisdiction without PL 280.

Ultimately, the Court's decision restricts the ability of tribal nations to seek self-sufficiency and build strong governments, which is an established and repeated policy goal of the federal government. Specifically, *Castro-Huerta* impedes the ability of tribes to utilize PL-280's procedures to retrocede state jurisdiction and build tribal government capacity and self-sufficiency. In order to protect public safety on tribal lands, our nations' ability to develop tribal governmental institutions and economies must be preserved, not limited by arbitrary impediments imposed by court decisions.

Castro-Huerta does nothing to increase public safety in Indian Country. It only creates confusion. And ultimately, the Court's disregard for the connection between sovereignty and safety for Native children threatens to obscure the critical work this Congress has done to restore our inherent right to protect our children. With the Supreme Court's consideration of *Brackeen v. Haaland* in the upcoming term, the opportunity for mischief and misinterpretations with regards to the inherent sovereignty of our tribal nations calls for the Court's immediate correction.

We urge Congress to action to correct the harm caused by the Court's decision.

QUESTIONS SUBMITTED FOR THE RECORD TO HON. TERI GOBIN, CHAIR, TULALIP TRIBES

The Honorable Teri Gobin did not submit responses to the Committee by the appropriate deadline for inclusion in the printed record.

Questions Submitted by Representative Leger Fernández

Question 1. The underlying presumption of the Castro-Huerta ruling is—as you say in your testimony—that "States will do a better job of protecting our children than our own governments."

(1a). Based on the Tulalip Tribes' experiences in a P.L. 280 state, is this presumption accurate?

Questions Submitted by Representative Stansbury

Question 1. What can Congress do to hear from Tribal Nations in order to find a reasonable consensus in Indian Country to respond to Castro-Huerta?

Questions Submitted by Representative Westerman

Question 1. Lead Up: Collaboration among tribal, state, federal, and local law enforcement and legal systems is needed to cover the complicated jurisdictional system that exists in Indian Country.

(1a). Could you provide examples of the best collaborative connection that your tribe has with non-tribal law enforcement, and how that may help inform discussion about public safety in Indian Country?

(1b). Can you explain whether the Castro-Huerta decision has had any impacts on your tribe's relationship with local, state, or federal law enforcement? And could you provide an example of how those relationship have changed, if they have?

Ms. LEGER FERNÁNDEZ. Thank you very much, Chair Gobin.

The Chair now recognizes the Honorable Sara Hill, who is the Attorney General of the Cherokee Nation. Attorney General Hill, the floor is yours.

STATEMENT OF THE HONORABLE SARA HILL, ATTORNEY GENERAL, CHEROKEE NATION, TAHLEQUAH, OKLAHOMA

Ms. HILL. Chair Leger Fernández, Ranking Member Obernolte, and distinguished members of the Subcommittee, on behalf of the 437,000 citizens of the Cherokee Nation, I thank you for this opportunity to speak about the Supreme Court's recent decision in *Oklahoma v. Castro-Huerta*.

As you know, the *Castro-Huerta* case arose on the Cherokee Nation reservation and involved a Cherokee child. The case was one of dozens the Oklahoma Attorney General brought in front of the high court hoping for an opportunity to overturn the landmark ruling in *McGirt v. Oklahoma*.

McGirt was the result of a generational effort by tribal advocates to displace what Justice Gorsuch referred to as the rule of the strong with the rule of law in Oklahoma's Indian Country. *Castro-Huerta* did not overturn *McGirt*, but it did issue a strong signal that despite clear Federal legislation that pre-empted state jurisdiction over crimes by non-Indians against Indians in Indian Country, as well as decades of prior court decisions, that we have

not yet departed from an era where the rule of the strong can prevail.

It is my belief, founded as it must be in faith in our democracy and our justice system, that *McGirt* will not be the high water-mark. But the *Castro-Huerta* decision is certainly a retreat from the principal decision in *McGirt* and that should give people who believe in tribal sovereignty and the rule of law some pause.

In *Castro-Huerta*, the Court went well out of its way to provide jurisdiction to Oklahoma over crimes committed by non-Indians against Indians. A new majority emerged in this case, and it demonstrated little regard for principles of Federal Indian law that had been in place since Chief Justice John Marshall was on the bench.

As Justice Gorsuch said in his dissent, "The majority accepted the lawless disregard of the Cherokee sovereignty." This departure from well-established law represents a real threat to tribal sovereignty.

The Court essentially flipped the script on state criminal jurisdiction in Indian Country. Instead of examining Federal law for evidence that Congress had authorized state jurisdiction in Indian Country, the Court held that it only needed to examine Federal legislation that might have pre-empted state jurisdiction. But the most troubling aspect of *Castro-Huerta* could be what it may portend for future cases and legislative efforts.

I understand the desire to move forward on legislation to address this case. However, it is important to proceed thoughtfully and with the full understanding of any legal challenges that such action might draw. We have seen what this Court is willing to do and that is something everyone should be thinking about as Indian Country and Congress decide on next steps.

As far as the current impact of *Castro-Huerta*, Cherokee Nation has been making extraordinary efforts post-*McGirt* to ensure public safety and the day-to-day work of enforcing criminal laws on the Cherokee Nation's Reservation is the same today as it was prior to *Castro-Huerta*.

The costs of sustaining the large criminal justice system needed on the Cherokee Nation's 7,000 square mile reservation are substantial. The reservation's population is more than half a million, many of whom are Indian, and contains several large municipalities including a sizable chunk of the City of Tulsa.

Under the leadership of our Principal Chief, Chuck Hoskin, Jr., and our Tribal Council, Cherokee Nation has increased its spending on public safety by roughly $40 million. Congressional efforts to help alleviate these costs have been slow to make their way to the tribes most affected by *McGirt*. For example, in the FY22 Omnibus, Congress appropriated $62 million for tribes directly impacted by the *McGirt* decision. That bill was enacted in March, but we are still waiting for BIA to allocate and release that funding.

Increasing the flow of resources into the *McGirt*-affected tribes would be a welcome relief to Cherokee Nation and other tribes absorbing these costs largely on their own. I fear these costs will only continue to grow.

Prior to *McGirt*, the Nation had fewer than 100 criminal cases in any year. In the first year post-*McGirt*, we filed over 3,700 cases,

and are on track to beat that number this year. Our District Court, Attorney General's office, and Marshal Service have all added significantly to their staff to meet this need.

Additionally, with jurisdiction over non-Indians increasing, due to recent amendments to the Violence Against Women Act, we are preparing for another jump in our caseload. Cherokee Nation had the highest number of charges filed under the expanded authority granted through VAWA 2013, and we expect a similar increase this time around.

In the wake of the *Castro-Huerta* decision, we call for the governor of Oklahoma to come back to the table to end his anti-tribal agenda and move forward as we enter this chapter of concurrent jurisdiction.

We stand ready to grow and continue the tribal state collaborations such as Cross Deputization Agreements that have proven so effective on our reservation. Our many successes at the local level highlight that tribal justice systems, far from being anything exotic or scary, are local and familiar and serve tribal communities with zeal and professionalism.

Given an opportunity to flourish post-*McGirt* and post-*Castro-Huerta*, I have no doubt that tribal justice systems will continue to be a source of innovation and public safety throughout our Nation. Thank you.

[The prepared statement of Ms. Hill follows:]

PREPARED STATEMENT OF SARA HILL, CHEROKEE NATION ATTORNEY GENERAL

Chair Leger Fernández, Ranking Member Obernolte, and members of the Subcommittee for Indigenous Peoples of the United States:

On behalf of the more than 437,000 citizens of Cherokee Nation, I thank you for this opportunity to offer comments regarding the U.S. Supreme Court's recent decision in *Oklahoma v. Castro-Huerta*, 142 U.S. 2486 (2022).

The *Castro-Huerta* case arose on the Cherokee Nation Reservation, and involved a Cherokee child. It was one of dozens of cases that the Oklahoma Attorney General appealed hoping for an opportunity to overturn the U.S. Supreme Court's decision in *McGirt v. Oklahoma*. Fortunately, Oklahoma could not convince the Court to consider the issues raised in *McGirt*.

The U.S. Supreme Court's decision in *McGirt v. Oklahoma* is best seen as the result of a generational effort by advocates in Oklahoma and across Indian Country to displace what Justice Gorsuch referred to as 'the rule of the strong' with the 'rule of law.' Oklahoma state officials illegally exerted jurisdiction over Indian Country, and the United States illegally suppressed tribal governments in Oklahoma until the 1970s. It was the work of tribal elected leaders, attorneys, and advocates that turned the tide. *McGirt* was a critical and much-celebrated part of this return to the rule of law in Oklahoma Indian Country.

But is it a high-water mark? The decision in *Castro-Huerta* has, unfortunately, broken in the opposite direction. Despite clear federal legislation that preempted state jurisdiction over crimes by non-Indians against Indians in Indian Country, as well as decades of prior court decisions, the U.S. Supreme Court went well out of its way to provide jurisdiction to Oklahoma over crimes committed by non-Indians against Indians. A new majority emerged in this case, and it demonstrated little regard for principles of federal Indian law that had been in place since Chief Justice John Marshall was on the bench.

This departure from well-established law by the U.S. Supreme Court represents a real threat to tribal sovereignty. The Court flipped the script on state jurisdiction in Indian Country. No longer did states lack jurisdiction unless Congress authorized it. Now, states have jurisdiction unless Congress has specifically preempted it.

And the list of considerations and sources of federal law that fail to preempt state law is extraordinarily long, according to the *Castro-Huerta* majority. Nothing preempts state jurisdiction: not the clear language from the General Crimes Act, not Public Law 280, "no principle of tribal self-government," none of the treaties

between the Cherokee Nation and the United States, and not the Oklahoma Enabling Act.

In short, there is much that is troubling about the U.S. Supreme Court's decision in *Castro-Huerta*. Before *Castro-Huerta*, the Cherokee Nation, joined by the Chickasaw Nation, called for legislation that would support tribal governments and self-determination while protecting tribal reservations. Post *Castro-Huerta*, it is important to proceed thoughtfully and with a full understanding of any legal challenges, such legislation might draw. The long-term importance of the *Castro-Huerta* decision is yet unknown. Will it grow in importance, or become part of the U.S. Supreme Court's misfires, relegated to a specific situation at a specific time but lacking application moving forward?

That is not something we can yet know, but it is something that everyone should be thinking about as Indian Country and Congress decide on next steps.

The day-to-day work of enforcing criminal laws on the Cherokee Nation's Reservation is the same before *Castro-Huerta* as it is today. The Cherokee Nation has been making extraordinary efforts post-*McGirt* to ensure public safety.

Under the leadership of our Principal Chief, Chuck Hoskin, Jr., and our Tribal Council, the Nation has increased spending on public safety by $40 million. With the increased jurisdiction over non-Indians increasing due to recent amendments to the Violence Against Women Act in 2022, we are preparing for another increase in our caseload. Cherokee Nation had the highest number of charges filed under the expanded authority included in VAWA 2013, and we expect a similar jump in cases this time around.

Prior to *McGirt*, the Nation would have fewer than 100 criminal cases filed in a year. In the first year post-*McGirt*, we filed over 3,700, and are on track to beat that number this year. Our District Court, Attorney General's Office, and Marshal Service have all added significantly to their staff.

The costs of sustaining the large criminal justice system needed on the Cherokee Nation's 7,000 square-mile reservation are substantial. The reservation's population is more than a half million, many of whom are Indian, and contains several large municipalities, including a sizable chunk of the city of Tulsa. Although Cherokee Nation is fully committed to ensuring public safety, additional resources from our federal trustee would be welcome.

Even when allocated, federal resources have been slow to make their way to the tribes most affected by *McGirt*. For example, in the FY22 omnibus Congress appropriated $62 million for Tribes directly impacted by the *McGirt* decision. That bill was enacted in March—we are still waiting for BIA to allocate and release that funding. Increasing the flow of resources into the *McGirt*-affected tribes would be a welcome relief to the Nation's absorbing the cost of this rapid expansion.

Finally, I want to highlight a state-tribal collaboration that has been so effective in the Cherokee Nation. The Cherokee Nation has cross-deputation agreements with all law enforcement agencies that operate within our jurisdiction. Most criminal cases prosecuted by the Nation come from state law enforcement acting under these cross-deputation agreements. Every day, our office fields phone calls from local police or sheriffs asking about cases, providing updates, asking questions, and generally working together with the Cherokee Nation. These successes at the local level highlight that tribal justice systems—far from being anything exotic or scary—are local and familiar and serve tribal communities with zeal or professionalism.

QUESTIONS SUBMITTED FOR THE RECORD TO HON. SARA HILL, ATTORNEY GENERAL, CHEROKEE NATION

Questions Submitted by Representative Stansbury

Question 1. What can Congress do to hear from Tribal nations in order to find a reasonable consensus in Indian Country to respond to Castro-Huerta?

Answer. There is rarely a 'one size fits all' solution among tribes. Some tribes have hundreds of thousands of citizens on their reservation, while others have dozens. Some reservations are developed and urban, while others lack basic infrastructure or access to essential services. Given this diversity, providing forums for tribal governments to speak directly with U.S. officials and each other about common concerns is one way to begin to identify areas where there would be broad-based, intertribal support. In the context of *Castro-Huerta*, there are many tribes that may still be unaware of the decision, or be unaware of how it will impact them over the short and long term. Consensus building should be viewed as a valuable

process worthy of considerable time and energy, and not rushed to justify imposing a predetermined solution upon Indian country.

Questions Submitted by Representative Westerman

Question 1. Lead Up: Collaboration among tribal, state, federal, and local law enforcement and legal systems is needed to cover the complicated jurisdictional system that exists in Indian Country.

(1a). Could you provide examples of the best collaborative connection not included in your written testimony that your tribe has with non-tribal law enforcement, and how that may help inform discussion about public safety in Indian Country?

Answer. Oklahoma and the tribes within its exterior boundaries have, by and large, found ways to successfully negotiate mutually acceptable agreements that have benefited both state and tribal communities. Often, litigation triggered the ultimate agreement. This was the case even post-*McGirt*.

Many small municipalities contacted the Cherokee Nation, concerned that the loss of revenue from traffic tickets would gut the small town police forces on the Cherokee Nation Reservation. The Nation's elected leaders felt that maintaining local municipal police was a top priority, and agreed to donate traffic ticket revenue back to the municipality. Today, there are twenty such agreement with local municipalities, and it has helped keep local police in place where they are most needed. This type of cooperation with non-tribal law enforcement has not been the exception in Oklahoma, but indeed the rule.

(1b). Could you provide further information and data about how plans to increase resources to the Cherokee Nation's tribal court system have or have not changed both pre- and post-the McGirt decision, and also pre- and post-the Castro-Huerta decision, including staff increases, staff position additions, funding increases, and other similar metrics?

Answer. Post-*McGirt*, the Cherokee Nation has made unprecedented investments in its law enforcement and justice systems. Among other investments, the Nation has hired additional law enforcement officers, prosecutors, and judges to help with the additional workload. In an average year prior to *McGirt*, the Cherokee Nation would file between 50 and 100 criminal cases. In comparison, from March 11, 2021, through March 10, 2022, the Cherokee Nation's Office of the Attorney General filed 3,700 criminal cases in our tribal court, including 533 domestic violence cases. In 106 of those cases—roughly 20%—a non-Indian defendant was charged under the Nation's special domestic violence jurisdiction.

In fiscal year 2022 alone, the Cherokee Nation invested in excess of $30 million to expand and improve the delivery of justice-related services across our Reservation. Among other investments, this funding was used to increase the capacity of the Cherokee Nation Office of the Attorney General ("OAG"). Specifically, the OAG has added 7 full-time prosecutors, and has budgeted to hire 5 more full-time prosecutors in the next fiscal year. The OAG has also added numerous support staff, including 8 full-time and 2 part-time staff, with additional hiring ongoing to meet need. Additionally, the OAG has recently added 2 full-time investigator positions, including an investigator dedicated to domestic violence prosecutions, and 2 full-time victim witness coordinators.

As the Cherokee Nation continues to carry out its sovereign duty to provide public safety and justice within our Reservation, our needs and specific priorities for investment will continue to change and evolve—just as they have over the last few years. Flexibility in tribal reprogramming requests will allow us to address new and evolving challenges and priorities, as we continue to identify them.

For instance, post-*McGirt* expansion of our justice systems has recently led to the creation of entirely new departments within the Cherokee Nation that we identified as necessary. A new probation services division was recently established, which employs 3 full-time probation officers. A Cherokee Nation Department of Juvenile Justice was also established to handle the increase in delinquent cases. The Cherokee Nation's Department of Juvenile Justice employs 9 full-time staff members, including a Director of Juvenile Justice, intake officers, probation officers, and support staff. In July 2021, the Cherokee Nation opened a new Juvenile Justice Center in Muskogee, Oklahoma, to house these new staff members and provide a convenient location to hold juvenile court.

As recently as July of this year, the Cherokee Nation committed an additional $10 million to increase the size of the Cherokee Nation Marshal Service. To date post-*McGirt*, the Cherokee Nation has added 18 officers to its Marshal Service, and we are in the process of adding 35 more officers for a target number of 102. These

officers will be stationed throughout the Cherokee Nation Reservation to improve response times to calls for assistance. In addition to the personnel expansion, the Cherokee Nation Marshal Service has seen an exponential increase in its pre-trial and post-conviction detention budget. Cherokee Nation averages 200 detainees daily. Currently, these detainees are housed in county jails that the Nation contracts on a per inmate daily rate. The Nation recently entered into a contract to provide longer-term detention for inmates, but that option comes with an increased daily rate.

With the passage of the Violence Against Women Reauthorization Act of 2022, the Cherokee Nation's jurisdiction again increased on October 1st of this year. The Cherokee Nation is now able to assert jurisdiction over non-Indians who perpetrate sexual assault, child abuse, stalking, sex trafficking, or assaults on tribal law enforcement within the Cherokee Nation Reservation. This increased jurisdiction will create additional and new demand for certain tribal justice services throughout our Reservation.

Accordingly, as the Cherokee Nation's needs and priorities post-*McGirt* and post-*Castro-Huerta* are still emerging and shifting and the Nation will continue to respond with what resources it has to address issues of public safety.

Ms. LEGER FERNÁNDEZ. Thank you very much, Attorney General. I thank every witness in the second panel for their passionate testimony.

I am going to remind the Members that Committee Rule 3(d) imposes a 5-minute limit on questions. The Chair will now recognize Members for any questions they may wish to ask of the second panel. I will start by recognizing myself for 5 minutes.

Honorable Chaudhuri, Honorable Ambassador, you spoke of the issues that arise because of the fact that tribes do not have, in essence, even when they have criminal jurisdiction, that they don't have full criminal jurisdiction. There are limitations on that jurisdiction, both in terms of the sentences that may be imposed, as well as the individuals against whom a tribe may prosecute.

Can you elaborate a bit on why that makes it difficult to protect your people on tribal lands? And why it might be good to address that as we address a public safety package for Indian Country?

Mr. CHAUDHURI. Absolutely. And thank you, Madam Chair. I very much appreciate the witness testimony today, all of whom have called for action by Congress.

Some of the limitations that I spoke of address sentencing limitations as well as jurisdictional limitations. And one of the main sources from it was another judicial usurpation of congressional power back in 1978, which called into question the capacity of Tribal Nations to prosecute properly criminal acts in Indian Country. And that was a surprise to Nations such as the Muscogee Creek Nation, whose roots of criminal justice systems existed before statehood of, not just Oklahoma, but also Alabama, and Georgia.

But that case itself restricted jurisdiction to prosecute bad guys in Indian Country which we fought for and Indian countries universally have fought for ever since.

But since then, in trying to restore some of that jurisdiction, Congress has taken a very measured approach that has resulted in a bipartisan conclusion that more restoration of tribal authority is better.

Some part of that measured approach included slowly ramping up sentencing authority of Tribal Nations, starting with the limit

of 1 year, then later, through the Tribal Law and Order Act, amping it up to 3 years. All of which was coupled with robust due process protections for any defendants within Indian Country.

At each stage of the way throughout this trend of Congress empowering Tribal Nations, we have heard nothing but good results. We haven't heard the sky is falling result of bad actions coming from tribal court prosecutions.

This is especially important to me. I had, in a previous life, served as Chief Justice of Muskogee Creek Nation, and I can speak to the capacity of Tribal Nations.

So, sentencing limitations need to be addressed in Indian Country. Jurisdictional limitations, if we really want to keep people safe, whether they are Native or non-Native in Indian Country, we have to empower local decision makers on the ground and the governments who have the greatest interest in protecting people.

Ms. LEGER FERNÁNDEZ. Thank you.

Mr. CHAUDHURI. That should appeal to both sides of the aisle.

Ms. LEGER FERNÁNDEZ. Thank you very much, Ambassador. I now wanted to turn to Chairwoman Gobin. I think your testimony about the implications that you need to be able to protect your children is really key. And I thought that we heard that theme throughout the testimony today.

Can you elaborate a bit more on what it means as a tribal leader to know that you might be restricted from being able to respond to those cases where the child on your reservation, the children of your community are being abused, and you cannot protect them, you cannot prosecute those crimes?

Ms. GOBIN. OK. This started out with the VAWA. When we first started to be able to prosecute non-tribals that were committing crimes against our women, some of the children that were in the room that actually got hurt really bad, they got beat during this time, there was no way to prosecute the crime against the child.

And those children have suffered a great deal. Not only the verbal but physical abuse that was horrific. They didn't get justice on having their portion of the crime go through a court system. It was devastating to the community. Some of these children are really suffering. They have to have mental health counseling, but it is not right that those crimes never got to go on through the system.

Ms. LEGER FERNÁNDEZ. Thank you very much. I did want to also ask Kevin Killer, the President of the Oglala Sioux Tribe, about the comparison of the funds available at the state level as to the tribal level, but I have run out of time.

We are going to ask the witnesses to respond to written questions. And I will submit my written questions so that we may move on. I now recognize Ranking Member Obernolte.

Mr. OBERNOLTE. Thank you to all our witnesses. It has been a very informative hearing so far.

Mr. Chaudhuri, I will start with a question for you. I want to thank you for coming to the table with a concrete solution. You have urged Congress to act, and I respect the position you have taken.

Are all of the Five Tribes of Oklahoma unified in their opinion of what Congress should do in this situation?

Mr. CHAUDHURI. My guess is in any room full of tribal leaders, there are going to be different approaches to different problems. But when we talk about consensus, one of the themes we have heard repeatedly today is that this is an Indian Country issue. We are always happy to work with our sibling Nations, and we are working toward solutions. But this is an issue that reaches far beyond Oklahoma.

I think even our Cherokee colleague mentioned the need for a thoughtful approach, and we respect the fact that she is calling for action and the Cherokee Nation is calling for action. But respectfully, one of the points that many of our colleagues raised is that the solutions are not new. They were vetted extensively by the Indian Law and Order Commission over 10 years ago, and the solutions are clear.

Mr. OBERNOLTE. Right. Well, I think those are some of the challenges that we face here, right? Because there are over 500 federally recognized tribes. There is probably going to be 500 different opinions of exactly what Congress ought to do, including what is probably the minority viewpoint, but including the viewpoint that P.L. 280 is not such a bad thing, and then maybe that should be expanded, which is something I know that you would vehemently disagree with.

So, how are we in Congress to determine what the right solution is given the fact that we probably want to apply it equally across the country?

Mr. CHAUDHURI. Thank you, sir. Excellent question. I was very thankful to hear the Chairwoman from Tulalip sound the alarm as to why Tribal Nations in Public Law 280 states have a deep interest in limiting the bad impacts of *Castro-Huerta*.

When you talk about consensus, consensus doesn't equal unanimity, and it is important to hear, certainly from all of Indian Country. But if Congress ever waited to act for every Tribal Nation to sign on board with every proposal, Congress would never be able to uphold its treaty and trust responsibilities.

So, respectfully, we appreciate the dialogue from today to show the vast majority of sentiment in Indian Country and urge Congress to consider appropriate actions to uphold its responsibilities.

Mr. OBERNOLTE. Thank you for the testimony.

Mr. CHAUDHURI. Thank you, sir.

Mr. OBERNOLTE. Ms. Gobin, I would like to follow up on the Chair's question because I am very interested in the problems that you have illustrated with P.L. 280. The situations where the perpetrators of crimes against Indians were not brought to justice as a result of that. Could you talk a little bit more about the situation you were discussing with the Chair—where crimes were committed against children, the evidence was there, but those crimes were not prosecuted.

Ms. GOBIN. Yes. So, that was where you have the two jurisdictions. You have the state and the feds, and neither one would take up the cases. And we have several that were on the books that did not get prosecuted. And we had conversations while trying to get the state to do it, but also with the feds.

Mr. OBERNOLTE. OK. So, why? I mean, I think opinions may differ about who has jurisdiction and who is going to do the prosecution, but it is hard to believe that anyone would say crimes have been committed against children, we have the evidence, and that is OK. So, how did these cases fall through the cracks?

Ms. GOBIN. Well, I think with the state, they may have difficulty working with the tribes. And the feds, we would have thought that we could have moved those cases forward but then they sit forever. And then we have had conversations on why aren't you taking us? So, we did have those conversations, and we are hoping to move them forward in a faster way. But, yes, children were hurt. And there is a bias at the state. They don't want to take tribal cases.

Mr. OBERNOLTE. Wow, that is stunning to hear that. I think that no matter what your opinion of *Huerta* is, we should all be unified in the desire to bring justice for the victims of these crimes. I thank you for your testimony. I yield back, Madam Chair.

Ms. LEGER FERNÁNDEZ. Thank you for your questions. The Chair will now recognize the gentleperson from the state of New Mexico, Representative Stansbury.

Ms. STANSBURY. Thank you, Madam Chairwoman. I want to start by saying thank you to all of our tribal leaders and welcoming you to our Committee and to Washington, DC. It is great to see so many old friends and wonderful to have you here. And thank you to Chairwoman Leger Fernández and our Ranking Member for this important hearing.

I want to start with my position on this issue which is that I believe that this decision by the majority of our Supreme Court is a direct affront to tribal sovereignty and to Tribal Nationhood, and upends, of course, generations of settled law in the U.S. tribal relationship, hundreds of treaties. And is an affront to our Constitution in which we recognize tribal sovereignty as inherent to our Tribal Nations. So, I strongly believe that we need to support the Tribal Nations who would like to see a legislative fix to this decision.

But my concern, and the question I want to direct to our tribal leaders who are here today and to those who are listening across our Tribal Nations in the United States, is how do we build a process at the congressional level to get to some form of consensus about the legislative path?

I know some of the previous questions have touched on this. I served on a panel just last week with a couple of dozen tribal leaders asking the question, what should the legislative fix look like? And I have received at least six different answers based on six different legal theories and bases.

I have heard more expansive responses that would like to overhaul and fix previous case law and statutory problems with how justice systems are supported in our Tribal Nations. I have seen more narrow fixes.

So, my question for our panelists today is really a process question more than a substance question. Which is, is there a need to seek an immediate fix that reaffirms *McGirt* or addresses a fatal flaw before the end of this Congress while we engage in a much more robust consultation process with the executive branch so that we can hear from all of our Tribal Nations? And sort of your

thoughts about how we build a reasonable consensus on a legislative path forward.

And I think if it is OK, Madam Chair, just going in the order of the witness' testimony, starting with our honorable Ambassador from Muskogee Creek.

Mr. CHAUDHURI. Does that work for you, Madam Chair?

If that does, thank you so much, Congresswoman Stansbury. Always good to see you.

In the interest of time, I will say that there is no legislative language that we put forward as a Nation. However, there are proposals that we support that are intended to generate meaningful discussion to have Congress signal its intent to uphold its responsibilities in short order.

We are mindful of the potential for mischief and erroneous misapplication of the underlying rationale of *Castro-Huerta* in cases that go beyond public safety. Most importantly, and coming around the horizon, the Supreme Court is set to hear arguments in the *Brackeen* case which if the Supreme Court wrongly extends the rationale under *Castro-Huerta*, it could be devastating for Native children throughout the country. So, we want Congress to act quickly.

In terms of legislative proposals that we would support, we not only support clarification in the public safety context but to be clear, we also support a robust effort collectively to go after bad guys. And going after bad guys requires addressing sentencing limitations, jurisdictional limitations, and so forth.

So, we do believe action is needed now, and we support something that addresses things collectively. We don't call it a fix. We call it strengthening public safety issues in Indian Country. Thank you so much for the question.

Ms. STANSBURY. Thank you so much. I am mindful that I actually have run out of time here with this. I am going to submit this, Madam Chairwoman, as a question for the record to all of our witnesses. And as I said, I would love to hear from Tribal Nations. We would love to hear from Tribal Nations across the country about how to build that consensus process.

And the question about acting expediently before the end of this Congress, and whether it is both, doing something now, as well as doing something more extensive.

Finally, I just want to say that we are working very hard to get a real budget passed, and we know that there is going to be a short-term CR. We are hearing the need to get more resources to support tribal courts, to beef up DOJ, and BIA, and law enforcement. And we know that this is a huge, immediate need across Indian Country. We stand with you, and we will be working very closely with the Tribal Nations to address this issue. Thank you, Madam Chairwoman.

Ms. LEGER FERNÁNDEZ. Thank you, Representative Stansbury, for your questions and the answers. The Chair will now recognize the gentleperson, Representative Rosendale. Thank you for being here.

Mr. ROSENDALE. Thank you, Madam Chair. Attorney General Hill mentioned some of this in her testimony, but I would like to hear more from you, Ambassador Chaudhuri, and AG Hill, on the

plans both your Tribal Nations have put in place to handle an increased caseload in your tribal courts, pre- and post-*McGirt*. We can start with you. You are right here.

Mr. CHAUDHURI. Yes, sir. And as I said before, we have our Attorney General Geri Wisner, who works on the day-to-day implementation of *McGirt* and any specific details she can follow up in the record with written testimony. And we are here today if you so choose. But we have, like Cherokee Nation, amped up our budget from day one at Muskogee Creek Nation.

Chief Hill formed a Commission to look at all aspects of *McGirt*. From that Commission, we increased our social services providers, our prosecutors, our judges. We now have doubled the number of judges that we ever had, servicing all the caseload that is coming through our system. We have more law enforcement on the ground and prosecutors.

The numbers, our budget isn't as big as Cherokee Nation's, but our ramp-up is probably proportionate, if not greater since we were the very first nation to start implementing *McGirt*.

Mr. ROSENDALE. And AG Hill? Do you have anything further?

Ms. HILL. Yes. I think just briefly, that $40 million represents a lot of different things. So, from having one part-time criminal prosecutor who also handled the whole juvenile docket which was one person could handle it, now I have seven full-time prosecutors and that is all they do.

We opened up additional locations in Muscogee and in Jay which are local areas and are still looking to expand our District Court system further. We hired additional court judges. We hired additional members of the Marshal Service.

So, basically, every part of our criminal justice system had to expand and grow in every way. That has just been an ongoing explosion in the criminal justice system. And one of the huge things I think that is worth mentioning is the detention budget.

All of these people who are receiving these sentences have to serve that sentence somewhere, and those costs have really been skyrocketing. I know that that, and also juvenile detention, has been a huge issue for all of the tribes in Oklahoma.

Mr. ROSENDALE. And while I have you still speaking, AG Hill, can you also speak to how these plans have or have not changed after *Castro-Huerta* was decided?

Ms. HILL. So, *Castro-Huerta*, the way that we looked at it, it didn't affect tribal jurisdiction. It didn't do anything to limit the number of cases coming directly to us. What it could limit is the number of cases coming to us under VAWA, because the Oklahoma Attorney General sent out a letter to some of the prosecutors in Oklahoma saying you need to be referring these cases to the state now.

That hasn't stopped those cases from coming to us. We are still seeing a pretty robust number of cases coming in from Indian Country that are non-Indian crimes against Indians. So, we haven't really seen a real big dip yet in that caseload. We are still proceeding with our expansion plans as if nothing had changed with *Castro-Huerta*, because as a practical matter, from our jurisdictional standpoint, the tribe's jurisdiction, it really didn't.

Mr. ROSENDALE. OK. Thank you. I was traveling around Oklahoma, it just so happens recently, and met with several law enforcement agencies and was really pleased to hear about the Cross Deputization and the collaboration that was taking place between the tribal and non-tribal law enforcement agencies. It sounded really, really positive.

But I did find it troubling to hear about the different penalties that were imposed based upon tribal or non-tribal status and the location of the offense. So, I don't know who is best suited.

AG Hill, I am thinking probably you. Could you expand on this for me and explain why that is so? And is there any plan to rectify or reconcile this difference?

Ms. HILL. Well, I think there is some mythology that gets mixed into all of that. I have heard on multiple occasions, that if you get a ticket in one jurisdiction, it is one cost, and if you get a ticket at Cherokee Nation, it is a different one. And I will chase it down, and it is just not true.

There is a lot of local law enforcement that sort of has this mythology that its tickets are much more expensive. And part of this is to get Indians to say, well, just go ahead and give me a ticket for the non-Indian court because it will be cheaper, right, even though this tribe has jurisdiction over them.

And for the most part, our penalties are very consistent with what state penalties are. The only time that that is different is where our jurisdiction or our ability to assess that penalty is limited by Federal law. Under the Indian Civil Rights Act, we simply cannot for any crime, for one single crime, have a penalty longer than 3 years. And there is nothing I can do about that from the tribal side.

Mr. ROSENDALE. OK. Thank you. Madam Chair, I yield back.

Ms. LEGER FERNÁNDEZ. Thank you very much for those questions and pointing out that distinction that I think that is part of the issue that we were raising earlier is the fact that we have, in essence, hobbled the ability of tribes to prosecute those crimes.

And as we know, when there isn't the fear of prosecution and serious sentences, that then may lead to more reckless and criminal behavior so thank you for——

Mr. ROSENDALE. Sort of like our southern border.

Ms. LEGER FERNÁNDEZ. We are dealing with our internal borders of the tribes right now and we love to focus on that exclusively in this Committee. I want to thank our witnesses for their valuable testimony and the Members for their questions.

Now I would like to transition to our final panel of witnesses for the day. Once again, I am going to remind non-Administration witnesses that they are encouraged to participate in the witness diversity survey created by the Congressional Office of Diversity and Inclusion.

Witnesses may refer to their hearing invitation materials for further information. Under our Committee Rules, oral statements are limited to 5 minutes, but you may submit a longer statement for the record if you choose.

When you begin, the onscreen timer will begin counting down. It will turn orange when you have 1 minute remaining. I recommend

that Members and witnesses joining remotely lock the timer on their screen.

After your testimony is complete, please remember to mute yourself to avoid any inadvertent background noise. I will allow the entire panel to testify before we began the question portion of the hearing.

Once again, we moved the hearing to 11 o'clock to see if we could get through the testimony before votes were called. We are hopeful we will be able to move through as much as possible before votes are called.

The Chair will now recognize Ms. Mary Kathryn Nagle, who is Counsel for the National Indigenous Women's Resource Center.

STATEMENT OF MARY KATHRYN NAGLE, COUNSEL, NATIONAL INDIGENOUS WOMEN'S RESOURCE CENTER, WASHINGTON, DC

Ms. NAGLE. Madam Chairwoman, members of the Subcommittee, and Ranking Member, I am honored to serve as Counsel to the National Indigenous Women's Resource Center, a national nonprofit, working to end domestic violence and sexual assault against Native women and children.

Today, our Native women and children face the highest rates of violence in the entire United States. The reasons for this epidemic, however, are no mystery. In 1978, the U.S. Supreme Court took away the inherent jurisdiction of our tribes to protect our own citizens on our own lands. And 2 months ago, the Court gave that jurisdiction to states.

The majority opinion in *Castro-Huerta* erroneously ignored Congress' passage of VAWA 2022. And the Court discarded Congress' considered judgment. The crime underlying the Court's decision in *Castro-Huerta* involved non-Indian abuse against an Indian child on tribal lands. A crime that as of October 1, 2022, Tribal Nations will once again be able to prosecute because Congress restored this jurisdiction to Tribal Nations, not states.

In restoring this jurisdiction, Congress recognized that no sovereign has a greater interest in protecting Native children than their own Tribal Nations. Indian law scholars have noted numerous problems with the judicial underpinnings of the opinion in *Castro-Huerta*. It misconstrues the plain language of the General Crimes Act. It violates the Constitution separation of powers and disrespects Congress' exclusive authority to legislate over Indian Affairs.

But most concerning is the fact that it obviates the connection between tribal sovereignty and safety for Native women and children. The consequences of *Castro-Huerta*, as they relate to safety for Native women and children, have already proven to be bad.

Because of *Castro-Huerta*, our Native women and children will now have to rely on their state and local governments to protect them and governments that until now, have failed to do so. The NIWRC is already receiving reports that individual U.S. Attorney's offices are implementing policies to defer prosecution of crimes committed against Indians on tribal lands to state law enforcement based on a flawed reading of *Castro-Huerta*.

Nothing in *Castro-Huerta* invites the Department of Justice to distance itself from its treaty, trust, duty, and responsibility to safeguard the lives of our women and children.

But as we have witnessed with P.L. 280, the Kansas Act, and the few other instances where Congress has granted states jurisdiction over crimes against Native victims on tribal lands, such a grant of jurisdiction to states inevitably results in a decrease in Federal prosecutions, a decrease in resources dedicated to the crime, and an increase in violent crimes against our Native people.

For instance, after Nebraska acquired this jurisdiction through P.L. 280, the United States Commission on Civil Rights reported that all the Tribal Nations in Nebraska were told the state simply, "did not have enough funds to maintain station deputy sheriffs on their reservations."

I wish I could say that state and local governments have historically prioritized the protection of our Native women and children, but they have not.

In Big Horn County, the state county with the highest rates of Missing and Murdered Indigenous Persons in the entire United States, the state of Montana has done nothing to address the fact that an entire Sheriff's County office repeatedly refuses to investigate the innumerable homicides of Native people within the state's jurisdiction. Kaysera Stops Pretty Places, Allison High Wolf, Selena Not Afraid, the list goes on and on.

In North Dakota, local and state law enforcement did not search for Savanna Greywind's body when she went missing. She was murdered in Fargo, North Dakota, but the Fargo police refused to look for her. It was her friends and family who organized the search party. State law enforcement did nothing.

In Alaska, the P.L. 280 state with the highest rates of violence against Native women, Native victims of violent crimes who call 911 wait days and days for the arrival of a state trooper. Oftentimes, children and family members have to guard the crime scene until state law enforcement finally arrives. Native children are their first responders.

In Wyoming, Native people comprise 3 percent of the entire state's population, but they are 21 percent of the state's homicide victims. Oklahoma, the state that asked this court for this jurisdiction, fairs no better.

In 2017, the Urban Indian Health Institute found that Oklahoma ranks in the top 10 of states with the highest number of MMIWG cases. And Oklahoma City ranks in the top eight of American cities that fail to properly record and investigate MMIWG cases.

The decision in *Castro-Huerta* sadly has nothing to do with what's best for Native victims. It is an outcome determinative decision fueled by one governor's multi-million-dollar PR campaign to overturn the Court's prior decision in *McGirt*. But when the dust is settled and the rhetoric has calmed down, it will be Native women and children who pay the price. We are asking Congress to take action and address the crisis created by *Castro-Huerta*. Thank you.

[The prepared statement of Ms. Nagle follows:]

PREPARED STATEMENT OF MARY KATHRYN NAGLE, COUNSEL, NATIONAL INDIGENOUS WOMEN'S RESOURCE CENTER

Madame Chairwoman and members of the committee, thank you for the opportunity to testify. I am honored to serve as counsel to the National Indigenous Women's Resource Center, a national non-profit whose mission is to end violence against Native women and children. Today, Native women and children face the highest rates of violence in the entire United States. The reasons for this epidemic of violence in Indian Country are no mystery.

In 1978, the U.S. Supreme Court took away the inherent jurisdiction of our Tribal Nations to prosecute crimes committed by non-Indians against Indian victims on tribal lands. And then two months ago, the Court gave that jurisdiction to States.

But after 1978, and before the Court's decision in *Castro-Huerta*, Congress passed two pieces of legislation that restored, partially, the jurisdiction the Court took away in *Oliphant*. In the last two re-authorizations of the Violence Against Women Act, Congress, in a bi-partisan manner, elected to restore this jurisdiction to Tribal Nations. Not States. In fact, the crime underlying the Court's decision in *Castro-Huerta* involved non-Indian abuse against an Indian child on tribal lands-a crime that, as of October 1, Tribal Nations will once again be able to prosecute. In restoring this jurisdiction to Tribal Nations, Congress recognized that no sovereign has a greater interest in protecting the safety and welfare of Native victims than their Tribal Nations. The majority opinion in *Castro-Huerta* erroneously ignored Congress' passage of VAWA 2022, and the Court ignored Congress' considered judgment.

Indian law scholars have noted numerous problems with the judicial underpinnings of the opinion in *Castro-Huerta*. It misconstrues the plain language of the General Crimes Act. It violates the Constitution's separation of powers and disrespects Congress' exclusive authority to legislate over Indian affairs. But as a Native woman dedicated to ending violence against Native women and children, the biggest problem I see with *Castro-Huerta* is that the Court erroneously concluded that state governments somehow have a greater interest in protecting Native victims than their own Tribal Nations.

They do not. The consequences of *Castro-Huerta*, as they relate to safety for Native women and children, have already proven to be dire. According to the DOJ, 96% of Native victims have been victims of violent crimes committed by non-Indians. Because of *Oliphant*, Tribal Nations cannot prosecute the majority of violent crimes committed against our women and children in our own homes. And because of *Castro-Huerta*, our Native women and children will now have to rely on their state and local governments to protect them, instead of the federal government—the only government with a treaty trust duty and responsibility to protect us. The NIWRC is already receiving reports that individual United States Attorneys Offices are implementing policies to defer prosecution of crimes committed by non-Indians against Indians on tribal lands to state law enforcement, based on a flawed reading of *Castro-Huerta*. Nothing in *Castro-Huerta* invites the Department of Justice to distance itself from its treaty trust duty and responsibility to safeguard the lives of our women and children. But as we've witnessed with PL 280, the Kansas Act, and the few other instances when Congress has grated States jurisdiction over crimes against Native victims on tribal lands, such a grant of jurisdiction to States inevitably results in a decrease in federal resources, a decrease in prosecutions, and an increase in violent crimes against our Native people. For instance, after Nebraska acquired this jurisdiction through PL-280, the United States Commission on Civil Rights reported in 1961 that Tribal Nations in Nebraska were told the State did "not have the funds to maintain station deputy sheriffs on their reservations." [1]

I wish I could say that state and local governments have prioritized the protection of Native women and children, but they have not.

In Big Horn County, the state county with the highest rates of Missing and Murdered Indigenous Persons in the United States, the State of Montana has done nothing to address the fact that an entire Sheriff's Office repeatedly refuses to investigate the innumerable homicides of Native people within the state's jurisdiction. Kaysera Stops Pretty Places, Allison High Wolf, Selena Not Afraid. The list goes on and on.

In North Dakota, local and state law enforcement did not search for Savanna Greywind when she went missing. She was murdered in Fargo, North Dakota. But the Fargo police refused to look for her. It was her family and friends who organized the search party. State law enforcement did nothing.

---

[1] 5 U.S. Comm'n on Civil Rights, Justice: 1961 Comm'n on Civil Rights Report 148 (1961).

In Alaska, one of the States with the highest rates of violence against Native women, Native victims of violent crimes who call 911 wait days and days for the arrival of a State trooper. Oftentimes, children and family members have to guard the crime scene until state law enforcement finally arrives. Native children are the first responders.

In Wyoming, Native people comprise 3 percent of the entire state's population, but they are 21% of the state's homicide victims.

Oklahoma, the State that asked the Court for this jurisdiction, fares no better. In 2017, the Urban Indian Health Institute ("UIHI") found that Oklahoma ranks in the top ten of States with the highest number of MMIWG cases, and Oklahoma City ranks in the top eight of American cities that fail to properly record and investigate MMIWG cases.

The decision in *Castro-Huerta* truly has nothing to do with what's best for Native victims. It is an outcome determinative decision fueled by one Governor's multi-million dollar PR campaign to overturn the Court's prior decision in *McGirt*. But when the dust has settled and the rhetoric has calmed down, it will be Native women and children who pay the price.

We are asking Congress to take action and address the crisis created by *Castro-Huerta*.

QUESTIONS SUBMITTED FOR THE RECORD TO MARY KATHRYN NAGLE, COUNSEL, NATIONAL INDIGENOUS WOMEN'S RESOURCE CENTER

Questions Submitted by Representative Leger Fernández

Question 1. Your testimony states that, due to the Castro-Huerta ruling, Federal authorities will begin to pull their public safety resources out of Indian Country altogether.

(1a). Why do you think this will be the case?

Answer. The NIWRC has already received reports that individual United States Attorney's Offices (USAOs) are implementing policies to defer prosecution of crimes committed by non-Indians against Indian victims on tribal lands to state law enforcement. Based on this flawed reading of *Castro-Huerta*, the Department of Justice is distancing itself from its trust responsibility to protect the lives of Native women and children. The NIWRC has also received reports that some USAOs see *Castro-Huerta* as an excuse to *not* refer Violence Against Women Act (VAWA) cases to Tribal Nations, and, instead, are instructing the referral of VAWA cases only to local county and state law enforcement. This is a violation of the federal government's trust obligation to uphold tribal self-determination and safety for Native women and children. Recently, the Department of Justice (DOJ) and the Department of the Interior (DOI) held joint-consultations with Tribal Nations on the Supreme Court's decision in *Oklahoma v. Castro-Huerta*. Notably, DOI was represented by a Senate confirmed political appointee. No political appointee from DOJ, however, was present at the consultation. Instead, DOJ was represented by career staff. The NIWRC does not question the dedication or the competency of DOJ career staff personnel. However, the failure of the DOJ to require any of its political appointees to attend the consultations with Tribal Nations indicates, sadly, that addressing and fully understanding the harmful effects of the Supreme Court's decision in *Castro-Huerta* is not a high priority for the Department.

Historically, insufficient federal funding for tribal government institutions has been particularly acute on reservations under concurrent state criminal jurisdiction. Initially this was because Congress, intending "to reliev[e] itself from the financial burdens of its trust responsibility," [1] did not allocate special funding for those States when enacting Public Law 280 or the various state-specific acts. Later, the Department of the Interior intentionally provided less funding to reservations under concurrent state criminal jurisdiction. *See Los Coyotes Band of Cuahilla & Cupeno Indians v. Jewell*, 729 F.3d 1025, 1031 (9th Cir. 2013) ("OJS must focus its limited dollars to provide direct law enforcement services to tribes in non-Public Law 280 states because state law enforcement is not available for Indian tribes in those states.") (quoting the Bureau of Indian Affairs Deputy Bureau Director of the Office

[1] *See, e.g.*, Duane Champagne and Carole Goldberg, *A Second Century of Dishonor: Federal Inequities and California Tribes*, Advisory Council on California Indian Policy, 47-59 (1996) www.aisc.ucla.edu/ca/Tribes.htm, ("Federal funding for law enforcement in California, never robust, disappeared almost entirely [after passage of Public Law 280].").

of Justice Services). Indeed, one study found that 91.8% of Tribes in mandatory Public Law 280 States and 82.8% of Tribes in optional Public Law 280 States did not receive any BIA law enforcement funding at all.[2]

(1b). What would be the result of a Federal withdrawal?

Answer. The result of the Supreme Court's decision to grant States criminal jurisdiction over all "Indian country" lands is the reality that crimes committed against Native women and children will be less likely to be prosecuted by federal authorities, and consequently, they will become more likely to occur as the absence of public safety and justice systems in Indian country inevitably leads to an increase in criminal activity. Historically, States with jurisdiction over Indian country lands have elected to not dedicate sufficient resources to protecting Native lives on Native lands. On reservations that, prior to *Castro-Huerta*, fell under state jurisdiction, lack of funding for States' assumption of Indian country criminal jurisdiction combined with misguided ideas about the exclusivity of state jurisdiction and the lack of accountability to reservation communities have resulted in problems that include slow response times, irregular and/or infrequent patrolling, poor evidence collection, mistrust in reservation communities, baseless removals of Indian children, and infringements on tribal sovereignty.[3] For instance, since its inception, PL-280 has been criticized for creating "jurisdictional uncertainty" between Tribes and States, the effects of which have resulted in a lack of law enforcement responsiveness due to States' "inability or unwillingness" to perform their mandated responsibilities under the law.[4]

Almost as soon as Congress began granting States this jurisdiction, the affected Tribal Nations began seeking retrocession and repeal,[5] in no small part because the laws that were ostensibly enacted to address "lawlessness" on reservations in many instances increased lawlessness and stultified the development of tribal governmental institutions.[6] Following PL-280s enactment, Tribal Nations located in States exercising PL-280 jurisdiction reported decreases in law enforcement protections and a concomitant increases in lawlessness on their tribal lands,[7] including specifically the Confederated Tribes of the Umatilla Reservation in Oregon,[8] the Tribes in Alaska,[9] and the Tulalip Tribes in Washington.[10]

In response to the public safety concerns expressed by Tribal Nations, as well as the concern that States were obtaining jurisdiction on tribal lands without the consent of Tribal Nations, in 1968, Congress amended PL-280 such that States could no longer exercise this concurrent jurisdiction absent a special election where the majority of the tribal citizens living in the affected area voted in *favor* of state jurisdiction. *See* 25 U.S.C. §§ 1321, 1326 (defining consent as an election where the "enrolled Indians within the affected area . . . accept such jurisdiction by a majority

---

[2] Vanessa J. Jimenez and Soo C. Song, *Concurrent Tribal and State Jurisdiction under Public Law 280*, 47 Am. U. L. Rev. 1627, 1661 (1998); Carole Goldberg, Duane Champagne, and Heather Valdez Singleton, *Final Report: Law Enforcement and Criminal Justice Under Public Law 280*, 340 (Washington, DC, U.S. Department of Justice, 2007), http://www.tribalinstitute.org/download/pl280_study.pdf.

[3] Sarah Deer, Carole Goldberg, Heather Valdez Singleton, and Maureen White Eagle, *Final Report: Focus Group on Public Law 280 and the Sexual Assault of Native Women*, Tribal Law and Policy Institute, 2, 6, 8 (2007).

[4] Jimenez and Song, *supra* note 2, at 1635-37.

[5] *See, e.g.*, 34 Fed. Reg. 14,288 (1969) (Quinault); 35 Fed. Reg. 16,598 (1970) (Omaha).

[6] *See* Carole Goldberg, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. Rev. 1405, 1423 (1997) ("With the tribe, the state, and the federal government all hobbled, at least partly, as a result of Public Law 280, the eruption of lawlessness was predictable.").

[7] M. Brent Leonhard, *Returning Washington P.L. 280 Jurisdiction to Its Original Consent-Based Grounds*, 47 Gonz. L. Rev. 663, 6599-700 (2011) ("Indian Country crime in some P.L. 280 states became worse than it was under exclusive federal jurisdiction.").

[8] *Id*. at 699-700 ("This was the experience of the Confederated Tribes of the Umatilla Reservation, and a significant reason the Umatilla tribes sought retrocession from Oregon in the 1970s.").

[9] Laura S. Johnson, *Frontier of Injustice: Alaska Native Victims of Domestic Violence*, 8 Mod. Am. 2, 6 (2012) ("The lack of prosecution for serious domestic violence crimes is a source of frustration for Native Alaskan victims and Alaska tribal governments alike.").

[10] Wendy Church, *Resurrection of the Tulalip Tribes' Law and Justice System and its Socio-Economic Impacts*, 15 (2006) (M.A. thesis, The Evergreen State College), https://www.tulaliptribes-nsn.gov/Base/File/TTT-PDF-TribalCourt-TulalipHistoryOfLaw ("[L]aw enforcement prior to retrocession [w]as ineffective and the county's lack of interest in enforcing the law on the reservation, and also tribal people not trusting the county. This left the Tribes in a state of lawlessness.") (quoting former Tulalip Chief Judge Gary Bass).

vote . . ..). Notably, since Congress amended PL-280 in 1968, *no* population of tribal citizens has voted in favor of granting a State PL-280 jurisdiction.[11]

For over half a century now, the States exercising PL-280 jurisdiction over crimes on tribal lands have failed to provide sufficient funding to county and local law enforcement patrolling tribal lands. For instance, as early as 1961, Tribal Nations in Nebraska were being told that local governments did "not have the funds to maintain station deputy sheriffs on their reservations."[12] Washington has likewise failed to adequately fund law enforcement on tribal lands, and in 1988, Percy Youckron, Chairman of the Chehalis Business Council, and Robert Joe, Sr., Chairman of the Swinomish Indian Senate, wrote to Senator Bob McCaslin that:

> Currently, the state of Washington, through the local county is responsible for [law enforcement services]. Historically this arrangement has not been successful for most reservations; partially due to . . . constrained County law enforcement budgets.[13]

In Alaska, another PL-280 State, Alaska Natives suffer disproportionately high rates of violence. Alaska has jurisdiction, but Alaska has declined to dedicate sufficient resources to protect Alaska's Native populations—something tribal leaders in Alaska have repeatedly asked the federal government to address.[14]

Where states and local entities are hostile toward Tribal Nations, Native victims may be used as bargaining chips to resolve disputes because there is no trust relationship. For example, the Mille Lacs Band of Ojibwe and Mille Lacs County in Minnesota have been involved in an ongoing boundary dispute. In 2016, the County terminated, without notice, its cooperative policing agreement with the Band that had been in place for 25 years. Because of the termination, over one hundred tribal citizens died during the two years that police calls went unanswered.[15]

The State of Montana, which exercises concurrent jurisdiction over crimes committed against Indians on the Flathead Reservation, has fared no better. Just this year, Lake County, Montana sent a demand letter to Governor Greg Gianforte requesting that the State allocate funding to address the "severe impact" concurrent state criminal jurisdiction is having on the county budget, as the county has been unable to adequately fund law enforcement on the Flathead Reservation.[16]

There can be no question that Montana has failed to allocate sufficient public safety resources to properly effectuate its concurrent jurisdiction on the Flathead Reservation. Furthermore, Montana has done nothing to recognize or address the fact that its county, Big Horn County, has the highest rates of Missing and Murdered Indigenous Persons cases in the United States. In fact, Montana has repeatedly turned a blind eye to the Big Horn County Sheriff's Office, an office that continues to refuse to investigate the innumerable homicides of Native women and girls within its jurisdiction. Because of its willful ignorance and failure to hold its localities accountable, Kaysera Stops Pretty Places, Allison High Wolf, Selena Not Afraid, and many others have yet to receive justice. But as the Supreme Court has previously noted, Montana's failure to fund law enforcement in and around Indian Country is not uncommon. *See United States v. Bryant*, 579 U.S. 140, 146 (2016)

---

[11] Leonhard, *supra* n. 7, at 702.

[12] 5 U.S. Comm'n on Civil Rights, Justice: 1961 Comm'n on Civil Rights Report 148 (1961).

[13] Letter from Percy Youckton, Chairman Chehalis Business Council, and Robert Joe, Sr., Chairman Swinomish Indian Senate, to Senator Bob McCaslin in support of retrocession of state criminal jurisdiction (Feb. 1, 1988) (on file with author).

[14] *See, e.g.*, U.S. Department of Justice Office on Violence Against Women, *2022 Tribal Consulation Report* 28 (2022), https://www.justice.gov/ovw/page/file/1481661/download (testimony of Vivian Korthuis, Chief Executive Officer of the Association of Village Council Presidents) ("Alaska is also a PL-280 state, meaning the federal government . . . transferred that authority to the State. However, State law enforcement is largely absent in our villages.").

[15] Oklahoma v. Castro Huerta: Bad Facts Make Bad Law, Wayne Ducheneaux, Native Governance Center (Jul. 14, 2022), https://nativegov.org/news/castro-huerta/.

[16] Letter from Reep, Bell & Jasper, P.C. to Governor Greg Gianforte (Feb. 8, 2022), https://bloximages.chicago2.vip.townnews.com/helenair.com/content/tncms/assets/v3/editorial/d/25/d25d3df9-c757-552f-9d9e-9e4c8cf46daa/6206fa6f2d1fa.pdf.pdf. Some of the funds that Lake County requests are for the Lake County jail, which services the Flathead Reservation. It is estimated that the Lake County jail releases about 80 people per month who have been arrested on felony warrants due to overcrowding. Seaborn Larson, Independent Record, (Feb. 13, 2022), https://helenair.com/news/state-and-regional/govt-and-politics/lake-county-launches-new-bid-to-recover-law-enforcement-costs/article_5e0a6fbe-c1a6-5153-9f50-9009deb0d030.html. Conditions at the Lake County jail were the subject of litigation in the 90s and are currently the subject of dozens of recently filed lawsuits. *See Lozeau v. Lake County*, 98 F.Supp 2d 1157 (D. Montana 2000); *see also Dozens of prisoners file lawsuits for inadequate living conditions*, Valley Journal (Mar. 2, 2022), http://www.valleyjournal.net/Article/26229/Dozens-of-prisoners-file-lawsuits-for-inadequate-living-conditions.

("Even when capable of exercising jurisdiction, however, States have not devoted their limited criminal justice resources to crimes committed in Indian country.").

Empirical evidence demonstrates that the Court's decision to grant States criminal jurisdiction over crimes committed against Native victims on tribal lands will only decrease safety for Native people overall. Ultimately, States lack any incentive—and ultimately, any accountability to Tribal Nations—because, in contrast to the federal government, States do not have a trust duty to recognize and protect Tribal Nations and their citizens. *See Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. at 501 ("States do not enjoy this same unique relationship with Indians . . . .").

The NIWRC stands in agreement with the Tulalip Tribes, the Muscogee (Creek) Nation, the Bay Mills Indian Community, the Wampanoag Tribe of Gay Head (Aquinnah), the Choctaw Nation, the Oglala Sioux Nation, and the many other Tribal Nations that have called upon Congress to take action and legislatively address the harms caused by the Supreme Court's decision in *Castro-Huerta*. Specifically, the NWIRC supports the Legislative Proposal to Improve Public Safety in Indian Country, as submitted by the Muscogee (Creek) Nation. The NIWRC also supports the Legislative Proposal put forward by the Tribes that comprise the membership of the Coalition of Large Tribes ("COLT"), Resolution No. 04-2022 (Aug. 16, 2022).[17] Any distinctions in the two proposals are without significance and can easily be resolved during the legislative process.

The NIWRC is hopeful that Congress will act quickly and expeditiously. We simply cannot afford to wait to take action to address the harmful effects of the Supreme Court's most recent decision in *Castro-Huerta*. To be sure, the solutions to the crisis we now face are not new. Over a decade ago, the Tribal Law and Order Act Commission, created through bi-partisan legislation and composed of bi-partisan federal Indian law experts, traveled throughout Indian country studying the public safety crisis and reported one overarching solution: restore tribal jurisdiction and authority. There is no need to wait and there is nothing more to study. The more we wait to take action, the more Native lives are lost.

Ms. LEGER FERNÁNDEZ. Thank you very much for your testimony.

The Chair will now recognize Ms. Bethany Berger, who is the Wallace Stevens Professor of Law at the University of Connecticut School of Law.

STATEMENT OF BETHANY BERGER, WALLACE STEVENS PROFESSOR OF LAW, UNIVERSITY OF CONNECTICUT SCHOOL OF LAW, HARTFORD, CONNECTICUT

Ms. BERGER. Thank you, Madam Chairwoman, for the opportunity to speak with you, and thank you for your attention to this important issue.

My testimony will focus on how *Oklahoma v. Castro-Huerta* violates both congressional original intent and 200-year understanding and practice. Federal jurisdiction over crimes of non-Indians against Indians was the first and most important of Congress' Indian Country jurisdiction statutes. Congress created that jurisdiction in 1790, but did not extend that jurisdiction to Indian Country crimes generally until 1817.

That is because non-Indians against Indian crime threatened the peace of the nation, treaties with Tribal Nations, and states could not be trusted to punish the offenders.

---

[17] COLT's membership includes the Blackfeet Nation, the Cheyenne River Sioux Tribe, the Crow Nation, the Eastern Shoshone Tribe, Fort Belknap Indian Community, Mandan, Hidatsa & Arikara Nation, the Navajo Nation, the Northern Arapahoe Tribe, the Oglala Sioux Tribe, the Rosebud Sioux Tribe, the Sisseton Wahpeton Sioux Tribe, the Shoshone Bannock Tribes, the Spokane Tribe, and the Ute Indian Tribe.

In 1832, the Supreme Court decided *Worcester v. Georgia*, a landmark decision in the battle between state, tribal, and Federal power. The Court held that Georgia, in prosecuting two non-Indian missionaries on Cherokee land, violated not only the Cherokee treaties but also Congress' statutes regarding crimes in Indian Country.

Two years later, Congress re-enacted those statutes incorporating that understanding of state exclusion. The language of those statutes has remained the same, the core language from 1834 to today. Although state authority has increased in Indian Country since 1834, states never got jurisdiction over crimes involving Indians.

In 1886, the Supreme Court affirmed that this was because the Federal trust responsibility prevented jurisdiction because states were often the deadliest enemies of Indian people. Although that case involved an Indian defendant, the Court in 1913, affirmed that this reasoning applied even more forcefully to cases where non-Indians were committing crimes against Indians.

In 1946, and again in 1959, the Supreme Court stated that states lacked jurisdiction over non-Indians against Indian crimes. Twentieth century statutes make this even clearer. In at least nine statutes between 1940 and 1994, Congress explicitly granted states jurisdiction over offenses by or against Indians in Indian Country.

Oklahoma v. Castro-Huerta suggests that that language in nine statutes over five decades was either merely Congress spinning its wheels or acting because it was not sure of the law, but that is not how we interpret statutes and the Supreme Court once recognized that.

Of course, those statutes were from an earlier time when Congress thought that state jurisdiction might improve public safety in Indian Country.

Today, as you have heard, we know that is not true. In fact, that is the opposite. State jurisdiction makes Native victims less safe. And the Federal Government has recognized that requiring tribal consent before states expand jurisdiction, encouraging and permitting states to retrocede the jurisdiction they already have, and expanding tribal accountable jurisdiction in its stead.

In *Oklahoma v. Castro-Huerta*, the Supreme Court ignored all of this history, all of these congressional actions, all of these Supreme Court statements. It also ignored the accepted rules for preemption in Indian Affairs, unsettling jurisdiction in civil as well as criminal matters.

Instead, it accepted Oklahoma's invitation to make up an interpretation on its own, forced from 200 years of history and understanding. This is bad law, and it is bad policy. Thank you for considering action to fix it. Thank you very much.

[The prepared statement of Ms. Berger follows:]

PREPARED STATEMENT OF PROFESSOR BETHANY BERGER, WALLACE STEVENS CHAIR, UNIVERSITY OF CONNECTICUT SCHOOL OF LAW
ONEIDA INDIAN NATION VISITING CHAIR, HARVARD LAW SCHOOL

Thank you for the opportunity to submit this testimony and for your attention to this important issue. My name is Bethany Berger, and I am the Wallace Stevens Professor at the University of Connecticut School of Law, and this year serve as the Oneida Indian Nation Visiting Professor at Harvard Law School. Before entering

academia, I worked for tribal people and governments on the Navajo, Hopi, and Cheyenne River Sioux reservations. I am co-author of a leading casebook in federal Indian law, a co-author and editor of Cohen's Handbook of Federal Indian Law, and co-author of amicus briefs for the National Congress of American Indians in *Oklahoma v. Castro-Huerta* [1] and *McGirt v. Oklahoma*.[2]

My written testimony will focus on two things:

First, the Supreme Court's decision in *Oklahoma v. Castro-Huerta* violates the historical understanding and intent of Congress from the Founding to the present.

- Jurisdiction over crimes by non-Indians against Indians was the subject of Congress's very first Indian country jurisdiction statute, and was always understood to be exclusive of state authority.
- Several Supreme Court cases reflect this understanding.
- Multiple twentieth century statutes do as well by granting particular states jurisdiction over "offenses by or against Indians" on tribal territories.
- *Castro-Huerta*'s interpretation of federal law is unmoored from this centuries' old consensus.

Second, the decision will hurt public safety and endanger Native people across the United States.

- Decades of evidence show that state jurisdiction harms Native victims by decreasing reporting, accountability, and cooperation.
- Congress has responded to this evidence by increasing tribal capacity, mandating coordination with tribal governments, and encouraging states to retrocede existing jurisdiction.
- *Oklahoma v. Castro-Huerta* undermines all of these welcome developments.

1. *Oklahoma v. Castro-Huerta* Violated Two Hundred Years of Congressional Policy and Intent

Oklahoma v. Castro-Huerta ignores over two hundred years of Federal law.

Federal jurisdiction over crimes by non-Indians against Indians was the first and most important of Congress's Indian country jurisdiction statutes. The very first U.S. Congress asserted federal jurisdiction over crimes by non-Indians against Indians—and only those crimes—in the Trade and Intercourse Act of 1790.[3] In contrast, Congress did not include jurisdiction over crimes between non-Indians or by Indians against non-Indians until 1817.[4] That was because non-Indian crimes against Indians were the greatest threat to U.S.-tribal relations. As President George Washington repeatedly urged Congress, such crimes "endanger[ed] the peace of the union,"[5] and without effective punishment "all pacific plans must prove nugatory."[6]

Everyone understood that the Trade and Intercourse Acts preempted state jurisdiction over non-Indian against Indian crimes. The acts do not state it directly, because the understanding at the time was that "any federal regulation of a given area automatically preempted all state regulation in the same area."[7] But their language explicitly describes Indian country as outside state jurisdiction. For example, the statutes declare that they do not "prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United

---

[1] Amicus Brief for National Congress of American Indians, Castro-Huerta v. Oklahoma, 142 S. Ct. 2486 (2022), https://sct.narf.org/documents/oklahoma_v_castro/amicus_ncai.pdf.

[2] Amicus Brief on behalf of the National Congress of American Indians, McGirt v. Oklahoma, 140 S.Ct. 2452 (2020), https://sct.narf.org/documents/mcgirt_v_ok/amicus_ncai.pdf.

[3] Trade and Intercourse Act, 1 Stat. 137, 138 § 5 (1790).

[4] 3 Stat. 383 (1817), codified as amended at 18 U.S.C. § 1152.

[5] President George Washington, Third Annual Message to Congress, Oct. 25, 1791; *see also* President George Washington, Proclamation Against Crimes Against the Cherokee Nations, Dec. 12, 1792 (responding to "certain lawless and wicked" Georgians who invaded a Cherokee town and killed several Cherokees, by declaring that "it highly becomes the honor and good faith of the United States to pursue all legal means for the punishment of those atrocious offenders.").

[6] President George Washington, Fourth Annual Message to Congress, Nov. 6, 1792.

[7] See Stephen A. Gardbaum, Nature of Preemption, 79 Cornell L. Rev. 767, 786 (1994); *see also Brief of Amici Curiae Federal Indian Law Scholars and Historians in Support of Respondent*, Oklahoma v. Castro-Huerta (2022) (discussing cases finding that either the federal government had jurisdiction, or states had jurisdiction, but concurrent jurisdiction could not exist).

States, and *within the ordinary jurisdiction of any of the individual states*."[8] Similarly they declare that non-Indians who violated the acts, if found within a state or territorial district, "may be there apprehended and brought to trial, in the same manner, *as if* such crime or offense had been committed within such state or district."[9] Crimes within Indian country, in other words, were neither "committed within such state" nor "within the ordinary jurisdiction of any of the individual states."

Where Congress intended states to have criminal jurisdiction, the Trade and Intercourse Acts state it clearly. When, for example, the statutes provide for compensation to citizens for crimes by Indians who "come over or across [the Indian country] boundary line, into any state or territory," they specify that "nothing herein contained shall prevent the legal apprehension or arresting, within the limits of any state or district, of any Indian having so offended."[10]

In *Worcester v. Georgia*,[11] Chief Justice Marshall agreed that the Trade and Intercourse Acts excluded state jurisdiction. By that time, Congress had extended general federal jurisdiction to all crimes in Indian country (except for those between non-Indians). The Court therefore found that Georgia's arrest of non-Indians Samuel Worcester and Elizur Butler not only violated the treaties with the Cherokee Nation, but were "also a violation of the acts which authorise the chief magistrate to exercise this authority."[12]

Two years after *Worcester* interpreted the Trade and Intercourse acts as preempting state criminal jurisdiction, Congress reenacted their criminal jurisdiction provisions and extended them to the Indian Territory.[13] The language of the General Crimes Act construed *Oklahoma v. Castro-Huerta* is almost unchanged since 1817.[14] Yet the Court ignored both the original intent of Congress, the holding of *Worcester*, and Congress's implicit ratification of that understanding in 1834 to find the statute did not preempt state jurisdiction over non-Indian against Indian crimes.

The latter nineteenth century saw confusion and contestation over the extent of state and federal power within state borders. This was partly because the 1834 definition of "Indian country" did not fit many western "reservations," creating questions of whether the existing statutes applied.[15] It was also because the Supreme Court, relying on a now discredited understanding of the equal footing doctrine, held that the federal government could not prosecute crimes not involving Indians on reservations.[16]

But with respect to crimes by non-Indians against Indians, exclusive jurisdiction remained. Solemn treaties promised that the United States itself would "at once" arrest and punish non-Indian offenders against the Indians and indemnify the victims from federal funds.[17] State concurrent jurisdiction would interfere with both promises. Later, in upholding federal jurisdiction over crimes between Indians on reservations within state borders, the Supreme Court affirmed why states should not have jurisdiction in Indian affairs. Although the United States had a "duty of protection" to Native people, they "receive [from states] no protection" and indeed, "the people of the states where they are found are often their deadliest enemies."[18]

---

[8] 1802 Act § 19 (emphasis added).

[9] Trade and Intercourse Act, 2 Stat. 139 § 17 (emphasis added); Trade and Intercourse Act, 1 Stat. 469 § 17 (1796).

[10] 1802 & 1796 Acts § 14.

[11] 31 U.S. 515 (1832).

[12] *Id.* at 562; *see* 1802 Act § 17, *incorporated by reference* 3 Stat. 383, § 3 (1817) (authorizing federal magistrates to arrest offenders against the trade and intercourse acts).

[13] 4 Stat. 729, 733 § 24–25 (1834) ("1834 Act").

[14] *See* 18 U.S.C. § 1152.

[15] *Compare* Donnelly v. United States, 228 U.S. 243, 269 (1913) (holding Trade and Intercourse criminal provisions covering "Indian country" applied to reservations within California) *with* Bates v. Clark, 95 U.S. 204, 207-09 (1877) (holding Trade and Intercourse liquor provisions statutes applying to "Indian country" did not apply to reservations in the Dakota Territory); *see* Bethany R. Berger, McGirt v. Oklahoma *and the Past, Present, and Future of Reservation Boundaries*, 169 U. Penn. L. Rev. Online 250, 269-74 (2021) (discussing history).

[16] *See* United States v. McBratney, 104 U.S. 621, 622 (1881) (holding statehood "necessarily repeals" the General Crimes Act with respect to crimes between non-Indians where it was not preserved by state's enabling act); Draper v. United States, 164 U.S. 240 (1896) (holding that "[a]s equality of statehood is the rule," General Crimes Act did not apply to crimes between non-Indians even when federal jurisdiction was preserved in a state's enabling act). *But see* Herrera v. Wyoming, 139 S. Ct. 1686, 1695 (2019) (recognizing repudiation of the idea that federal protection of tribal rights was inconsistent with the equal footing doctrine).

[17] *See, e.g.*, Treaty with the Navajo, 15 Stat. 687, art. 1 (1868); Treaty with the Sioux, 15 Stat. 635, art. 1 (1868); Treaty with the Northern Cheyenne and Northern Arapaho, 15 Stat. 655, art. 1 (1868).

[18] United States v. Kagama, 118 U.S. 375, 384 (1886).

Although that case concerned a crime between tribal citizens, the Court soon held that its reasoning applied "perhaps *a fortiori*—with respect to crimes committed by white men against the persons or property of the Indian tribes."[19] State and federal jurisdiction, in other words, turned on whether an Indian was involved *either* as victim or defendant. As the Supreme Court later explained, state courts "may have jurisdiction over offenses committed on this reservation between persons who are not Indians, the laws and courts of the United States, rather than those of [the state], have jurisdiction over offenses committed there, as in this case, by one who is not an Indian against one who is an Indian."[20]

Congress repeatedly confirmed this understanding in the twentieth century. Between 1940 and 1994, Congress enacted multiple statutes granting particular states criminal jurisdiction on reservations.[21] All of these statutes give the respective states jurisdiction over "offenses committed by *or against* Indians."[22] Strikingly, Congress enacted three such statutes in 1948, including one on June 25, 1948, the same day it reenacted the General Crimes Act construed in *Castro-Huerta*.[23] The Court's decision, therefore, means that in at least nine statutes enacted over five decades, Congress was spinning its wheels, repeatedly giving states jurisdiction that they always already had.

This conclusion makes no sense, and the Supreme Court once recognized it. In 1959, the Court stated in *Williams v. Lee* that "if [a] crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive."[24] *Williams v. Lee* even cited the congressional grants of jurisdiction to selected states as evidence that "when Congress has wished the States to exercise this power it has expressly granted them the jurisdiction which *Worcester v. State of Georgia* had denied."[25] This understanding is doubly persuasive as it came soon after Congress enacted its most comprehensive state jurisdiction statutes.

The *Castro-Huerta* decision is particularly outrageous given the test for preemption in Indian affairs. Given Congress's plenary authority and the historic exclusion of state law from reservations, express preemption is not required,[26] and state law may only apply where "those laws are specifically authorized by acts of Congress, or where they clearly do not interfere with federal policies concerning the reservations."[27] Although the test is complicated as to civil matters, given the long and comprehensive history of federal laws and treaties regarding non-Indian against Indian crime, the results in the criminal context were clear.

Or rather, it was clear before *Oklahoma v. Castro-Huerta*. The majority ignored all of this history, all of this congressional action, and all of these previous Supreme Court statements. Instead, it accepted Oklahoma's invitation to make up its own interpretation of the General Crimes Act, rejecting the consensus of two centuries. The next section discusses why this is not just bad law, it is bad policy.

2. *Oklahoma v. Castro-Huerta* Will Undermine Safety of Indigenous People Throughout the United States

Oklahoma v. Castro-Huerta will undermine public safety and congressional policy on reservations throughout the United States. As Congress recognized in the 2010 Tribal Law and Order Act and the 2013 and 2022 amendments to the Violence Against Women Act, public safety in Indian country requires enhancing the capacity of tribal institutions and increasing state and federal coordination with them.

---

[19] Donnelly v. United States, 228 U.S. 243, 272 (1913).

[20] Williams v. Arizona, 327 U.S. 711, 714 (1946)

[21] See Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162; 25 U.S.C. §§ 1321) ("P.L. 280"); Mohegan Nation of Connecticut Land Claims Settlement Act, 108 Stat. 3501 § 6(a) (1994); Seminole Indian Land Claims Settlement Act, 101 Stat. 1556 § 6(d)(1) (1987); Florida Land Claims Settlement Act, 96 Stat. 2012 § 8(b)(2)(A) (1982); 62 Stat. 1224 (July 2, 1948) (granting New York jurisdiction); 62 Stat. 1161 (June 30, 1948) (granting Iowa jurisdiction over the Sac and Fox Reservation); 62 Stat. 827 (June 25, 1948) (reenacting Kansas authorization); 60 Stat. 229 (1946) (granting North Dakota jurisdiction over the Spirit Lake Reservation); 54 Stat. 249 (1940) (granting Kansas jurisdiction).

[22] *Id.* (emphasis added).

[23] 62 Stat. 757 (June 25, 1948).

[24] Williams v. Lee, 358 U.S. 217, 220 (1959).

[25] *Id.* at 221.

[26] White Mountain Apache v. Bracker, 448 U.S. 136, 143-44 (1980).("The unique historical origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of pre-emption that have emerged in other areas of the law . . . We have thus rejected the proposition that in order to find a particular state law to have been preempted by operation of federal law, an express congressional statement to that effect is required.").

[27] Warren Trading Post v. Arizona, 380 U.S. 685, 687 n.3 (1965).

Numerous studies—including several commissioned by the federal government—show that state law enforcement makes Native people less safe and stymies development of tribal institutions. That's why the United States has permitted and encouraged states to retrocede existing criminal jurisdiction on reservations and increased tribal law enforcement capacity for decades. *Oklahoma v. Castro-Huerta* goes directly against this welcome trend.

I want to start with the non-jurisdictional facts of the case against Victor Castro-Huerta, who was tried and convicted before *McGirt*, because I think they are emblematic of the impact this decision will have.[28] This was a case of horrible child neglect tied to poverty and disability. Aurora, the little girl in this case, had cerebral palsy, was blind, and could not move herself. She could not swallow and required five cans of PediaSure a day. She was one of three children Christina Calhoun had when she married Mr. Castro-Huerta; he brought another two children to the marriage. Mr. Castro-Huerta was undocumented and worked two jobs. The North Carolina and Oklahoma Departments of Social Services had previously investigated Ms. Calhoun for neglect of her son, and he later died of natural causes in her case. The Oklahoma Department of Human Services also received reports of neglect of Aurora for over two years before she wound up in the emergency room in 2015. The state did not adequately respond to the neglect, and never notified Aurora's tribe of the reports. Christina and Victor had a baby together in 2015, and shortly after coming home from the hospital they took Aurora to the emergency room because she was starving. The state responded by arresting Victor and sentencing him to thirty-five years in prison.

This was a unique and tragic case. But as in this case, many crimes in Indian country arise from like family disfunction and poverty. And as in this case, states often unable to address root causes of crime, and the punishment is often harsh and too late for victims. Studies of Public Law 280, which grants some states jurisdiction over crimes by or against Indians, provide substantial evidence of this. A study commissioned by the U.S. Department of Justice, for example, found that while only 44% of reservation residents in Public Law 280 jurisdictions found state/county police responded to calls in a timely manner, about 70% of residents in non-280 jurisdictions felt tribal and federal police responded in a timely manner.[29] Similarly, only 30% of residents in Public Law 280 jurisdictions felt state and county policy communicated well with reservation residents, while in non-280 jurisdictions, majorities felt both tribal police (57%) and Federal/BIA police (54%) communicated well.[30] Similarly, the federally mandated Indian Law and Order Commission found that in Public Law 280 jurisdictions, "calls for service go unanswered, victims are left unattended, criminals are undeterred, and Tribal governments are left stranded. . . ."[31]

State law enforcement also has a terrible record of brutality against Native people. A 2020 study of seven Midwestern states found that Native women were 38 times more likely to suffer fatal encounters with police than White women, and Native men were 14 times more likely than White men.[32] These fatal encounters were overwhelmingly in areas subject to state jurisdiction: they were more than ten times higher per capita outside tribal statistical areas, and within tribal statistical areas, they were 70% higher on those subject to state jurisdiction.[33] Sociologist Barbara Perry, who conducted 274 interviews with Native people from across the United States, found that "a key theme running throughout the interviews" is that "police appear to need little provocation to intervene against Native Americans" but the heightened "surveillance is for the purpose of responding to Native American offenders, rather than Native American victims."[34]

The result is that Native victims simply do not report to state police. As one of Perry's interview subjects said, "I don't want that to happen to me, for them to hit me, or kick me. I won't go to the police. I won't talk to 'em, cause ya' just don't

---

[28] These facts are drawn from the Transcript of Jury Trial, Oklahoma v. Victor Manuel Castro-Huerta, Tulsa Dist. Ct. Oct. 2–6, 2017.

[29] Carole Goldberg, Duane Champagne & Heather Singleton, Final Report: Law Enforcement and Criminal Justice under Public Law 280 at 90 (2007), https://www.ncjrs.gov/pdffiles1/nij/grants/222585.pdf.

[30] *Id*. at 148.

[31] Indian Law & Order Comm'n, *A Roadmap for Making Native America Safer: Report to the President & Congress of the United States* 69 (2013) ("Roadmap").

[32] Matthew Harvey, Center for Indian Country Development, Fatal Encounters Between Native Americans and the Police 2 (2020), https://www.minneapolisfed.org/article/2020/fatal-encounters-between-native-americans-and-the-police.

[33] *Id*. at 18.

[34] Barbara Perry, *Impacts of Disparate Policing in Indian Country*, 19 Policing & Society 263, 267-68 (2009).

know where that's gonna go."[35] Or, as a Riverside County Lieutenant Sheriff testified before the Indian Law and Order Commission, "State law enforcement in Indian country, as we learned, was viewed as an occupying force, invaders, and the presence wasn't welcome."[36] As the federally-mandated Indian Law and Order Commission found, state authorities "actually encourage crime," because "Tribal citizens and local groups tend to avoid the criminal justice system by nonparticipation," and creating "greater and longer disruptions within the communities."[37]

Federal studies also show the solutions: increase capacity of tribal governments, and limit jurisdiction of state governments. In one pilot program, for example, the United States raised funding levels for tribal law enforcement on four reservations to permit staffing comparable to off-reservation communities.[38] This resulted in initial increases in offenses as local citizens "gained the confidence to report more crimes," but within two years, crime had dropped by an astounding 35% across the four reservations.[39] Another report including residents of reservations where states withdrew their jurisdiction under Public Law 280 found that crime decreased, and policing, prosecutions, and community well-being all increased after retrocession.[40]

And Congress has responded to this evidence. This began as early as 1968, when Congress amended Public Law 280 to permit states to retrocede existing jurisdiction.[41] Since then, there have been more than thirty such retrocessions.[42] More recently, in the 2010 Tribal Law and Order Act, Congress recognized that tribal governments were often the "first responders" and "most appropriate institutions" for maintaining law and order in Indian country.[43] Even as *Oklahoma v. Castro-Huerta* was pending, this Congress passed the Violence Against Women Reauthorization Act to increase tribal jurisdiction victimizing Native people, including in cases of criminal child abuse.[44] The act also explicitly recognizes that state jurisdiction poses obstacles to tribal law enforcement, noting that tribes "located in States with concurrent authority to prosecute crimes in Indian country . . . face unique public safety challenges."[45]

Oklahoma v. Castro-Huerta runs counter to this evidence-based congressional policy, expanding state jurisdiction and making Native victims less safe. I thank you for considering how to respond to the threat the decision poses.

QUESTIONS SUBMITTED FOR THE RECORD TO BETHANY BERGER, WALLACE STEVENS PROFESSOR, UNIVERSITY OF CONNECTICUT SCHOOL OF LAW

Questions Submitted by Representative Leger Fernández

Question 1. In your testimony, you note that the Castro-Huerta ruling implies that Congress has been "spinning its wheels" for decades in the passage of legislation that grants State jurisdiction over certain crimes committed in Indian Country. Can you elaborate on this idea?

Answer. Certainly, and thank you for the question. In at least nine statutes between 1940 and 1994, Congress gave particular states jurisdiction over "offenses committed by *or against* Indians" on various reservations in the states.[1] But *Oklahoma v. Castro-Huerta* holds that states always already had jurisdiction over offenses "against Indians," meaning that in repeatedly adding those two words to the statute, Congress was actually doing nothing. The majority opinion acknowledged the argument that these words were "pointless surplusage if States already

---

[35] Perry, *supra*, at 273.
[36] Roadmap, supra, at 6.
[37] *Id.* at 5.
[38] *Id.* at 64.
[39] *Id.* at 64-65.
[40] Goldberg, supra, at 457-59.
[41] Pub. L. 90-284, Title IV, § 401, Apr. 11, 1968, 82 Stat. 78 (codified at 28 U.S.C. § 1321).
[42] Cohen at § 6.04[3][g] n.298 (listing 31 retrocessions).
[43] Pub. L. 111-211, Title II, § 202, July 29, 2010, 124 Stat. 2262.
[44] Pub. L. 117-103, 136 Stat 49 (March 15, 2022).
[45] *Id.* at § 801(a)(14).

[1] See Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162; 25 U.S.C. §§ 1321) ("P.L. 280"); Mohegan Nation of Connecticut Land Claims Settlement Act, 108 Stat. 3501 § 6(a) (1994); Seminole Indian Land Claims Settlement Act, 101 Stat. 1556 § 6(d)(1) (1987); Florida Land Claims Settlement Act, 96 Stat. 2012 § 8(b)(2)(A) (1982); 62 Stat. 1224 (July 2, 1948) (granting New York jurisdiction); 62 Stat. 1161 (June 30, 1948) (granting Iowa jurisdiction over the Sac and Fox Reservation); 62 Stat. 827 (June 25, 1948) (reenacting Kansas authorization); 60 Stat. 229 (1946) (granting North Dakota jurisdiction over the Spirit Lake Reservation); 54 Stat. 249 (1940) (granting Kansas jurisdiction).

had concurrent jurisdiction over crimes committed by non-Indians against Indians in Indian Country," and that the words suggested that "Congress must have assumed that States did not already have concurrent jurisdiction over those crimes."[2] But the majority declared these arguments irrelevant because "assumptions are not laws" and the statutes granted states jurisdiction over other actions in Indian Country.[3] In other words, the majority finds that Congress did nothing in including these two words again and again over five decades, that doing so was based on Congress's mistaken understanding of the law, but that's OK because those statutes did other things which were not "pointless surplusage."

Questions Submitted by Representative Grijalva

Question 1. Your written testimony traces nearly 200 years of Federal Indian legal precedent that existed before the Castro-Huerta ruling. What does it mean for the U.S. Supreme Court to ignore well-established legal history in this way?

Answer. Thank you for the question. Whenever the U.S. Supreme Court ignores legal history in this way, it violates the legal building blocks of the rule of law and separation of powers. This is always dangerous, but it is particularly so for Indigenous peoples.

Tribal sovereignty is desperately vulnerable to shifting political tides. Congress has plenary power over all aspects of tribal sovereignty. It may break treaties, take tribal territories, and change jurisdiction at will. Because Indigenous people make up less than 3% of the United States population, moreover, political power is often against them. The saving grace is that (1) only Congress has the power to diminish tribal sovereignty, and (2) there must be clear evidence of its intent to do so. As the Supreme Court has repeatedly recognized, "proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent."[4]

But the Court flipped the script in *Oklahoma v. Castro-Huerta*. It started from the presumption that states have plenary authority in Indian Country, and that Congress had to act explicitly to keep state authority out. Even worse, it held that it alone—not Congress, to which the Constitution entrusts this authority, not the Executive Branch, which fulfills the trust responsibility to tribal people, not even unanimous Supreme Court opinions from 1832, 1946, and 1959—could decide whether federal law limited state intrusions on Indian affairs. That is "at odds with the Constitution, which entrusts Congress with the authority to regulate commerce with Native Americans."[5] It is also at odds with the fundamental legal doctrines that protect tribal peoples—and treaty promises to them—from the worst excesses of colonial domination.

Thank you again for your attention to this issue.

Ms. LEGER FERNÁNDEZ. Thank you very much for your testimony.

The Chair will now recognize Ms. Carole Goldberg, who is the Jonathan D. Varat Distinguished Professor of Law at the University of California School of Law, as well as the Chief Justice for the Court of Appeals for the Tulalip Tribe, and the Chief Justice for the Court of Appeals for the Pachanga Band of Indians.

---

[2] Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2500 (2022).

[3] *Id*.

[4] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60 (1978); *see also* McGirt v. Oklahoma, 140 S.Ct. 2452, 2462 (2020) ("This Court long ago held that the Legislature wields significant constitutional authority when it comes to tribal relations, possessing even the authority to breach its own promises and treaties. Lone Wolf v. Hitchcock, 187 U.S. 553, 566-568 (1903). But that power, this Court has cautioned, belongs to Congress alone. Nor will this Court lightly infer such a breach . . ."); Michigan v. Bay Mills Indian Community, 572 U.S. 782, 790 (2014) ("Although Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government.").

[5] *McGirt* at 2462 (citing U.S. Const., Art. I, § 8).

STATEMENT OF CAROLE GOLDBERG, JONATHAN D. VARAT DISTINGUISHED PROFESSOR OF LAW, UNIVERSITY OF CALIFORNIA SCHOOL OF LAW; CHIEF JUSTICE, COURT OF APPEALS, HUALAPAI TRIBE; CHIEF JUSTICE, COURT OF APPEALS, PECHANGA BAND OF INDIANS, LOS ANGELES, CALIFORNIA

Ms. GOLDBERG. Thank you very much, Madam Chairwoman, Ranking Member, for this opportunity to testify.

My name is Carole Goldberg, and I have been researching and writing about a Federal law known as Public Law 280 for nearly 50 years, in addition to other aspects of Federal Indian law. And I can say, with quite an emphasis, that *Castro-Huerta* got the relevant law entirely wrong.

I am going to focus my testimony on Public Law 280 because *Castro-Huerta* actually made a mess and a mockery of that statute. That statute should have precluded state jurisdiction even if the Federal Indian Country Crimes Act, Section 1152 of the Federal Criminal Code, did not.

Now, why should Public Law 280 have produced a different result in *Castro-Huerta*? Well, as you heard from the Chairwoman of Tulalip, this law was enacted in 1953. It gave six states jurisdiction over crimes committed by or against Indians in Indian Country.

It also created a very specific mechanism for any other state to opt into the same jurisdiction. And in 1968, that same opt-in mechanism was amended to require consent through a vote of the affected Indians. Oklahoma was neither one of the six states named in Public Law 280, nor has it ever invoked the mechanism of Public Law 280 to acquire jurisdiction over crimes committed by or against Indians.

In 1971, in a case called *Kennerly v. District Court*, the U.S. Supreme Court required the state of Montana to use the mechanism of Public Law 280 to acquire jurisdiction, even though the affected tribe had made an agreement with the state to allow jurisdiction.

Castro-Huerta assumes that if the tribes' interests aren't hurt by piling state jurisdiction on top of Federal, state jurisdiction should be fine. But if that were true, the *Kennerly* decision would have come out the other way, because the Tribe in that case had actually made an agreement.

But instead, in *Kennerly*, the U.S. Supreme Court insisted on strict compliance with Public Law 280 for a variety of reasons, including respect for Congress and for tribal sovereignty.

I also explain in my written testimony, why *Castro-Huerta*'s attempt to explain away the inclusion of crimes by non-Indians against Indians in Public Law 280, their argument doesn't hold water.

Basically, there is no evidence whatsoever in the legislative history of Public Law 280 that Congress ever doubted the preemptive effect of Section 1152, which Professor Berger has already explained. Congress believed that further legislation was necessary to allow state jurisdiction over crimes committed by non-Indians against Indians and Public Law 280, with its mechanism, was that law.

Castro-Huerta also reflects a misguided policy choice regarding Indian Country criminal justice. My empirical research on Public Law 280 shows that under that statute, where state jurisdiction does apply, it has produced biased treatment against Indian victims and witnesses in state courts, as well as biased treatment favoring non-Indian perpetrators in state courts.

The unanimous bipartisan 2013 report of the Indian Law and Order Commission, on which I was privileged to serve, produced policy recommendations pointing in the exact opposite direction from the policy choices implicit in *Castro-Huerta*. We recommended moving criminal justice authority closer to Native nations and away from both Federal and state governments. This was unanimous and bipartisan, Republican as well as Democratic appointees.

And I want to stress, as have others, that tribes in Oklahoma are not the only ones affected by *Castro-Huerta*. Dozens of other states have either failed to opt into Public Law 280, or as with Tulalip, the previously imposed Public Law 280 jurisdiction has been retroceded or returned to the Federal Government.

Castro-Huerta would introduce state jurisdiction without the mechanism of Public Law 280, and that is just wrong. Not a single tribe has consented to state jurisdiction since 1968. But if any tribe today truly wants the state jurisdiction that *Castro-Huerta* spoke of, it can go ahead through the processes established by Public Law 280.

The poor reasoning of that opinion also puts Native nations throughout the United States at risk in a variety of realms as among others, the representative from Bay Mills Indian Community elaborated.

So, thank you very much for this opportunity to testify. I look forward to answering any questions you may have.

[The prepared statement of Ms. Goldberg follows:]

PREPARED STATEMENT OF CAROLE GOLDBERG, DISTINGUISHED RESEARCH PROFESSOR, UCLA SCHOOL OF LAW; CHIEF JUSTICE, COURT OF APPEALS, HUALAPAI TRIBE; CHIEF JUSTICE, COURT OF APPEALS, PECHANGA BAND OF INDIANS

My name is Carole Goldberg, and I am Distinguished Research Professor of Law at UCLA and the Chief Justice of the Courts of Appeal of the Hualapai Tribe and the Pechanga Band of Indians. From 2011–2013, I served as a Presidential appointee to the bipartisan Indian Law and Order Commission, which Congress established in the Tribal Law and Order Act of 2010.

The U.S. Supreme Court's decision in *Oklahoma v. Castro-Huerta* (June 29, 2022), allowing state criminal jurisdiction over crimes committed by non-Indians against Indian victims within Indian country, got the relevant law entirely wrong. It misread 18 U.S.C. section 1152, which has long been understood to establish federal jurisdiction that preempts state authority over such offenses. Furthermore, it made a mess and mockery of 18 U.S.C. section 1162, commonly known as Public Law 280, in which Congress created a very specific mechanism for states to acquire jurisdiction over crimes committed by or against Indians in Indian country—a mechanism that had not been invoked by the state in *Castro-Huerta*.

Even if one accepts—which I do not—that 18 U.S.C. section 1152 should be read to allow state jurisdiction over crimes by non-Indians against Indians in Indian country, Public Law 280 should have prevented exercise of state jurisdiction in *Castro-Huerta*. The Supreme Court's error in interpreting Public Law 280 is the error I want to focus on, both because it served as a backstop to arguments that section 1152 preempted the state's jurisdiction, and because I have researched and written about Public Law 280 for nearly 50 years.[1] Public Law 280 was enacted by

[1] See, e.g., Carole Goldberg and Duane Champagne, Captured Justice, Native Nations and Public Law 280 (Carolina Academic Press, 2010 and 2020 editions); Carole E. Goldberg, "Public

Congress in 1953 as a component of the broader termination policy of that era, naming six states that would acquire jurisdiction immediately, and allowing other states to opt in through specific processes. Responding to criticisms from a wide array of sources, including Tribes, Congress amended Public Law 280 in 1968 to incorporate a further process of Indian consent before state jurisdiction could be introduced in states that wanted to opt in. Oklahoma was not named in the initial law, and has never opted in under the terms and processes of Public Law 280, either before or after 1968. Indeed, since 1968, not a single Tribe anywhere in the United States has consented to state jurisdiction through Public Law 280.

Ever since Public Law 280 was enacted, the U.S. Supreme Court has insisted that the law's terms be adhered to strictly before state jurisdiction could take effect. In 1971, in *Kennerly v. District Court*,[2] the Supreme Court disallowed state jurisdiction within a reservation pursuant to a tribal-state agreement because the consent provisions of Public Law 280 had not been followed. Ignoring the ruling in the *Kennerly* decision, *Castro-Huerta* posited that state jurisdiction should be allowed in Indian country because it would not harm tribal interests to add state jurisdiction over non-Indian offenses against Indian victims on top of federal jurisdiction. Assuming, for sake of argument, the correctness of that proposition, it would seem that a tribal-state agreement should also supersede Public Law 280's procedural requirements. But the Supreme Court emphatically rejected that kind of interest-based analysis in the *Kennerly* case, insisting that Public Law 280 be followed. In contrast, *Castro-Huerta* allowed state jurisdiction that is addressed in Public Law 280 to go forward without the state's compliance with the processes built into that law.

As someone who has studied Public Law 280 and its impact, I emphatically reject the weak reasoning offered in *Castro-Huerta* for refusing to treat Public Law 280 as the sole mechanism for establishing state jurisdiction over the types of offenses, including crimes committed by non-Indians against Indians, referenced in that law. *Castro-Huerta* acknowledges that this mechanism is still required for states to assume jurisdiction over offenses committed by Indians within Indian country. So why not also require that mechanism for offenses committed by non-Indians against Indians, which are also referenced in Public Law 280? According to Justice Kavanaugh's opinion, Public Law 280 only referred to those non-Indian offenses at the time of the law's enactment in 1953 because Congress was *uncertain* whether state jurisdiction had already been preempted by 18 U.S.C. section 1152, not because federal law *actually* had such preemptive effect. There is no evidence whatsoever in the legislative history of Public Law 280 to support such a claim, and *Castro-Huerta* supplies none. As I have shown in scholarly research, that legislative history is rife with Congressional concern about alleged "lawlessness" in Indian country. If Congress had believed there was some basis for interpreting 18 U.S.C. section 1152 to allow state jurisdiction, it would have mentioned the potential exercise of that jurisdiction as one possible response to the problem. No such mention appears in the record of hearings, testimony, reports, and floor debates. It was taken as given, and rightly so, that without further legislation, states were precluded from exercising jurisdiction over offenses by non-Indians against Indians under 18 U.S.C. section 1152.

In addition to getting the law wrong, *Castro-Huerta* reflected a misguided policy choice regarding Indian country criminal justice. The federal government has long been aware that state involvement in Indian country criminal justice can jeopardize tribal-federal relations and interfere with the federal trust responsibility toward Tribes, through biased treatment against Indian victims and witnesses in state courts, as well as biased treatment favoring non-Indian perpetrators in state proceedings. My own research in Public Law 280 states, where state jurisdiction has applied, has documented the justifications for these tribal and federal concerns.[3]

Law 280: The Limits of State Jurisdiction over Reservation Indians," 22 UCLA Law Review 535 (1975) (cited and relied upon by the U.S. Supreme Court in *Bryan v. Itasca County*, 426 U.S. 373 (1976) and *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); Carole E. Goldberg-Ambrose, "Public Law 280 and the Problem of Lawlessness in California Indian Country," 44 UCLA Law Review 1405 (1997). I have also drafted sections on Public Law 280 for the leading treatise on federal Indian law, Cohen's Handbook of Federal Indian Law (1982, 2005, and 2012 editions).

[2] 400 U.S. 423 (1971).

[3] See Carole Goldberg and Duane Champagne, Captured Justice: Native Nations and Public Law 280 (2nd ed., Carolina Academic Press, 2020), at pp. 73–118; "Searching for an Exit: The Indian Civil Rights Act and Public Law 280," in K. Carpenter, M.L.M. Fletcher, and A. Riley, eds. The Indian Civil Rights Act at Forty (UCLA American Indian Studies Center, 2012) at 247–272 (documenting complaints of discrimination and abuse by state authorities under Public Law 280).

The potential for concurrent federal jurisdiction over those same offenses, as allowed under *Castro-Huerta*, would not erase concerns about bias and interference with the federal trust responsibility.

A recent and thorough examination of the needs for justice and safety in Indian country has produced unanimous, bi-partisan policy recommendations pointing in the exact opposite direction from the policy choices reflected in *Castro-Huerta*. In the 2010 Tribal Law and Order Act, Congress launched a bi-partisan commission, the Indian Law and Order Commission, to recommend improvements for the justice systems serving Indian country. As a Presidential appointee to that Commission, I participated in Indian country-wide hearings, and contributed to the Commission's 2013 report, A Roadmap for Making Native America Safer. This report was unanimous and bi-partisan in recommending that criminal justice authority be brought closer to tribal communities through enhanced tribal jurisdiction. Some members approached this conclusion from the starting point of tribal sovereignty. Others approached it from the starting point of local control and accountability. But Republican and Democratic appointees alike favored situating criminal justice within tribal authorities, keeping even federal involvement to a minimum, through funding and oversight of individual rights protections. The Roadmap report was also clear in supporting a tribal option to remove existing state criminal jurisdiction in Indian country under Public Law 280. In stark contrast, *Castro-Huerta* produced an expansion of such jurisdiction.

My focus on the erroneous interpretation of Public Law 280 in *Castro-Huerta* underscores that the impact and implications of that opinion extend far beyond a single state. Oklahoma is hardly the only state that was neither named in Public Law 280 nor covered by a properly followed opt-in. Dozens of other states have either failed to opt into Public Law 280, or their previously accepted Public Law 280 jurisdiction has been formally returned (retroceded) to the federal government. The criminal jurisdiction allowed under *Castro-Huerta* affects Indian country in all of them, and should never have been allowed until those states properly follow the mechanisms established by Congress more than fifty years ago. Furthermore, any future retrocession of existing Public Law 280 jurisdiction will be less than complete because of state jurisdiction allowed under *Castro-Huerta*. Finally, every Tribe has to be concerned about the potential for careless extension of the flawed rationale that underlies *Castro-Huerta*.

QUESTIONS SUBMITTED FOR THE RECORD TO CAROLE GOLDBERG, JONATHAN D. VARAT DISTINGUISHED PROFESSOR OF LAW EMERITA, UCLA

Questions Submitted by Representative Leger Fernández

Question 1. Can you speak more on the findings and verdicts of the Indian Law and Order Commission?

(1a). How do these bipartisan efforts compare to the Court's recent ruling in Castro-Huerta?

Answer. In 2013, following extensive nation-wide and Indian country-wide consultations, the bi-partisan Indian Law and Order Commission issued its unanimously endorsed report, A Roadmap for Making Native America Safer. Chapter One of the Commission's report was entirely devoted to criminal jurisdiction questions, and includes a chart (Figure 1, page 7) entitled "General Summary of Criminal Jurisdiction on Indian Lands." That chart clearly shows crimes by non-Indian offenders against Indian victims falling within exclusive federal jurisdiction—a widespread understanding of the law, until the Supreme Court made its misguided ruling in *Castro-Huerta* allowing concurrent state jurisdiction over such offenses.

The Commission's recommendations regarding criminal jurisdiction in Indian country point in exactly the opposite direction from the jurisdictional outcome established in *Castro-Huerta*. *Castro-Huerta* allows for greater state jurisdiction in Indian country than was previously understood to exist, including by the Commission (see above), the United States Department of Justice (from which the Commission took its chart), and the most respected treatise in the field of federal Indian law, Cohen's Handbook.[1] In stark contrast, the recommendation of the Indian Law and Order

[1] The most recent edition of this treatise states unequivocally: "The Major Crimes Act and the Indian Country Crimes Act (ICCA) create federal criminal jurisdiction that is exclusive of the states; that is, if federal jurisdiction exists under one or both of those two statues, the states

Commission was to cut back sharply on state criminal jurisdiction in Indian country. The following excerpts from the Executive Summary of the Commission's report specify how and why state jurisdiction should be reduced.

> While problems associated with institutional legitimacy and jurisdictional complexities occur across the board in Indian country, the Commission found them to be especially prevalent among Tribes subject to P.L. 83-280 or similar types of State jurisdiction. Distrust between Tribal communities and criminal justice authorities leads to communication failures, conflict, and diminished respect. . ..
>
> Ultimately, the imposition of non-Indian criminal justice institutions in Indian Country extracts a terrible price: limited law enforcement; delayed prosecutions, too few prosecutions, and other prosecution inefficiencies; trials in distant courthouses; justice system and players unfamiliar with or hostile to Indians and Tribes; and the exploitation of system failures by criminals, more criminal activity, and further endangerment of everyone living in and near Tribal communities. When Congress and the Administration ask why the crime rate is so high in Indian country, they need look no further than the archaic system in place, in which Federal and State authority displaces Tribal authority and often makes Tribal law enforcement meaningless.
>
> The Commission strongly believes, as the result of listening to Tribal communities, that for public safety to be achieved effectively in Indian country, Tribal justice systems must be allowed to flourish, [and] Tribal authority should be restored to Tribal governments when they request it. . ..
>
> **Congress should clarify that any Tribe that so chooses can opt out immediately, fully or partially, of . . . congressionally authorized state jurisdiction . . .. (Executive Summary, p. ix)**

The Commission's recommendation included a requirement that any Tribe opting out of state jurisdiction must afford defendants all rights protected under the United States Constitution, subject to very limited review in a newly-constituted federal appellate court, the U.S. Court of Indian Appeals. Furthermore, any such Tribe would no longer be subject to sentencing limitations established in the Indian Civil Rights Act.

The body of the Commission's report further elaborates on the failings of existing state criminal jurisdiction in Indian Country:

> Because Tribal nations and local groups are not participants in the decision making, the resulting Federal and State decisions, laws, rules, and regulations about criminal justice often are considered as lacking legitimacy. As widely reported in testimony to the Commission, nontribally administered criminal justice programs are less likely to garner Tribal citizen confidence and trust, resulting in diminished crime-fighting capacities. The consequences are many: victims are dissuaded from reporting and witnesses are reluctant to come forward to testify . . .. Potential violators are undeterred. (p. 4)
>
> . . . State government authority often appears even less legitimate to Tribes than Federal government authority. The Federal government has a trust responsibility for Tribes, many Tribes have a treaty relationship with it, and there is an established government-to-government relationship between Tribes and the Federal government . . ..
>
> . . . Tribes' widespread disenchantment with State criminal jurisdiction stems from the fact that States often have proven to be less cooperative and predictable than the Federal government in their exercise of authority . . .. Memories that States and local governments actively sought reductions of Indian territories still engender distrust from Tribal governments and their citizens. (p. 11)

The illegitimacy of state authority affects cases with Indian victims as much as cases with Indian defendants, because cooperation from victims and witnesses is necessary to achieve a successful prosecution. Although there are individual instances of cooperative arrangements succeeding between Tribal and local sheriffs and prosecutors, the Commission's report properly notes that these arrangements

---

lack concurrent criminal jurisdiction to prosecute the same conduct." Nell Jessup Newton et al., Cohen's Handbook of Federal Indian Law (2012), at 763 (citations omitted).

are highly contingent on local non-Indian politics and are unstable over time. (p. 15) The findings and recommendations of the Indian Law and Order Commission clearly oppose state criminal jurisdiction in Indian Country, calling for Tribes to be able to opt out of such jurisdiction. To the contrary, *Castro-Huerta* expands such jurisdiction.[2]

Question 2. In your work examining Public Law 280, how will the Castro-Huerta ruling affect the State and tribal governments that are currently operating under this law?

Answer. *Castro-Huerta* affirms state criminal jurisdiction—crimes by non-Indians against Indian victims in Indian country—that is largely already allowed under Public Law 280. However, there are limitations on the criminal jurisdiction that states acquire under Public Law 280 that do not seem to operate on the jurisdiction recognized in *Castro-Huerta*. Most significantly, Public Law 280 does not confer jurisdiction on states to impose their "regulatory" laws within Indian country, even if those laws have an associated criminal component.[3] Because *Castro-Huerta* relies on "inherent" state jurisdiction rather than a particular statutory grant, it presumably incorporates no such limitation. Thus, even for Tribes already subject to Public Law 280, *Castro-Huerta* likely represents an expansion of state jurisdiction.

Furthermore, *Castro-Huerta* makes retrocession of state Public Law 280 jurisdiction (return of such jurisdiction to the federal government) significantly less beneficial and meaningful for Tribes. Under current law, only states, not Tribal nations, may initiate retrocession. (The Indian Law and Order Commission's recommendations, discussed above, would give control over retrocession to the affected Tribes.) Nonetheless, numerous instances of retrocession—both in the "mandatory" states named in the statute, and in those states that opted in—have occurred.[4] Before *Castro-Huerta*, it was assumed that retrocession would result in exclusive federal jurisdiction over crimes committed by non-Indians against Indian victims. Since the Supreme Court's ruling in *Castro-Huerta*, state jurisdiction will have a larger role in Indian country even after retrocession, raising all the issues of unfairness and illegitimacy discussed in the report of the Indian Law and Order Commission (see above).

Questions Submitted by Representative Grijalva

Question 1. As your testimony notes, State involvement in criminal justice in Indian Country could jeopardize tribal-federal relations.

(1a). To clarify for the record, does the federal trust responsibility apply to State governments?

Answer. With the exception of certain eastern states that signed separate treaties with Tribal nations, states do not have a trust responsibility to those nations. The trust responsibility has consistently been articulated by the Supreme Court as an obligation of the federal government associated with its constitutional authority over Indian affairs and its government-to-government relationship with Tribal nations.[5] In contrast, the Supreme Court has recognized that states often have interests antagonistic to Tribal nations. According to *United States v. Kagama*, 118 U.S. 375, 383–84 (1886), "These Indian tribes are the wards of the nation . . .. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies."

(1b). How will this impact the delivery of public safety services post-Castro-Huerta?

Answer. As I indicated in my written testimony, and as discussed above in relation to the report of the Indian Law and Order Commission, research supports concern that state criminal jurisdiction will result in biased and ineffective law enforcement and criminal justice when non-Indians commit crimes against Indians in Indian Country. Loss of respect and cooperation from victims and witnesses because of lack of legitimacy of state institutions can leave crime undeterred. Even if individual localities may sometimes be more diligent and culturally respectful, the problems of illegitimacy, discrimination, and overlapping, confusing jurisdiction will

[2] To be clear, the Commission did not address state jurisdiction over crimes by non-Indians against Indian victims outside of Public Law 280, because it assumed (correctly, in my view) that such state jurisdiction did not exist.

[3] *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

[4] *See* Duane Champagne and Carole Goldberg, Captured Justice: Native Nations and Public Law 280 (2nd ed., Carolina Academic Press, 2020), at 177–209.

[5] *See* Cohen's Handbook, *supra*, at pp. 412–429 and cases cited therein.

likely be the norm. A particular concern is when multiple jurisdictions defer to each other, each forsaking jurisdiction and leaving crime unattended.

Ms. LEGER FERNÁNDEZ. Thank you, Professor and Associate Justice Goldberg.

The Chair will now recognize the Honorable Matthew J. Ballard, who is the District Attorney for Oklahoma's District 12. You are now recognized for 5 minutes.

STATEMENT OF THE HONORABLE MATTHEW BALLARD, DISTRICT ATTORNEY, OKLAHOMA DISTRICT 12, CLAREMORE, OKLAHOMA

Mr. BALLARD. Thank you, Madam Chair and Ranking Member. My name is Matthew Ballard. It is my honor to appear before you today as the elected District Attorney for Oklahoma District 12 and to give voice today to the Native American victims, who have been given hope as a result of *Castro-Huerta*.

My purpose today is to provide real-world examples of people, of Native American victims, who have benefited from *Castro-Huerta*, who *Castro-Huerta* served as a beacon of hope that they might one day get justice. These are more than anecdotes. These are real people in my community. These are my constituents. They are my neighbors. They are my friends. We go to the same church. We send our kids to the same schools. The people I am talking to you about today are from my community.

Two years ago, the law enforcement community in Oklahoma was thrust into chaos when the Supreme Court determined that 2 million Oklahomans resided on reservations that had never been disestablished. To give you an idea of that, there are 14 states in this nation with populations smaller than the number of Oklahomans living on Indian reservations.

So, what did that look like in my district? In my district, we saw hundreds of cases being dismissed. We saw dockets that were filled of 200, 300, 400 different cases, that we knew that we were going into court and those cases were going to be dismissed. Those victims were never going to see justice.

I had multiple times where I walked into my victim advocates offices. These are people who exist and do their job every day building trust with victims, telling victims and assuring them that we will seek justice for them, who build relationships with victims. As a result of the phone calls they were making, they spent hours calling victim after victim after victim just to notify them that their case was being dismissed.

On multiple occasions, I walked in and found my victim advocates in tears it was so overwhelming. At one point, I told them, go home and call it a day. And they looked at me, and they held up a list. And they said not until we go through this list. It is on us to call every victim on this list and let them know. They can't hear from social media. They shouldn't hear it from the news. They need to hear it from us because they trust us. And Native American victims were bearing the brunt of the *McGirt* decision.

Only Federal jurisdiction existed where non-Native victims were involved. In the Eastern District, the Federal U.S. Attorney's office

determined that their threshold for filing cases with serious bodily injury. If a case didn't involve serious bodily injury, it was a decline.

Let me tell you about some of the victims and how that impacted them. Let me tell you about Kayla Dobbs. The day the Cherokee Reservation was recognized by the Oklahoma Court of Criminal Appeals as having not been disestablished, that night, Kayla Dobbs was at the Iron Horse Saloon in rural Oologah, Oklahoma. While she was there, she ran into an ex-boyfriend who was there with a female acquaintance. While she was on the phone and with her back turned, she was hit in the back of the head, knocked to the ground, and pepper sprayed in her face.

Rogers County deputies were dispatched to the scene. They showed up, and they had to ask the question, is anyone here Native American, to determine whether they even had jurisdiction to investigate? Kayla, our victim, was Native American and her assailant was not so the deputy quickly realized that he didn't have jurisdiction. It was solely Federal. As a result, he called the FBI office at 1 in the morning about a bar fight and was told the FBI wouldn't come out. That is what we are seeing in Oklahoma.

But let me tell you now about a case involving hope. Let me tell you about Katrina West. Katrina's son was violently murdered along with his cousin. It was later determined that her son and his cousin were Native American. And the case, our state case was dismissed.

But we got to know Katrina through my office, assuring her we were going to seek justice. We told her Federal courts did refile, and she came to us upset that they had offered a 17-year sentence. Mind you that the minimum sentence in Oklahoma for a single homicide is a life sentence which is calculated at 45 years.

She came to us upset, and we explained unless *Castro-Huerta* came out in our favor, her son, there is nothing we could do. The day *Castro-Huerta* came out, she called me in tears. The victim advocate came in and said she is on the phone. I took the call. She was tearful. And she said, Matt, does this mean what I think it means? Does it mean you can refile your case?

I told her that it did. And through her tears, she said thank God. We have refiled that case, and we are going to seek justice. And that is what *Castro-Huerta* provided to us in the state of Oklahoma, the opportunity to go out and seek justice for our Native American victims. Thank you to the panel.

[The prepared statement of Mr. Ballard follows:]

PREPARED STATEMENT OF MATTHEW J. BALLARD, DISTRICT ATTORNEY, OKLAHOMA DISTRICT 12

I serve as the elected District Attorney for Oklahoma District 12, encompassing Rogers, Mayes and Craig Counties, an office I have held since 2015. Suburban/rural in character, my District lies to the northeast of Tulsa and along Interstate 44. It is located primarily within the bounds of the Cherokee Nation, and also includes a small portion of the Creek Nation. The District is located entirely within Indian Country.

For 113 years, the federal government, the State of Oklahoma, and the sovereign tribal governments with rights to lands within the political boundaries operated in the belief that the tribal reservations were abolished when Oklahoma was named the 46th of the United States of America. Two years ago, one of the most consequential Supreme Court decisions in history cast Oklahoma law enforcement into chaos.

When the Supreme Court determined the reservations within the political boundaries of the State of Oklahoma had not been abolished, the population of Native Americans living on reservation land in the United States nearly tripled. Today, nearly 2 million Oklahomans live in Indian Country. To put that into perspective, approximately 14 states have populations smaller than the population of Oklahomans living on reservation land.

The consequences of this decision on victims of crime were immediate. Every case involving a Native American defendant or victim was in jeopardy of being dismissed or overturned. Thousands of pending state cases were dismissed, never to be refiled. Those that were refiled put victims, both Native and non-Native, in the traumatic position of reliving previous trials and the crimes against them and their loved ones. In my district alone, court dockets with hundreds of cases involving defendants seeking to have their charges dismissed consumed hours of court time. My victim advocates spent hours making phone calls to crime victims to deliver the devastating news that their case was dismissed. On more than one occasion, I found my team's victim advocates in tears as the stress of making these phone calls became overwhelming.

Meanwhile, police investigators were left with state court judges who refused to sign arrest warrants or even search warrants for cases involving Native Americans. Judges became concerned that acting in the absence of jurisdiction would leave them open to personal liability and therefore adopted an extremely conservative review of every case involving a Native American. Officers preparing affidavits were required to include a statement affirming that neither the suspect nor victim was Native American, and were even required to check with Oklahoma tribes to ensure non-membership.

The impact on day to day law enforcement was profound. Dispatchers on 911 calls were forced to ask whether a Native American was involved, so that the call could be properly dispatched. Although cross-deputization agreements ameliorated some of the worst effects, these agreements could not provide protection to the most vulnerable group impacted: Native American victims. In cases with non-Native perpetrators, Native American victims were left only with the hope that the federal government and the U.S. Attorneys' offices in Oklahoma would prosecute their cases. These agencies, however, were overwhelmed by the tsunami of new cases (many of which had never or were rarely prosecuted by these agencies) and the backlog of old cases that had been dismissed. In the United States Eastern District for Oklahoma, the U.S. Attorney's office adopted the position that the threshold for filing charges against those that had victimized Native citizens was serious bodily injury, as defined by federal law. If the case did not involve serious bodily injury, it would be declined. Incredibly, this included such cases as strangulation not resulting in death or protracted injury. It certainly included property crimes against Native Americans ranging from home invasion to theft, embezzlement, fraud, and more.

On the day after the Oklahoma Court of Criminal Appeals issued its decision finding that the Cherokee Reservation had not been disestablished, victims of crime in Rogers, Mayes, and Craig Counties were immediately impacted. Just after midnight that evening, Kayla Dobbs was a patron at the Iron Horse Saloon in rural Rogers County. While she was distracted, a female acquaintance of her ex-boyfriend approached her, punched her in the back of the head, knocking her to the ground, and pepper sprayed her in the face. The parties were separated and Deputy Ronnie Roden from the Rogers County Sheriff's office was dispatched. Upon arrival, Deputy Roden asked Ms. Dobbs if she was Native American and she confirmed that she was, but that her ex-boyfriend and his acquaintance were not. Because Ms. Dobbs was Native American but her assailant was not, the case would be solely federal. Although Deputy Roden was cross-commissioned with the Cherokee Marshal Service, this did not provide federal credentials and no on-duty sheriff deputy held federal credentials (because federal credentials are more difficult to obtain, they are held primarily by investigators). Lacking jurisdiction to conduct an investigation in his own county or to make an arrest, Deputy Roden could only ensure the scene was safe and then had no recourse other than to contact the FBI field office in Tulsa (approximately 45 miles away). The FBI advised they would not respond and that, as the assault was only a misdemeanor, they would likely take no action on the case. Deputy Roden shared this information with Ms. Dobbs and, with nothing further to do, departed.

Unfortunately, scenes like this played out nearly every day in my district. What I saw in my community prior to the ruling in Castro-Huerta, was that my office, and those of cooperating state and local professional law enforcement agencies, stood nullified in our efforts to ensure the safety of our communities through the enforcement of laws, investigation of crime, and redress for victims, both Native and

non-Native, in a crippling number of cases. Without the modulating effects of this ruling, the federal government is essentially tasked with the heretofore novel and nontraditional role of community policing. Current agencies lack the resources, capacity, and, frankly, will to execute these functions within the expectations of the populace. What was needed was essentially a federal police force. This type of agency could certainly be created with enough time and resources, but victimized members of the public do not expect the government to respond to their very real crises in a number of years. They seek immediate response and quick redress.

The possibility that victims could once again see justice after Castro-Huerta spread almost immediately through my community. Within hours of the decision, I received a phone call from Katrina West asking about a case involving her son. I first came to know Ms. West in 2019, when her son and his cousin were murdered and my office filed charges against the individual responsible. As the case progressed, we had multiple meetings with Ms. West and she came to trust that we would do everything in our power to seek justice for her son. Unfortunately, during the pendency of the case, we learned that her son, who identified as African-American, was also a member of the Creek Nation. As a result, the state's case against his killer was dismissed. The U.S. Attorney's office filed two counts of Murder 1, however, in the weeks prior to Castro-Huerta, they notified Ms. West that they had reached a tentative plea agreement with the murderer by which he would receive a sentence of 17 years. By comparison, the minimum sentence in Oklahoma for a single count of Murder 1 is calculated at 45 years and this particular defendant had violently murdered two people. Ms. West was extremely distraught about the federal prosecution's proposed resolution of the case and sought my advice. I explained to her that, absent a favorable decision in Castro-Huerta, my office had no jurisdiction and there was nothing my team could do.

Within hours of the Castro-Huerta decision, one of my victim advocates notified me that a very emotional Ms. West was on the phone. I accepted the call and Ms. West, through her tears, asked me if it was true that this meant we could refile the case against her son's killer. I told her that was exactly what it meant and that I would be proud to seek a just sentence on his behalf. Emotional, Ms. West exclaimed that this was the answer to her prayers.

Unfortunately, the scenario of crimes against Native Americans going unprosecuted, played out all too often prior to Castro-Huerta. Here are just a handful of additional examples from my district:

- A Native American female was stopped at a stoplight in front of an elementary school. Another driver, angry at a perceived driving infraction, approached her window and punched through the glass, breaking the window. The incident was caught on video and disseminated widely through social media. The other driver was not Native American. No charges were brought for the assault.
- A Native American female became involved in a road rage incident with another driver. While her vehicle was stopped, the male driver advised her that he was a police officer and ordered her out of the vehicle. In fact, he was not a police officer. When the Native American driver stepped out of her vehicle, he held her arms, while she was assaulted by his female passenger. This occurred in front of the Native American female's children. The male driver and his female passenger were not Native American. No charges were brought.
- After a fight outside of a bar, a man pulled out a gun and fired a shot at a man fleeing on foot. The man fleeing was Native American, so in an effort to circumvent the jurisdictional issue, my office filed a misdemeanor reckless conduct with a firearm charge, rather than any charge associated with the actual victim. No federal charges were filed.
- Claremore Police found a non-Native American woman living in a squalid hotel room with her five children (ages 4 months to 13 years) and two dogs. Covered in trash, the room reeked of human and animal excrement. Two of the children were completely naked. An unsecured firearm was accessible to all children, as was a plainly visible container of medical marijuana. The woman's children were Native American and while they were removed from the deplorable conditions, no charges for child neglect were filed.

The first published case in which the Oklahoma Court of Criminal Appeals applied Castro-Huerta was prosecuted by my team in District 12. In that case, Deputy Keisha Oberg of the Mayes County Sheriff's office arrested an individual near a high school football field for carrying a firearm while intoxicated and public intoxication. After securing the arrestee in her vehicle and while driving to the

Mayes County jail, the arrestee managed to gain leverage with his feet, elevate himself, head butt Deputy Oberg multiple times and interfere with her driving. The arrestee was charged with felony Assault and Battery on a Police Officer. Deputy Oberg, however, is a Native American member of the Cherokee Nation. As such, her case was dismissed by the state court and my office appealed. The appeal was significant because under federal law, the defendant could only be charged with a misdemeanor assault, as federal law on assaults on law enforcement officers only extends to federal officers. Applying Castro-Huerta, however, the Oklahoma appellate court determined the state case could proceed. Absent Castro-Huerta, this criminal and similarly situated perpetrators would merit shorter sentences for no reason other than the fact their victim is Native American. It was my firm belief that Deputy Oberg, as a Native American first responder putting her life on the line, deserved the full protection afforded to all Oklahoma citizens.

Oklahoma is not a place where societal lines are drawn between Natives and non-Natives. When an officer responds to the scene of an accident, they cannot determine which parties are Native or non-Native without going through detailed questions, and those questions must be asked of every person because, just like many of those in my own family, tribal membership may differ within a single household, both among tribes and a mix of native and non-native members. In my own office, my office manager, who is Native American, made certain that her husband, who is not Native American, was listed on her vehicle titles to ensure that if their car was stolen or burglarized, he could be listed as the victim and therefore allow state prosecution.

In the midst of this chaos, the Castro-Huerta decision has been a beacon of hope for Native American victims of crime. It returned to Oklahoma law enforcement what had been the practice for the 113 years prior to McGirt. State and local law enforcement officers and local prosecutors could once again prosecute cases involving Native American victims. The impact I have witnessed is not suppositional or theoretical. If you have read stories in publications such as the Wall Street Journal or New York Times about what you think may be isolated incidents I can assure you they are not. Those victims are neighbors and members of my community. They are parents, and business owners, and members of my church. They are my constituents. I can speak directly to the evidence of the realities in which I work to protect ALL individuals, families, businesses and others in the jurisdiction that have placed their trust in my office. I cannot speak to how the current situation could have been improved had individuals acted differently outside my lifetime. What I can say is that in 2022 the people of Oklahoma deserve a very real conversation about today's challenges, and assurances that their communities remain safe places to live, worship, raise families, and operate businesses.

I am proud to lend my voice to the Native American victims that I was elected to represent. Castro-Huerta has given them hope. I will be working to do all that I can to live up to this trust and to ensure that my office seeks justice for all victims of crime.

QUESTIONS SUBMITTED FOR THE RECORD TO MATTHEW J. BALLARD

Questions Submitted by Representative Westerman

Question 1. Can you provide the Committee with further examples of acts that are currently criminal under Oklahoma law that would not be prosecutable if Castro-Huerta were not in effect?

Answer. In Oklahoma, school children are considered a vulnerable population and state law prohibits sexual contact between a school teacher and a secondary student, regardless of the age of consent. Under federal law, no such prohibition exists. This means that prior to *Castro-Huerta*, it was illegal for a teacher to have sexual contact with a student, unless that student was Native American. The concern that this could lead to Native Americans being targeted, particularly in the realm of criminal conduct that frequently involves grooming and the selection of particularly vulnerable students, is obvious.

Similarly, state law prohibits sexual contact between detention officers in jails or prisons and the detainees under their supervision. Federal law only extends to federal detention facilities and federal detention officers, therefore providing no protection to Native Americans in the facilities with which the tribes contract to hold tribal citizens awaiting trial.

Under Oklahoma law, an assault and battery on a law enforcement officer is a felony crime. Federal law, however, only extends to federal law enforcement officers,

so if an offender assaults a Native American serving in state or tribal law enforcement, the crime is only a misdemeanor and is no different than an assault and battery on a civilian. In Rogers County, the sheriff is a member of the Cherokee Nation and numerous other law enforcement officers are Native American, making this a very real concern. In Mayes County, the first published case establishing *Castro-Huerta* was a case involving an assault and battery on a Mayes County Sheriff's deputy while she was on duty. The case was dismissed by the trial court and the state appealed. Following *Castro-Huerta*, the case was reinstated, but without *Castro-Huerta*, the crime would have been only a federal misdemeanor offense.

Question 2. Have there been instances where criminals exploit the criminal jurisdiction issues in Oklahoma that existed prior to Castro-Huerta?

Answer. Although data is difficult to quantify, anecdotally law enforcement has seen an increase in crimes committed against Native Americans. I am aware that some Native Americans elected to remove tribal tags from their vehicles out of concern that criminals would recognize that any crime committed against a Native American was much more likely to go un-prosecuted and would therefore target vehicles owned by Native Americans.

This gap is exacerbated by the inability of the federal U.S. Attorneys' offices to function as front line District Attorneys' offices. U.S. Attorney offices in the Northern and Eastern Districts accept only approximately 31% and 22%, respectively, of cases referred to them. This means that the vast majority of cases referred to the federal government for prosecution are not filed. This has been confirmed by my own anecdotal observations. I have seen numerous cases that we filed that the federal government declined and refused to prosecute.

I have personally listened to jail calls between offenders and family members where the offender is asking if they or the victim are Native American and indicated that this would lead to more favorable treatment in the criminal case. We have offenders who are active members of racial gangs that persecute races including Native Americans, who have later researched family ties to establish tribal citizenship to avoid prosecution or obtain more favorable sentences. My attorneys have literally been put in the position of advocating for victims who claim they are not Native American for purposes of *McGirt*, while the person who victimized them is arguing that they are in fact Native American. Criminal defendants fully realize that it is in their best interest to claim their victims are Native American and state prosecutors are put in the delicate position of litigating this issue. Prior to *Castro-Huerta*, it was heart wrenching to explain to victims that if they are Native American, their case will be dismissed.

Question 3. In your experience, how has Castro-Huerta impacted the federal law enforcement workload? Has it decreased, remained the same, or increased?

Answer. *Castro-Huerta* helped to alleviate investigation of crimes that formerly fell solely under federal jurisdiction: Non-Natives committing crimes against Native Americans. Because these fell solely under federal jurisdiction, both the state and tribes were limited in their authority to respond and provide timely investigation. While both the state and tribes have a limited number of officers with federal credentials, these officers are very sparse in number and availability, with the effect being crimes going without timely investigation, or with no investigation.

Castro-Huerta enabled state prosecutors to begin tackling the backlog of cases that have been left unprosecuted. I have maintained open lines of communication with federal prosecutors and they have been consistently referring cases back to my office for prosecution. We have been addressing these cases on a consistent basis and have been able to reach out to a number of Native American victims to tell them their case has been refiled in state court.

This has also allowed us to tackle a particularly troubling manifestation my office was seeing prior to *Castro-Huerta*. In one case involving numerous sexual assault victims, the offender targeted several school students. As is common throughout Oklahoma, the school had both Native American and non-Native American students and the offender's victims included students in both categories. Prior to *Castro-Huerta*, we were not able to seek justice for the Native American victims, and were instead limited solely to bringing charges involving non-Native Americans, resulting in two tiers of justice for individuals depending on their racial and political identity as defined by federal law.

Question 4. Can you further explain your understanding of the differences in capacity and/or focus between Oklahoma state prosecutors and federal prosecutors for the federal districts of Oklahoma?

Answer. U.S. Attorney offices have never functioned like District Attorneys' offices. In 2019, prior to *McGirt*, the 11 counties that make up the federal Northern District of Oklahoma filed 27,726 state criminal cases. Last year, the Northern District of Oklahoma filed 444. Federal courts across the country are correctly focused on the enforcement of the laws of the United States, crimes involving interstate commerce, international criminal organizations, securing our borders, and other federal interests. The federal system of justice is not set up to prosecute local crime like District Attorneys' offices. In Tulsa County District Court, state prosecutors typically conduct approximately 20–30 murder jury trials on an annual basis. In the entirety of the United States of America, federal prosecutors took 21 homicide cases to jury trial last year.

This is further exacerbated by the lack of local accountability. As a local elected official, I engage with my constituents at local sporting events, the grocery store, church, and elsewhere on a daily basis. I am constantly receiving feedback on the performance of my prosecutors and I am well aware that I am one election away from no longer serving as District Attorney. On the federal level, however, there is no such local accountability. The closest elected official to a U.S. Attorney office is President Joe Biden.

While I have a great deal of respect for my federal law enforcement partners, their role in the criminal justice system is different than mine. There are a variety of reasons for this. Federal law regarding speedy trial allows much less time for a criminal prosecution and forces a compressed trial schedule. Department of Justice protocols allow for less individual flexibility among prosecutors. I have always enjoyed an excellent working relationship with federal prosecutors and have relied on them to take on the complex, international, or other cases that my office does not have the resources or experience to handle. On the other hand, my office excels at handling the volume of cases that is seen by state prosecutors across the nation. Prior to *McGirt*, my office and the U.S. Attorney's office formed a cohesive law enforcement wall against crime. While we continue to work together, the state and federal systems of justice are different and the volume of cases now being referred to the federal government is overwhelming a system not set up to handle it.

Question 5. Can you further expand beyond your written testimony, and speak to how you have seen the McGirt and Castro-Huerta decisions play out day-to-day in Oklahoma?

Answer. The *McGirt* case instantly thrust Oklahoma law enforcement into chaos and uncertainty. For 113 years, the state functioned cohesively with Native Americans and non-Native Americans living and working as a unified community. Now, law enforcement is thrust into a world where jurisdiction is constantly uncertain. While the state, tribes and federal government work together to fill the gaps, doing so consistently and effectively is impossible. State court judges are left without jurisdiction over persons who appear before it. If a Native American witness commits perjury in state court, the state is left without recourse. Courts cannot enforce their own subpoenas. Native American jurors in state court cases swear an unenforceable oath "under penalty of perjury under the laws of Oklahoma." Among our state citizens are a number of Native American elected officials, from our state congress to our governor, who can pass laws to which they are not subject in half the state.

In the day-to-day world of law enforcement, the situation is untenable. In a recent election, it was discovered that a candidate had set up a tent within 300 feet of a polling location, a violation of state electioneering law on election day. In that same election, numerous state offices in my District involved Native American candidates. This prompted a discussion about the ability of state law enforcement to prevent Native American candidates (or Native American supporters) from electioneering near polling locations. While the issue was fortunately not pressed, the ultimate conclusion was that state officers could not enforce state election law against Native Americans in state elections.

When it comes to investigation of Native American victims, *Castro-Huerta* served as a lifeline. Although law enforcement work to investigate crimes against Native Americans, federal declination rates that approach 70–80% are hard to ignore. Cases like one in my district in which a two-year-old was admitted to a hospital after ingesting drugs are being shut down with no investigation and no prosecution (crushingly, the sheriff's investigator assigned to that particular case and seeking justice for this tribal toddler is himself Native American).

Question 6. How difficult is it to determine whether a victim is Native American and is the non-prosecution of cases with Native American victims a wide-spread issue?

Answer. Determining the Native American status of victims is an intricate process that, prior to *Castro-Huerta*, was dispositive of how a case should progress. The test for whether a victim is Native American is complex. It requires recognition by a federally recognized Indian tribe and a degree of Indian blood. However, if the victim is not an enrolled member, they may still be considered Native American depending on a variety of factors including government recognition and the receipt of benefits reserved for Native Americans, enjoying the benefits of tribal affiliation, and social recognition as a Native American. These factors do not lend themselves to quick determination, leading to confusion as to who has jurisdiction to investigate a particular crime.

To give just one example of how this plays out in the real world, J.S. was a five-month-old infant when he was taken to the emergency room at a local hospital because he was writhing uncontrollably, he was inconsolable, and he was vomiting. At the hospital, he tested positive for amphetamines and spent days in the hospital going through withdrawal from his exposure to methamphetamine. J.S.'s mother was not Native American. The identity of his father, however, was unknown. It was not until a DNA paternity test established the father's identity that it was discovered that his father was in fact Native American, making J.S. also Native American. By the time this was discovered, however, months had passed. There is a reason that investigators launch immediate investigations, before facts grow cold or evidence becomes stale. Situations such as this force law enforcement into the difficult decision of attempting to make a determination about a victim's ancestry, which can be absolutely critical to the success of a criminal case.

Further complicating this process is the realization by victims that it is not in their best interest to cooperate. We have seen this personally, as one case was remanded by the appellate court to determine whether the victim, a minor child, was Native American. When we asked the child's parents if they were Native American, they replied, "What if we refuse to tell you?" This raised additional issues, due to the fact that if the parents were in fact Native American, state court subpoenas would not be enforceable and if they refused to testify, a state court judge would have no jurisdiction over them. In this same case, the state court ultimately determined that the children, although not enrolled tribal members at the time they were molested, were Native American for purposes of *McGirt* and dismissed the case. Although charges were initially filed in federal court, federal prosecutors ultimately decided that the children were not Native American and dismissed the federal case. Splits of authority such as this are unfortunately too common where the decision of Native American status is very fact intensive and can change during the pendency of a case.

As to the non-prosecution of cases with Native American victims, it is an insult to law enforcement and evinces a complete lack of understanding of the culture of Oklahoma. In my own family, three of my nieces are Native American. The Sheriff of Rogers County is Native American. I have prosecutors who are Native American. My office manager is Native American. I work every day with Native American police officers. Cherokee Nation citizens make up approximately 25% of the population of my District. Native and non-Native Americans make up one community. Our children attend the same schools, we worship at the same churches, our families live in the same neighborhoods. Prior to *McGirt*, we never inquired as to the racial or political identities of offenders or victims, unless a hate crime was committed. We sought to protect Oklahomans and those visiting our state. And my District is not alone. Other Districts in Oklahoma actually have a higher percentage of Native American citizens and it is my experience that every District Attorney works to protect all of their citizens. To suggest that I would advocate for anything but the best interest of a sizable category of my constituents that includes my own family members is disappointing and inaccurate.

Prior to *McGirt*, we would simply have no way of knowing when a Native American was even involved in a case. It was not until such a determination became dispositive that the inquiry into Native American status began. Before *Castro-Huerta*, defense attorneys were probing the background of victims to make the argument that state charges should be dismissed, to the benefit of those preying on Native Americans. I am thankful for *Castro-Huerta* and I am thankful that such offensive practices have been stopped. Just like the other District Attorneys in Eastern Oklahoma, I will continue to pursue justice for all victims and to stand against those who would exploit the loopholes that have now been filled by the Supreme Court.

Ms. LEGER FERNÁNDEZ. Thank you very much for your testimony and the stories of the victims.

The Chair now recognizes Mr. Mansinghani—my apologies, Mr. Mansinghani, who is a Partner at Lehotsky Keller, for 5 minutes. Thank you.

STATEMENT OF MITHUN MANSINGHANI, PARTNER, LEHOTSKY KELLER LLP, OKLAHOMA CITY, OKLAHOMA

Mr. MANSINGHANI. Chairwoman Fernández and Ranking Member Obernolte, I want to start by thanking the House Subcommittee on Indigenous Peoples for inviting me to speak.

By way of background, I am a Partner at Lehotsky Keller in our Oklahoma City office, where one of my specialties is Federal Indian law. Prior to returning to the private practice earlier this year, I served for 5 years as the Solicitor General for the state of Oklahoma, where I litigated several important Federal Indian law cases including the case that is the topic of today's hearing, *Oklahoma v. Castro-Huerta*.

My testimony today represents my own personal views and not those of my current or former employers.

In *Oklahoma v. Castro-Huerta*, the Supreme Court held that the Federal Government and the states have concurrent jurisdiction to prosecute crimes committed by non-Natives against tribal members in Indian Country. Those crimes are within the Federal jurisdiction because of Federal statutes of the General Crimes Act extended Federal law into Indian Country.

And they are within state jurisdiction because nothing in that Federal law said that the Federal Government's jurisdiction was exclusive or otherwise pre-empted state jurisdiction.

This particular case concerned the prosecution of a foreign national, who severely neglected, to the point of torture, his daughter, who was a member of an Indian tribe based in North Carolina. The crime occurred in the newly recognized Cherokee Reservation in Eastern Oklahoma.

The state intervened in this abuse to protect the Native American child from a non-Native abuser. And that is what this case was always about. Do states have jurisdiction within their own borders over people who are not members of a tribe, including those non-Natives who hurt tribal members?

Or put another way, the question is, did Congress ever pass a law saying that states have no power to protect tribal members within state borders when those tribal members are abused by non-Natives within the state?

The Supreme Court, following a close reading of the laws Congress has enacted and its past precedent, said states have jurisdiction to punish these crimes.

I go over all of this because I think it is important to keep in mind what this case is about and to read the Supreme Court's decision for what it says.

So, while this hearing is about the decision's impact on tribal sovereignty, we should remember that the decision in *Castro-Huerta* is, first and foremost, a ruling about state sovereignty. It says that state borders matter, and that state sovereignty matters, which under our Constitution stands for the common-sense

proposition that states have jurisdiction within their borders unless Congress validly says otherwise.

The decision, therefore, gives meaning to Congress' choice to create states like Oklahoma, or New Mexico, or California, and to establish their borders to include lands that are Indian Country. And it correctly observed that Congress never has said states lacked jurisdiction over non-Indians within their borders when those persons commit crimes in Indian Country.

The Court's opinion, of course, was not silent on the issues of tribal sovereignty. But what it said was that the exercise of state jurisdiction here would not infringe on tribal self-government. Because a state prosecution of a crime committed by a non-Indian against an Indian would not deprive the tribe of any of its prosecutorial authority. And I think I just heard Attorney General Hill agree with that idea, that this doesn't affect tribals' prosecutorial authority.

And a state prosecution of a non-Indian does not involve the exercise of state power over any Indian or over any tribe. The only parties to the criminal case are the state and the non-Indian defendant. Nor was this opinion silent on the role of the Federal Government.

The Court held that both the states and the Federal Government can prosecute these crimes providing a dual layer of protection. State prosecution would supplement Federal authority, not supplant Federal authority.

But the state being forced to turn a blind eye when non-Indians abuse Indians doesn't serve anyone's interests, not state interests, not Federal interests, and not tribal interests.

Some have suggested that Congress try to pass a law overturning the result in *Castro-Huerta*. I think that would be ill-advised, as the Supreme Court stated in its opinion, such a rule would require states to treat Indian victims as second-class citizens.

And I know from my experience in Oklahoma, in which the vast majority of Indian Country now lives, that when states are hobbled in their ability to protect Native victims, the unfortunate results are all too predictable.

Thank you and I welcome any questions the Subcommittee members may have.

[The prepared statement of Mr. Mansinghani follows:]

PREPARED STATEMENT OF MITHUN MANSINGHANI, PARTNER, LEHOTSKY KELLER LLP

Chairwoman Fernandez and Ranking Member Obernolte, I want to start by thanking the House Subcommittee on Indigenous Peoples for inviting me to speak. By way of background, I am a partner at Lehotsky Keller in our Oklahoma City office, where one of my specialties is federal Indian law. Prior to returning to private practice earlier this year, I served for five years as the Solicitor General for the State of Oklahoma, where I litigated several important federal Indian law cases, including the case that is the topic of today's hearing, *Oklahoma v. Castro-Huerta*. My testimony today represents my own personal views, and not those of my current or former employers.

In *Oklahoma v. Castro-Huerta*, the Supreme Court held that the Federal Government and the States have concurrent jurisdiction to prosecute crimes committed by non-Natives against tribal members in Indian Country. Those crimes are within federal jurisdiction because a federal statute, called the General Crimes Act, extended federal law into Indian country. And they are within state jurisdiction, because nothing in that federal law said that the federal government's jurisdiction was exclusive or otherwise preempted state jurisdiction.

This particular case concerned the state prosecution of a foreign national who severely neglected, to the point of torture, his daughter, who was a member of an Indian tribe based in North Carolina. The crime occurred in the newly-recognized Cherokee reservation in Eastern Oklahoma. The state intervened in this abuse to protect the Native American child from a non-Native abuser. That is what the case was always about. Do states have jurisdiction within their own borders over people who are not members of a tribe, including when those non-Natives hurt tribal members? Or, put another way, the question is did Congress ever pass a law saying states have no power to protect tribal members within state borders when those tribal members are abused by non-Natives within the state? The Supreme Court, following a close reading of the laws Congress has enacted and its past precedent, said States have jurisdiction to punish these crimes.

I go over all this because I think it's important to keep in mind what this case is about and to read the Supreme Court's decision for what it says. So while this hearing is about the decision's impact on tribal sovereignty, we should remember that the decision in *Castro-Huerta* is, first and foremost, a ruling about state sovereignty. It says that state borders matter and that state sovereignty matters, which under our Constitution stands for the common-sense proposition that states have jurisdiction within their borders unless Congress validly says otherwise. The decision therefore gives meaning to Congress's choice to create states like Oklahoma, or New Mexico, or California, and to establish their borders to include lands that are Indian country. And it correctly observed that Congress never has said states lack jurisdiction over non-Indians within their borders when those persons commit crimes in Indian country.

The Court's opinion, of course, was not silent on the issues of tribal sovereignty. But what it said was that "the exercise of state jurisdiction here would not infringe on tribal self-government" because "a state prosecution of a crime committed by a non-Indian against an Indian would not deprive the tribe of any of its prosecutorial authority." And "a state prosecution of a non-Indian does not involve the exercise of state power over any Indian or over any tribe. The only parties to the criminal case are the State and the non-Indian defendant."

Nor was the opinion silent on the role of the federal government; the Court held that *both* the states and the federal government can prosecute these crimes, providing a dual layer of protection. "State prosecution would supplement federal authority, not supplant federal authority." But the State being forced to turn a blind eye when non-Indians abuse Indians doesn't serve anyone's interests: not state interests, not federal interests, and not tribal interests.

Some have suggested that Congress try to pass a law overturning the result in *Castro-Huerta*. I think that would be ill-advised. As the Supreme Court stated in its opinion, such a rule would require states "to treat Indian victims as second-class citizens." And I know from my experience in Oklahoma—in which the vast majority of Indian country now lives—that when states are hobbled in their ability to protect Native victims, the unfortunate results are all too predictable.

Thank you, and I welcome any questions the subcommittee members may have.

*****

ADDITIONAL WRITTEN TESTIMONY FOR THE RECORD FROM MITHUN MANSINGHANI, PARTNER, LEHOTSKY KELLER LLP

I also want to dispel some myths that have arisen since the *Castro-Huerta* decision that might confuse or misinform those who are less familiar with the complex field of federal Indian law.

First, some have said that the *Castro-Huerta* decision ignores a constitutional rule that the federal government has the sole role in governing "Indian affairs," to the exclusion of any state government activity. But nothing in the Constitution says that. Instead, the Constitution gives Congress the power "[t]o regulate Commerce . . . with the Indian tribes." When a state punishes a non-Indian for victimizing a tribal member, and such a prosecution does not violate any federal statute, that in no way interferes with Congress's power to regulate commerce with tribes. Indeed, the idea that states can never interact with tribal members unless they have a congressional permission slip is contrary to both precedent and practice. For example, in Oklahoma, tribal members go to state schools, receive state housing benefits, and get healthcare in state-run hospitals. Education, housing, and healthcare of tribal members all relate to "Indian affairs," but the Constitution nowhere requires states to discriminate against Native Americans in the provision

of these services. Similarly, *Castro-Huerta* holds that States can also provide criminal justice services to tribal members by prosecuting their non-Indian victimizers.

Second, some have pointed to the Supreme Court's decision in 1832, called *Worcester v. Georgia*, where John Marshall once expressed the view that state laws have "no force" in Indian country. But as Justice Thurgood Marshall put it in his decision in *White Mountain Apache Tribe v. Bracker*, the Supreme Court "long ago" departed from that view. Later, Justice Scalia quoted that line from the *Bracker* case, adding the well-settled observation in *Nevada v. Hicks* that "State sovereignty does not end at a reservation's border." That is the same settled law that is embraced in the Supreme Court's *Castro-Huerta* decision. And in my view, when Justices Thurgood Marshall and Antonin Scalia agree on a rule of law, it is difficult to see that legal rule as radical or controversial.

Third, some claim that the *Castro-Huerta* decision upends long-settled understandings about state jurisdiction. I find this view a little ironic because it is often expressed by those who support the Supreme Court's earlier decision in *McGirt v. Oklahoma*, which itself upended long-settled understandings about the state's jurisdiction. But the view is also wrong. For most of this country's history—from the 1830s through the 1980s—courts, states, and the federal government went back and forth about whether states can hold non-Indians accountable when they trample on tribal members. This long-debated question was finally and rightly decided by the Supreme Court this year in *Castro-Huerta*. Congress, for the reasons I've already stated, would be ill-advised to try to upset the rule the Supreme Court has now established.

QUESTIONS SUBMITTED FOR THE RECORD TO MR. MITHUN MANSINGHANI, PARTNER, LEHOTSKY KELLER LLP

Questions Submitted by Representative Westerman

Question 1. Lead Up: Other witness statements have stated that Castro-Huerta was decided contrary to standing law. Your statement gave a defense of the decision.

(1a). Could you further explain how Castro-Huerta is a continuation of the current understanding of criminal jurisdiction in Indian Country and not a departure from it?

Answer. Prior to the decision in *Oklahoma v. Castro-Huerta*, the U.S. Supreme Court had never decided a case challenging the validity of a state conviction of a non-Indian who had committed a crime against an Indian in Indian country. It is thus hard to see how others claim that the decision affirming a state's power to prosecute such crimes was contrary to established law. Instead, that question has been a subject of debate for much of this country's history, until the *Castro-Huerta* decision settled the matter.

For example, in 1835, a federal court of appeals, writing through Supreme Court Justice McLean, recognized state authority to punish its own citizens who committed crimes in Indian country within state borders, as states like New York were doing.[1] In 1855, the U.S. Attorney General similarly acknowledged that states have jurisdiction over "any controversy within state borders to which one of their citizens is a party," even if the other party was a tribal member.[2] As described further below, in 1859, the U.S. Supreme Court upheld New York's ability to enforce its laws against non-Indians who trespass on tribal lands.[3]

These views of state authority continued into the 20th century. In 1941, the North Carolina Supreme Court upheld a state prosecution of a non-Indian who committed a crime against an Indian.[4] The Department of Justice also suggested that states have concurrent authority to prosecute such crimes in a brief to the Supreme Court in 1946.[5] And that remained the Department of Justice's view in 1979, when the Office of Legal Counsel carefully considered the question and recognized the strong arguments in favor of concurrent state jurisdiction over crimes committed by non-Indians against Indians in Indian Country.[6] And while the Department of Justice had abandoned this long-held position by the late 1980s, states had continued to

---

[1] *United States v. Cisna*, 25 F. Cas. 422, 422, 425 (C.C.D. Ohio 1835).
[2] 7 Op. Atty. Gen. 174, 178 (1855).
[3] *New York ex rel. Cuter v. Dibble*, 62 U.S. (21 How.) 366 (1859).
[4] *State v. McAlhaney*, 17 S.E.2d 352, 354 (N.C. 1941).
[5] *New York ex rel. Ray v. Martin*, No. 45-158, U.S. Br. at 15 n.8 (1946).
[6] 3 Op. Off. Legal Counsel 119.

press this position during this period, albeit with little success.[7] But even state court decisions that questioned state authority were not without dissent, with one judge expressing the view that tribal members "are entitled to the protection of our [state] laws" as are any other state citizen.[8] In short, while some claim the question finally answered in *Castro-Huerta* was contrary to settled law from the past 200 years, the historical record is far more complex than those advocates would care to admit.

To be sure, the U.S. Supreme Court in the context of other cases had at times indicated that states might lack jurisdiction over non-Indians who commit crimes against tribal members in Indian country. But prior to *Castro-Huerta*, it had never squarely confronted the question, and many of its decisions indicated the propriety of state jurisdiction over these crimes. As the Supreme Court's opinion in *Castro-Huerta* recounts:

> In 1859, the Court stated: States retain "the power of a sovereign over their persons and property, so far as" "necessary to preserve the peace of the Commonwealth." *New York ex rel. Cutler v. Dibble*, 21 How. 366, 370, 16 L.Ed. 149 (1859).
>
> In 1930: "[R]eservations are part of the State within which they lie and her laws, civil and criminal, have the same force therein as elsewhere within her limits, save that they can have only restricted application to the Indian wards." *Surplus Trading Co. v. Cook*, 281 U.S. 647, 651, 50 S.Ct. 455, 74 L.Ed. 1091 (1930).
>
> In 1946: "[I]n the absence of a limiting treaty obligation or congressional enactment each state ha[s] a right to exercise jurisdiction over Indian reservations within its boundaries." *New York ex rel. Ray v. Martin*, 326 U.S. 496, 499, 66 S.Ct. 307, 90 L.Ed. 261 (1946).
>
> In 1992: "This Court's more recent cases have recognized the rights of States, absent a congressional prohibition, to exercise criminal (and, implicitly, civil) jurisdiction over non-Indians located on reservation lands." *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 257-258, 112 S.Ct. 683, 116 L.Ed.2d 687 (1992).
>
> And as recently as 2001: "State sovereignty does not end at a reservation's border." *Nevada v. Hicks*, 533 U.S. 353, 361, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001).[9]

As the Supreme Court put it in 1882 when examining state jurisdiction over a crime between two non-Indians committed on an Indian reservation, when a state enters the Union, it "has acquired criminal jurisdiction over its own citizens and other [non-Indians] throughout the whole of [its] territory."[10] Reservations, as the Supreme Court stated in 1962, are therefore "part of the surrounding State or Territory, and subject to its jurisdiction except as forbidden by federal law."[11]

Much more could be said about why the decision in *Castro-Huerta* is a logical continuation from prior precedent, not a radical and wholly unreasoned departure from it. For that, I would refer the Subcommittee to the Supreme Court's opinion in *Castro-Huerta*, as well as the briefs I co-authored in the matter.[12]

(1b). Could you further expand beyond your written testimony, and speak to how you have seen the McGirt and Castro-Huerta decisions play out day-to-day in Oklahoma?

Answer. The unfortunate results of *McGirt* on criminal justice have been all-too-real for the victims of crime. I have observed massive decreases in state prosecutions without an equally corresponding increase in tribal and federal prosecution. This is especially true with respect to property crimes. For example, when I looked earlier this year at federal prosecutions in the Eastern District of Oklahoma, prior to the *Castro-Huerta* decision, I could not find a single instance where the federal government had brought a case against a non-Indian for automobile theft or larceny of a tribal member's property. Indeed, essentially all prosecutions of non-Indians by

---

[7] *See State v. Larson*, 455 N.W.2d 600, 601 (S.D. 1990); *Arizona v. Flint*, No. 88-603, Petition for Certiorari (U.S. 1989).
[8] *State v. Greenwalt*, 663 P.2d 1178, 1183, 1184 (Mont. 1983) (Harrison, J., dissenting).
[9] *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2493–94 (2022).
[10] *United States v. McBratney*, 104 U.S. 621, 623-24 (1882).
[11] *Organized Vill. of Kake v. Egan*, 369 U.S. 60, 73 (1962).
[12] *See* https://www.supremecourt.gov/DocketPDF/21/21-429/215115/20220228123146151_21-429_petbr.pdf.

the federal government in the Eastern District involved either aggravated violence or crimes against children. This means all other crimes against Indians by non-Indians in that district—even violent ones—were going without prosecution. And even for crimes that the federal government was prosecuting, there were many instances of federal prosecutors offering plea bargains for relatively short sentences, which is probably a result of those prosecutors being overwhelmed with the volume of cases.

Only a few months have elapsed since *Castro-Huerta* was decided, and because it only affects a subset of crimes impacted by *McGirt*, it will not completely rectify the criminal justice consequences of *McGirt*. But early results are promising. For example, for the third quarter of 2021 (after *McGirt* and the state court decisions implementing it), felony prosecutions in Wagoner County dropped by more than 50% as compared to the same period in 2019. But in that same period after *Castro-Huerta* (the third quarter of 2022), felony prosecutions rose almost 25 percent as compared to the same period in 2021. Put another way, about 20% of the drop in state felony prosecutions caused by *McGirt* has been restored by *Castro-Huerta* in that county.

Ms. LEGER FERNÁNDEZ. Thank you very much for your testimony today. We will now go to Member questions. Reminding the Members that Committee Rule 3(d) imposes a 5-minute limit on questions. The Chair will now recognize Members for any questions they may wish to ask the witness.

I will start by noting that votes have been called. Because of the time that we have, we are hopeful that we will be able to get through questions before we each have to go vote, but we might do a little tag team. I will start by recognizing myself for 5 minutes.

Ms. Nagle, you described in quite an impactful way, the manner in which women and children and other persons have been harmed and there haven't been prosecutions of them. We also heard some very powerful testimony about others in Oklahoma who might have not faced prosecution.

Can you describe how you believe coming up with a congressional response to *Castro-Huerta* can address the issues that you raised in your testimony? You're on mute. There we go.

Ms. NAGLE. OK. One thing I just want to address very quickly is that the NIWRC and Tribal Nations have been working to protect Native victims long before July 9, 2020. Oklahoma's profound professed commitment to safety for Native victims really began on July 9, 2020, when they discovered that it would serve their political interests in their attempt to overturn *McGirt* to say they care about Native victims.

In the state of Oklahoma, organizations like Native Americans Against Violence advocated for decades, begged the state of Oklahoma to put Native women on state recognized committees targeted to addressing domestic violence so that they could have a say in how the state would disperse resources or prosecute cases of violence against Native victims. And the Attorney General and Governor for decades refused to put Native women on those committees.

We have numerous examples in Oklahoma of Native victims not receiving justice under state jurisdiction. And at the end of the day, I am sure individual district attorneys can come up with individual Native victims they have sought out and convinced to say that they are pro-state jurisdiction and anti-tribal jurisdiction.

But across all of Indian Country and all of the United States, what the data shows, what we know to be true, is that no one has a stronger interest in protecting Native victims than Tribal Nations. And when it is left up to the state, sure, you will find instances where one county attorney or district attorney does prosecute that case. But by and large, statistically, our Native victims are left without justice when they are told go look for justice at the state. I could guess as to the reasons, but I think at the end of the day, and I know the Ranking Member asked a question earlier, it is hard to fathom why a state wouldn't prosecute a crime against a Native victim. I think it comes down to allocation of resources, and it just hasn't been a significant priority. But it is a priority for tribes.

And the public safety crisis post-*McGirt* was really the fabrication of the failure and refusal of local county sheriffs and attorneys to actually collaborate with attorney generals like Geri Wisner, who is sitting here from Muskogee Creek Nation or Sara Hill at Cherokee Nation. Our tribes stand ready to prosecute these cases.

And one other thing I will just add, as the Supreme Court held in the *United States v. Cooley*, it is a false narrative to say that you can't investigate a crime that you see happening because you might not have jurisdiction to prosecute.

As the Supreme Court reminded us in the *United States v. Cooley*, all sovereigns have a right, if there is reasonable suspicion that a crime is being committed, to detain. You may not be the sovereign that can ultimately prosecute, but you can intervene when a crime is being committed and then call the feds, or the state, or the tribe, or whoever needs to be called to address that crime.

So, a lot of the public safety crises that we are hearing about are really just designed to serve a particular political purpose.

Ms. LEGER FERNÁNDEZ. Thank you very much. I also wanted to have a bit more testimony with regards to the concerns with how this might overflow into civil jurisdiction. I believe I am going to ask that of Ms. Bethany Berger. Can you discuss a bit more about your concerns about whether even though this began—and I think that this is the issue—this began in one jurisdiction, but its implications across the country, across all the many tribes in all of our states, is broader, so that is what we are looking at. Ms. Berger, can you address why you are concerned about that?

Ms. BERGER. Sure. It has always been the understanding that when the Federal Government comes in and asserts jurisdiction to itself, that pre-empts state jurisdiction. In fact, that understanding has been even broader that when the Federal Government doesn't directly impose jurisdiction but acts in appeal, that pre-empts state jurisdiction. That comes from that old deadly enemy's relationship.

And what *McGirt* did is it said, contrary to what the Supreme Court has always said, you have to expressly pre-empt state jurisdiction. So, this allows, potentially—I hope not—allows state jurisdiction over family law, over tax law, over numerous fields, that has never been allowed.

Ms. LEGER FERNÁNDEZ. Thank you very much. Finally, I wanted to also get more from Ms. Carole Goldberg about the Law and Order Commission that you spoke much about, why you believe the

decision was wrong. But also you quickly touched on the fact that your work on the Indian Law and Order Commission in some ways sets the path to where we need to be headed.

I will leave that for answer to a written question and will now recognize the Ranking Member for questions.

Mr. OBERNOLTE. Thank you to all of our witnesses. It has been a very interesting panel. Mr. Ballard, I am sure you were listening during the previous panel. There were some pretty emotional testimonies about cases where a declination of prosecution had occurred in Indian Country and resulted in denial of justice to victims.

Do you believe that non-prosecution of cases with Native American victims is a widespread issue?

Mr. BALLARD. I can speak to my district, and I can tell you that prosecution of cases and standing up for victims is something that I feel very passionately about. These are our Native American victims. They are members of my community. I have three nieces who are Native American. We live together. We work together. We worship together. And at the end of the day, I feel very passionately that we seek justice for every victim.

And, no, I don't believe that it is widespread. I believe that in my office, we absolutely seek justice for every victim. I can tell you it was devastating to my staff to be told that we couldn't prosecute cases. And the cases that we believed in, that we had built relationships with victims, that we had persuaded victims to trust us, to come forward with horrible stories, and place that trust in us, it was so very difficult to see those cases dismissed.

Mr. OBERNOLTE. Well, thank you very much for your passion. Mr. Mansinghani, something that you said in your oral testimony really stuck out to me. You were talking about how allowing states' jurisdiction to prosecute crimes committed in Indian Country provided, I think your exact words were, a dual layer of protection for victims.

But there were multiple members of the previous panel who had exactly the opposite opinion that said that, with so many different agencies having jurisdiction, that crimes could fall through the cracks.

So, I wanted to give you an opportunity to expand on your opinion that the dual layer of protection idea is the correct one.

Mr. MANSINGHANI. Sure. And I think we heard from the Department of the Interior Representative that the Federal Government will, in fact, not be pulling back resources. So, I think we can be confident in that dual layer of protection.

And to the extent that there are states out there that don't want to exercise this authority, then nothing changes. Because the Federal Government continues to have jurisdiction under *Castro-Huerta*, and this wouldn't increase any public safety problems.

I think the idea that if there is another sovereign that can prosecute, that only complicates and makes things worse, is not the right one. And we know that including from the tribal perspective. When the tribal governments were given jurisdiction under the Violence Against Women Act statutes, they were given it concurrently with the Federal Government.

But nobody was arguing that that would make Indian victims less safe because now there is a second sovereign that can

prosecute. It was always argued that it would make Indian victims more safe. So, I think that belies the assertion that whenever you add another sovereign, it just makes things worse, not better.

Mr. OBERNOLTE. All right. Thank you. Well, I want to thank all of our witnesses. This has been an incredibly informative hearing. Hopefully, this is the first of several hearings that we will conduct as we try to craft a solution to this issue.

But I want to thank everyone for focusing on the need to provide this justice and the need to provide resolution to victims and their families. I think that that should be our guiding principle. Thank you, Madam Chair. I yield back.

Ms. LEGER FERNÁNDEZ. Thank you, Ranking Member. The Chair will now recognize the gentleperson from Guam, Representative San Nicolas.

Mr. SAN NICOLAS. Thank you so much, Madam Chair. I apologize for my tardy presence in the hearing. I had the original scheduling for 1 p.m. on my calendar. I didn't realize that it was moved to 11 a.m. I will definitely be catching up on the transcriptions of the previous testimony.

But I was able to dial in just in time to listen to Mr. Mansinghani and the case he was making for somehow dual sovereignty in a judicial system being a good thing.

I really can't see how that makes much sense. It is like saying that having a plethora of authority to be able to determine a judicial process is somehow something that is going to be better for the process.

And, really, when you are talking about due process, and when you are talking about the sovereignty of the Tribal Nations, you really cannot serve two masters, and you cannot have two systems that claim to be espousing one form of justice.

We need to, in my opinion, Madam Chair, respect the history, respect the trajectory, and respect the sovereignty of the Tribal Nations and what we have extended to them over the years.

I believe that the ruling of the Supreme Court to allow for states to also be able to interject into the need for judicial proceedings in the face of tribal sovereignty, I think is just something that is incompatible with the word sovereignty.

So, I would very much like to familiarize myself more with the testimony that I was unfortunately unable to capture earlier. But I will go ahead and yield my time back to you, Madam Chair, if there was anything you wanted to elaborate, based on any of the sentiments I have shared.

Ms. LEGER FERNÁNDEZ. Thank you very much for your comments and your apt description of multiple masters. I am concerned about issues where you have overlapping jurisdiction. We are all, I think, very comfortable with the Federal-state or Federal-tribal relations.

I will say I have worked in tribal-state relations for 30 years. And whenever you have dual taxation, it is an area that we worked in a lot. Because it doesn't work when you have overlapping jurisdictions that are not Federal, at the Federal level, Federal-tribal. So, I think that that is one of the concerns that we will be addressing.

We also, I think, statistically, know that the issue of Murdered and Missing Indigenous Women and People is precisely because of

the fact that there hasn't been clear jurisdiction and the ability of the tribes to prosecute, so these are issues.

I really do want to thank our two witnesses for the perspective that they gave which was important for us to hear. I thank you very much for that. I thank you for your commitment to the victims of crime in your jurisdiction and your dedication to them.

With that, we are at the end of our hearing. Are there any other—OK, great. Not great, because we have to go vote, but that we actually were able to do this. We thought it was important that we have our hearing on this decision. That we move forward because it does have such great implications. And we have a very long series of votes this afternoon.

As I stated before, the members of the Committee may have some additional questions for the witnesses, and we will ask you to respond to those in writing. Under Committee Rule 3(o), members of the Committee must submit witness questions within 3 business days following the hearing, and the hearing record will be held open for 10 business days for these responses.

If there is no further business, without objection, the Subcommittee stands adjourned.

[Whereupon, at 1:18 p.m., the Subcommittee was adjourned.]

[ADDITIONAL MATERIALS SUBMITTED FOR THE RECORD]

PREPARED STATEMENT OF THE HON. RAÚL M. GRIJALVA, CHAIR, COMMITTEE ON NATURAL RESOURCES

Good afternoon. I would like to thank the witnesses and the Assistant Secretary for being here. I think this is an important issue that we will be discussing today and I thank the Chair for holding this timely and important hearing.

Protecting and upholding tribal sovereignty has always been the policy of this Committee, and like most I am concerned about the legal reasoning and disregard of legal precedent behind the *Castro-Huerta* ruling and its implications for Indian Country.

As many of you know, tribal criminal jurisdictions were initially diminished decades ago under the Court's *Oliphant* ruling—when the Court found that tribes do not have inherent criminal jurisdiction over non-Indians.

The *Oliphant* ruling led to fearmongering that framed tribal lands as lawless zones where only the Federal Government could maintain order. This ruling also diminished tribal sovereignty.

Since the *Oliphant* ruling, the Federal Government has consistently failed to provide adequate public safety resources and funding to tribal communities. Further, the Federal Government has consistently failed to prosecute offenses committed against Native victims.

The Federal Government's failure to prosecute has resulted in mass public safety crises like the Murdered and Missing Indigenous Peoples (MMIP).

One thing's clear: tribes care most about the safety and well-being of their communities. Therefore, tribal governments should have the complete authority to investigate and prosecute crimes committed against their citizens.

In the last two reauthorizations of the Violence Against Women Act (VAWA) this intent was embedded with the inclusion of tribal elders and children. The passage of the 2016 VAWA and 2022 VAWA clarified some aspects of the *Oliphant* ruling and it also gave tribal governments the authority to better respond to domestic violence incidents.

The *Castro-Huerta* ruling ignores the intent of tribal sovereignty, as well as centuries of legal precedent, by determining that State authorities hold concurrent jurisdiction over major crimes committed in Indian Country.

This ruling's impact will impact all 574 tribes and states, so I think it's important that we hear from everyone today about what those impacts might look like for all individual tribal governments.

Since the Administration is here, I also hope to hear what plans are in place for coordination between the Departments of the Interior and the Department of Justice, who have the most influence over these topics in Indian Country.

I also want to note that the Supreme Court's ignorance of the legal precedent, established at the founding of this country, related to Federal Indian law is troublesome and I hope that we can hear from everyone today about the vast impact of that ignorance.

Thank you again to our witnesses, I look forward to today's discussion.

Statement for the Record

Chickasaw Nation
[Senior Counsel Stephen Greetham]

Chairwoman Leger Fernández, Vice Ranking Member Obernolte, and honorable members of the Subcommittee, on behalf of the Chickasaw Nation, thank you for this opportunity to offer comments for the record in the Subcommittee's September 20, 2022, hearing on the U.S. Supreme Court's decision in *Oklahoma v. Castro-Huerta*.[1] The Chickasaw Nation does not support calls for rushed legislative action at this time and instead suggests a more deliberative approach.

The Chickasaw Nation is one of six Native nations in Oklahoma whose treaty territories have been judicially affirmed as reservations following the Court's ruling in *McGirt v. Oklahoma*.[2] While we view the *McGirt* ruling itself as representing the Court's unremarkable adherence to precedent and doctrine,[3] its impact has been nonetheless remarkable: To put it in the most easily quantifiable terms, our criminal justice duties expanded from approximately 3% of our land base to 100%, which presented understandable challenges. We have responded by growing our policing, prosecuting, and court infrastructure and enhancing our victim services programming, which has enabled our system to expand from previously handling only seventy-five criminal cases annually to now take care of more than 2,500 each year. We are proud of our work, all of which we have so far accomplished without yet receiving additional federal funding—though we look forward to the Administration's distribution of Congress's recent *McGirt*-related appropriations.

To be clear, though: We do not do our work alone. We have built a broad network of more than seventy cross-deputation and similar agreements with non-Tribal agencies, partners with whom we work every day. Along with our regular cross-jurisdictional outreach, the Eastern and Western District U.S. Attorneys recently joined us to co-host a plenary public safety summit, which brought together nearly 100 tribal, state, and federal police, prosecutors, and other officials under the aegis of our shared mission.[4] Contrary to stories some have told to allege jurisdictional chaos, this collaborative work has a real and positive impact on the public's safety. For example, more than two-thirds of the criminal cases prosecuted by the Chickasaw Nation Office of Tribal Justice Administration are referred to us by non-Chickasaw law enforcement departments. Likewise, approximately two-thirds of the charges developed by Chickasaw Nation Lighthorse Police are referred to non-Chickasaw prosecution agencies. While not everyone yet cooperates fully, the overwhelming and growing majority do, which is where we concentrate our attentions, efforts, and resources. This is how things *should* work, even when the unexpected arises.

---

[1] 142 U.S. 2486 (2022).

[2] 140 S. Ct. 2452 (2020).

[3] E.g., Prof. Greg Ablavsky, *McGirt*: Gorsuch Affirms "Rule of Law," Not "Rule of the Strong," In Key Federal Indian Law Decision (Jul. 10, 2020), https://law.stanford.edu/2020/07/10/mcgirt-gorsuch-affirms-rule-of-law-not-rule-of-the-strong-in-key-federal-indian-law-decision/.

[4] U.S. Dep't of Justice, Chickasaw Nation and United States Attorneys for the Western and Eastern Districts of Oklahoma Co-Host Public Safety Summit (September 8, 2022), https://www.justice.gov/usao-wdok/pr/chickasaw-nation-and-united-states-attorneys-western-and-eastern-districts-oklahoma-co.

Our latest unexpected development came on June 29, 2022, when the U.S. Supreme Court decided *Castro-Huerta* and held Oklahoma has jurisdiction over non-Indians accused of committing state law crimes against Indians in the Cherokee Nation. Working with a spirit of progressive self-reliance and cooperation (on which the *McGirt* Court had earlier remarked [5]) the Chickasaw Nation previously called for federal law reforms to empower our negotiation of intergovernmental criminal jurisdiction agreements.[6] Had Congress advanced that measure, we could today be implementing systems of comparable practical affect (e.g., increasing Oklahoma's role in on-reservation law enforcement) through the more appropriate and nuanced tool of exercised Tribal self-determination and collaboration. Had Congress acted on that measure we may even have avoided the Court's taking up *Castro-Huerta* in the first instance—a case arising within the Cherokee Nation, a Native sovereign who also supported H.R. 3091.[7] Instead, the Court took charge and broke with a long line of prior congressional action, judicial analyses, and law enforcement practice to flip basic principles of federal Indian law on their head. In doing so, the Court produced a ruling that, regardless of its holding, pioneers a novel and disruptive approach to Indian law that disregards the criticality of Native sovereignty and Congress's established role in Tribal affairs. If left to lay as a radical pathmarker in this area of the law, the *Castro-Huerta* decision poses real risks to federal interests and Native sovereignty by upending established and nationally applicable understandings of the law and replacing them with new doctrinal uncertainties. This is *not* how things should work.

Aspects of the Court's ruling are of course self-limiting. For example, the Court did not disturb existing federal or tribal jurisdiction, and it disclaimed impact on tribal rights to self-government. Likewise, the ruling emphasizes the Court's belief that the *McGirt* ruling had destabilized reservation criminal justice in eastern Oklahoma, which highlights alleged factual grounds that should limit the ruling's application—particularly since those grounds are directly challenged as unfounded.[8] Encouragingly and with a truer adherence to established law, federal courts are limiting the decision's fallout,[9] and for our part, the Chickasaw Nation is committed to advocacy aimed at *further* constraining and mitigating its reach, even revisiting our own prior legislative proposal in light of this Court's new legal analysis.

Others have called for more and insisted Congress must act now to enact policies recommended in the 2013 report of the Tribal Law and Order Commission.[10] We have listened closely to those calls and engaged with several of the advocates for immediate action. However, we cannot join those calls at this time. While we believe lifting Tribal court sentencing limitations or implementing Tribal self-determination policies akin to what we called for in H.R. 3091 are appropriate and necessary, we believe a rush to act without a proper understanding of *how* an enactment might be construed by *this Court* would only risk elevating new constitutional conflicts for *this Court* to control. Respectfully, such action would be unwise, if not downright reckless.

In considering what policy actions to take, Congress must *now* wrestle with questions the Tribal Law and Order Commission did not need to address a decade ago. For example, Congress must *now* consider how legislation it enacts will be affected by this Court's apparent view that states possess an inherent, robust, and constitutionally based jurisdiction in Indian country.[11] Likewise, Congress must *now* address the Court's conclusion that a state's exercise of on-reservation jurisdiction over non-Native persons victimizing Natives does not implicate Tribal rights to self-

---

[5] 140 S. Ct. at 2481 ("With the passage of time, Oklahoma and its Tribes have proven they can work successfully together as partners.").

[6] See H.R. 3901, Cherokee Nation and Chickasaw Nation Criminal Justice Compacting Act of 2021, 117th Cong., https://www.Congress.gov/bill/117th-congress/house-bill/3091. E.g., Chris Casteel, Cherokee, Chickasaw Leaders Endorse Criminal Jurisdiction Bill in Congress (May 10, 2021), https://www.oklahoman.com/story/news/2021/05/10/chickasaw-cherokee-nation-leaders-endorse-criminal-jurisdiction-bill-congress-mcgirt/5023678001/.

[7] See *supra* at n.6.

[8] E.g., Rebecca Nagle & Allison Herrera, Where is Oklahoma Getting its Numbers in its Supreme Court Case? (April 26, 2022), https://www.theatlantic.com/ideas/archive/2022/04/scotus-oklahoma-castro-huerta-inaccurate-prosecution-data/629674/).

[9] E.g., *Lac Courte Oreilles Band of Lake Superior Chippewa Indians, et al. v. Evers, at al.*, No. 21-1817 (7th Cir. Aug. 15, 2022) (rejecting *Castro-Huerta* in federal Indian tax law dispute).

[10] Indian Law & Order Comm'n, A Roadmap for Making Native America Safer: Report to the President & Congress of the United States (November 2013), https://www.aisc.ucla.edu/iloc/report/files/A_Roadmap_For_Making_Native_America_Safer-Full.pdf.

[11] E.g., 142 S. Ct. at 2502 ("Under the Constitution, States have jurisdiction to prosecute crimes within their territory except when preempted (in a manner consistent with the Constitution) by federal law or by principles of tribal self-government.")

government or federal interests [12]—an *incredible* proposition given the scourge such violence poses for Indigenous communities and Congress's already extensive legislation on the subject. On these points and others, the *Castro-Huerta* majority broke with established understandings of the law and burdened any work Congress may *now* take up. To renew calls for rushing enactment of the Tribal Law and Order Commission's recommendations in the wake of this ruling *without* further consideration of the ruling's implications for those recommendations is to confuse a goal with the means for achieving it. We cannot support such an effort.

Additionally, while we appreciate the dissent's robust advocacy for Tribal self-determination, we cannot support its call to amend Public Law 280.[13] To be clear: That statute merely continues a Termination Era undermining of Tribal sovereignty that explicitly bypasses the very mechanisms of self-government Native peoples have worked for generations to rebuild.[14] Public Law 280's provision for Native approval does not provide for real "consent" but is, instead, an example of the sort of federal paternalism in Tribal affairs that should be rejected in favor of actual government-to-government engagements. The Chickasaw Nation has built and operates its own institutions of government in accord with a constitution its people first formed in 1850 and then substantially reformed and revised in 1983 after intense internal deliberation. Our criticism and rejection of Public Law 280's archaic approach to Indigenous consent arises from our commitment to the Chickasaw Nation's sovereignty and systems of self-determination. This commitment shaped our call for the approach taken in H.R. 3091, and it has not changed, notwithstanding the *Castro-Huerta* dissenters' endorsement of using Public Law 280 as a legislative vehicle. What is more, even if H.R. 3091—our own policy proposal—were suggested for action at this time, we would still call for its careful evaluation with regard for the *Castro-Huerta* Court's statements on state and congressional Indian country authorities.

Indian country deserves Congress's attention and supportive action, but it deserves supportive action designed to last. We believe Congress should act, *one*, with the assumption its enactments will produce litigation that will end up before *this Court* and, *two*, in a manner engineered to give its enactments the best chance to be affirmed. In that spirit, we call on our trustee to abide its fiduciary duties and work closely with us to protect our sovereignty but to do so by: *first*, more adequately funding its Indian country law enforcement obligations, including support for Tribal criminal justice systems; *second*, working with us to limit this aberrational decision's fallout in the lower courts and to build a legal test case and/or legislation that will serve Indian country's needs; and *finally*, acting with circumspection and a commitment to avoid putting those needs in *further* jeopardy. We would welcome the opportunity to work with you to such end.

Castro-Huerta is an unfortunate ruling. It nonetheless represents this new and relatively young Supreme Court majority's current approach on matters of Indian law, sovereignty, and the U.S. Constitution. As such, it must be taken seriously. It must be studied and acted upon deliberately and in a manner designed to contain it before it more broadly destabilizes federal interests and inherent Tribal rights. We believe this goal would not be achieved by a rush to enact the general policies so far proposed.

---

[12] E.g., 142 S. Ct. at 2501.

[13] *Castro-Huerta*, 142 S. Ct. at 2527 (Gorsuch, J., dissenting) ("Nor must Congress stand by as this Court sows needless confusion across the country. Even the Court acknowledges that Congress can undo its decision and preempt state authority at any time. And Congress could do exactly that with a simple amendment to Public Law 280." (Internal cross-reference omitted.)).

[14] 25 U.S.C. § 1326 (providing for measuring Tribal consent through Dep't of the Interior administered vote of the community's members or citizens, rather than through the communities own mechanisms for decision making). E.g., Carole Goldberg, The Perils and Possibilities of Employing Public Law 280 in Oklahoma 15 (2020) ("Native Nations in Oklahoma should approach Public Law 280 with great caution. The consent feature bypasses tribal governments in favor of direct vote by the tribal electorate, which could be viewed as a challenge to tribal sovereignty."), https://drive.google.com/file/d/13qLPPmKpiLL6SMwxBmXPB6RDXr7kJd7E/view. See also Stephen H. Greetham, Lessons Learned, Lessons Forgotten: A Tribal Practitioner's Reading of *McGirt* and Thoughts on the Road Ahead, 57 Tulsa L. Rev. 613, 658-69 (2022), https://digitalcommons.law.utulsa.edu/tlr/vol57/iss3/7/.

Choctaw Nation of Oklahoma
Durant, OK

September 22, 2022

Hon. Teresa Leger-Fernandez, Chairwoman
Hon. Jay Obernolte, Ranking Member
Natural Resources Committee
U.S. House of Representatives
Washington, DC 20515

Re: Comment for the Record of September 20, 2022, Castro-Huerta Oversight Hearing

Dear Chairwoman Leger-Fernandez and Ranking Member Obernolte:

On behalf of the Choctaw Nation of Oklahoma (the "Nation") and the people of our Reservation, I want to thank you for holding such an important hearing. Unfortunately, I write to you today to express concern regarding comments made by some witnesses during the September 20, 2022, oversight hearing titled, "Examining *Oklahoma v. Castro-Huerta*: The Implications of the Supreme Court's Ruling on Tribal Sovereignty." While such hearings often elicit diverse viewpoints, I believe it is prudent to respond when some statements on the record perpetuate half-truths and misstatements of law and fact.

Some witnesses alluded to reports of public safety chaos in Oklahoma following the Supreme Court decision in *McGirt v. Oklahoma* and subsequent court cases reaffirming the reservations of each of the Five Tribes and the Quapaw Nation. These reports were and are false. The day the Oklahoma Court of Criminal Appeals agreed that the Reservation of the Choctaw Nation had never been disestablished by Congress, the Choctaw Nation was prepared to file and did file, every case that was eligible for prosecution under the laws of the Choctaw Nation. In fact, not one single inmate for a crime arising within the Choctaw Reservation left custody. The Nation did and is still doing everything in its power to provide adequate public safety for not only our tribal members but for all those who live within our Reservation.

The Choctaw Nation cannot control what the U.S. DOJ does, nor could we control how it responded after the *McGirt* decision. The U.S. DOJ is understaffed and underfunded to perform the job necessary. Even still, we refuse to allow the U.S. DOJ to shirk its federal responsibility, and we are actively working to hold them accountable. This is yet another reason why Congress should empower tribal governments on the ground and restore federal recognition of tribal public safety jurisdiction on tribal reservations.

During the hearing, Matthew Ballard, District Attorney for Oklahoma District 12, made the claimed that prior to *Castro-Huerta*, Native victims were not receiving proper justice in Oklahoma, because the State could not prosecute their perpetrators. He also said that cross-deputized officials could not investigate crime scenes when they arrived. Regarding the first claim, we agree that in some cases, Native victims do not receive justice. Unfortunately, while this has been an issue for decades, it is due to no fault of the tribes. By and large, repairing the perceived inability of Tribal Nations to effectively pursue and punish those—Native and non-Native alike—who seek to harm tribal members within their reservation boundaries lies at the feet of Congress.

The second point made by Mr. Ballard is false. If the State truly cared about victims, it would investigate the situation first and then sort out questions of prosecutorial jurisdiction later. That is exactly how the process works in many other states. Federal courts have held, including the recent decision by the U.S. Supreme Court in *United States v. Cooley*, that responding agencies can temporarily detain suspects, investigate, and collect evidence of crimes, regardless of whether they end up concluding they have authority to prosecute the perpetrator. The incident cited by Mr. Ballard is disingenuous because he failed to mention the most crucial fact—federal courts had already ruled on the matter. Does this Subcommittee truly believe the Cherokee Nation—a Nation with a large and capable police force—would purposefully refuse to support county officers investigating an assault on a tribal member? The answer is simple and spinning up a narrative to the contrary is deceitful. Both before and after *Castro-Huerta*, the Choctaw Nation, and other tribal governments have worked effectively with the State through the utilization of cross-deputization agreements. Certain State official's continued narrative of division, chaos; and uncertainty in Eastern Oklahoma only pumps oxygen into the flame of

anti-tribal sovereignty sentiment. This is something we cannot accept. Fortunately, Indian Country knows the solution, and we will continue to urge Members of Congress to clarify federal law before the State of Oklahoma succeeds in completely obliterating tribal sovereignty through false fear-mongering.

To that point, many tribes retain treaty rights which the U.S. Constitution requires be honored as the supreme law of the land. During the hearing, Kevin Killer, President of the Oglala Sioux Tribe, mentioned its treaties with language providing for their exercise of criminal jurisdiction over non-Indians. Likewise, the Choctaw Nation has similar treaty provisions. The most recent treaty the Choctaw Nation signed with the United States reads as follows:

> *Every white person who is married a Choctaw or Chickasaw, resides in the Choctaw or Chickasaw Nation, or has been adopted by the legislative authorities of either nation, is subject to the laws of the Choctaw and Chickasaw Nations and may be prosecuted, tried, and punished as though he were a native Choctaw or Chickasaw.*

In the 5-4 *Castro-Huerta* decision, the Supreme Court not only erroneously interpreted numerous statutes crucial to criminal jurisdiction within Indian Country, but it also committed an egregious overreach when it decided to legislate tribal affairs from the bench. Congress must reclaim its constitutional plenary power over tribal affairs and legislate a correction right away. The complete jurisdiction of tribal governments must be restored to ensure we can prosecute all persons committing crimes on our Reservation, thus bringing an end to this ridiculous and unprecedented checkerboard jurisdictional scheme patched together by the 5-4 *Castro-Huerta* majority. Tribal governments are not asking for anything new, nor are we asking for an expansion of tribal sovereignty or authority. We are simply asking Congress to clarify federal law so that tribal authority is recognized in federal law as being restored. In other words, we are asking for the United States to honor and uphold its trust and treaty obligation to Tribal Nations.

During times such as these, I am reminded of the verse in 2nd Timothy 1:7, "for God has not given us a spirit of fear, but of power and of love and of a sound mind." While my strong faith tells me not to entertain a spirit of fear, it is difficult to ignore the adverse and consequential fates that will befall Tribal Nations if Congress fails to act to correct the misguided and unprecedented 5-4 majority opinion in *Castro-Huerta*. It is my sincere hope that Congress will live up to its constitutional responsibilities, under the watchful eye of history, and fortify the recognition in federal law of tribal sovereignty, self-governance, and self-determination, all of which are at risk of being dismantled following this erroneous ruling in *Castro-Huerta*. Please, heed the advice of Justice Gorsuch in his dissent in *Castro-Huerta*, and do the right thing by moving swiftly to protect the Choctaw Nation and all other Tribal Nations.

Sincerely,

GARY BATTON,
Chief

Statement for the Record

Department of Justice

Thank you for the opportunity to submit this Statement for the Record in support of the September 20, 2022 oversight hearing entitled "Examining *Oklahoma v. Castro-Huerta*: The Implications of the Supreme Court's Ruling on Tribal Sovereignty."

BACKGROUND

As stated in President Biden's January 2021 Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships,[1] "American Indian and Alaska Native Tribal Nations are sovereign governments recognized under the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. It is a priority of my Administration to make respect for Tribal sovereignty and self-governance, [and] commitment to fulfilling Federal trust and treaty responsibilities to Tribal Nations . . . cornerstones of Federal Indian policy." These are precisely the foundational principles that have long guided the Department of Justice's efforts to promote public safety in Tribal communities. The Department remains steadfastly committed to furthering our government-to-government relationship with each Tribe and to respecting and supporting Tribes' authority to exercise their inherent sovereign powers, including powers over both their citizens and their territory.[2]

The Supreme Court ruling in *Oklahoma v. Castro-Huerta* that the States have jurisdiction over crimes by non-Indians against Indians without express Congressional authority corrodes the fundamental sovereign right of Tribes to determine the appropriate means for securing the public safety for their people and to govern their lands. It may also confuse an already complex jurisdictional scheme and significantly increase the potential for conflict between sovereigns, which could render more complicated each sovereigns' ability to keep the peace and protect the inhabitants of Indian country.

SUPREME COURT DECISION IN *OKLAHOMA V. CASTRO-HUERTA*

The State of Oklahoma charged Victor Manuel Castro-Huerta, a non-Indian living on the Cherokee Nation reservation in Oklahoma with criminal child neglect. The victim was a member of the Eastern Band of Cherokee Indians. After his conviction in state court, Castro-Huerta appealed the decision, and while his appeal was pending the Supreme Court decided *McGirt v. Oklahoma*.[3] In *McGirt*, the Supreme Court held that Congress did not disestablish the Muscogee Creek Nation reservation in eastern Oklahoma when Oklahoma became a State. As a result, the Muscogee Creek Nation reservation remained Indian country, and the United States had jurisdiction over crimes committed there by Indians under the Major Crimes Act, 18 U.S.C. § 1153, even on non-Indian lands. Based on the *McGirt* decision, the Oklahoma Court of Criminal Appeals ("OCCA") later concluded that due to its similar history the Cherokee Nation reservation also remained intact.[4]

In the wake of *McGirt*, Castro-Huerta challenged his state conviction asserting that the State of Oklahoma lacked criminal jurisdiction to prosecute him. The OCCA agreed.[5] The state sought certiorari arguing that it had inherent jurisdiction to prosecute non-Indians who commit crimes against Indians in Indian country.

The Supreme Court granted certiorari. The United States filed an amicus brief in support of Castro-Huerta and participated at oral argument. The United States, as well as Castro-Huerta, argued that under the General Crimes Act, 18 U.S.C. 1151, the historical context of its enactment, and numerous Supreme Court decisions construing that provision, federal jurisdiction is exclusive of state jurisdiction in Indian country over crimes committed against Indians unless Congress has granted the State such jurisdiction by statute. This argument followed the principle that absent authority conferred by Congress, States only have criminal jurisdiction over crimes committed by non-Indians against non-Indians or victimless crimes committed by non-Indians in Indian country.[6]

The Supreme Court held in Oklahoma's favor that States have certain inherent authority over the Indian country within their borders and that the General Crimes

---

[1] https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-tribal-consultation-and-strengthening-nation-to-nation-relationships/.

[2] https://www.govinfo.gov/content/pkg/FR-2014-12-12/pdf/2014-28903.pdf.

[3] 140 S. Ct. 2452 (2020).

[4] *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, ¶ 15, 497 P.3d 686, 689.

[5] *Castro-Huerta v. State*, No. F-2017-1203 (Apr. 29, 2021).

[6] *United States v. McBratney*, 104 U.S. 621 (1881).

Act does not preempt state authority to prosecute non-Indians who commit crimes against Indians in Indian country. As a result, the decision has upended the settled understanding that states lacked such criminal prosecutorial authority in Indian country.[7] Under this ruling, States now possess criminal authority in Indian country when the perpetrator is non-Indian.

The *Castro-Huerta* decision is already the subject of public criticism by both Tribal government leaders and by legal scholars.[8] While *Castro-Huerta* is a criminal case involving a non-Indian defendant, States may argue that it has broader implications.

TRIBAL RESPONSE

The Departments of Justice and the Interior held joint listening sessions on September 26–27, 2022, to discuss with Tribal representatives the implications of this decision and the impact on Tribal communities. More than 500 people participated in these discussions, the majority of whom participated on behalf of a Tribe. The Departments are still receiving written comments and processing feedback received during these listening sessions.

Several clear themes have emerged from our discussions and in analyzing written comments received thus far:

1. This decision was characterized as an attack on Tribal sovereignty by Tribes and Tribal advocates that participated in the discussions or submitted written comments.
2. Participating Tribes and Tribal advocates expressed immediate concerns about the confusion that this decision injects into an already complex jurisdictional and operational landscape.
3. Participating Tribes and Tribal advocates also expressed significant concerns about the long-term implications of this decision, and have already seen signs that some States will rely on this decision to interfere in Tribal operations and functions outside of criminal jurisdiction.
4. Although there appears to be some difference in opinion on ideal timing and scope, the participating Tribes and Tribal advocates called for a legislative fix.
5. Participating Tribes and Tribal advocates also called for guidance from federal agencies clarifying relevant processes and protocols post-*Castro Huerta*.

NEXT STEPS

The Departments of Justice and the Interior will continue to coordinate as we receive written comments and evaluate the need to clarify or adjust our respective agencies' policies or operations. The Department of Justice will continue to seek formal and informal input from Tribes as we strive to meet the public safety needs of our Tribal partners and honor our treaty and trust responsibilities.

CONCLUSION

The Supreme Court decision in *Oklahoma v. Castro-Huerta* upends important consistent jurisdictional understandings and the operational status quo across Indian country. Some of the most vulnerable and historically underserved citizens of this country may be impacted while law enforcement and justice systems adjust to align with the new jurisdictional reality imposed by the Supreme Court.

This decision, however, does not erode the Department of Justice's commitment to our mission to uphold the rule of law, keep our country safe, and to protect civil rights. Nor does this decision erode our commitment to honor our treaty and trust responsibilities, to promote public safety in Native communities, and to respect and support Tribes' authority to exercise their inherent sovereign powers.

---

[7] *Worcester v. Georgia*, 31 U.S. 515 (1832).

[8] The Supreme Court previously held that state criminal law does not apply in Indian country, *Worcester v. Georgia*, 31 US 515 (1832). However, Congress, exercising its plenary power over Indian affairs, can confer criminal jurisdiction on states and on occasion has done so via legislative enactment. The Supreme Court has held that states have criminal jurisdiction over crimes committed by non-Indians against non-Indian victims in Indian country; *US v. McBratney*, 104 US 621 (1881); *Draper v. US*, 164 US 240 (1896). Crimes by or against Indians are subject to federal and/or tribal jurisdiction. Prior to the *Castro-Huerta* decision, the presumption was that states possessed no criminal jurisdiction over crimes committed by or against Indians unless Congress conferred such authority upon a state. In *Castro-Huerta*, the Supreme Court changed that analysis with respect to crimes committed by non-Indians against Indians.

Statement for the Record

United Keetoowah Band of Cherokee Indians in Oklahoma

By Chief Joe Bunch

Chairwoman Leger Fernández, Ranking Member Obernolte, and honorable members of the Subcommittee, on behalf of the United Keetoowah Band of Cherokee Indians in Oklahoma, I thank you for this opportunity to submit this statement for the record in the Subcommittee's September 20, 2022 hearing regarding the recent Supreme Court decision in *Oklahoma v. Castro-Huerta*.[1]

The United Keetoowah Band of Cherokee Indians in Oklahoma, a federally recognized Tribe located on the Cherokee Reservation in Oklahoma, is a successor-in-interest to the historic Cherokee Nation, the body politic who entered into the treaties establishing the Oklahoma Cherokee Reservation and accordingly, possesses jurisdiction on the Cherokee Reservation in Oklahoma. While the Subcommittee received testimony from Sara Hill, Attorney General of the Cherokee Nation of Oklahoma, regarding the impacts of *McGirt v. Oklahoma*,[2] the Subcommittee must be aware that the Cherokee Reservation in Oklahoma belongs not only to the Cherokee Nation of Oklahoma but also equally to the United Keetoowah Band of Cherokee Indians in Oklahoma. While we do not disagree with Ms. Hill's testimony regarding the plight of tribal law enforcement and judicial programs on the Cherokee Reservation resulting from *McGirt* and *Castro-Huerta* and while we do not disagree that legislation is necessary to restore and protect tribal sovereignty of all Tribes, we assert that any legislation must be deliberate and recognize and respect the tribal sovereignty of the United Keetoowah Band of Cherokee Indians in Oklahoma and must not diminish or impair our inherent authority on the Cherokee Reservation in Oklahoma.

Additionally, as a Tribe who is affected and impacted by the *McGirt* and *Castro-Huerta* decisions, it is imperative that the United Keetoowah Band of Cherokee Indians in Oklahoma be adequately included in the Bureau of Indian Affairs' distribution of the $62m enacted funding for such affected and impacted Tribes.

Statement for the Record

Ute Indian Tribe of the Uintah and Ouray Reservation

Chair Leger Fernandez, Acting Ranking Member Obernolte and Members of the Subcommittee, the Ute Indian Tribe of the Uintah and Ouray Reservation appreciates the opportunity to provide this testimony on "Examining *Oklahoma v. Castro-Huerta*: The Implications of the Supreme Court's Ruling on Tribal Sovereignty." The decision is a clear attempt by an activist Court to rewrite the Constitution and hundreds of years of Congressional acts and Court precedent. The Court's decision flips this history, laws, and the United States relationship to Indian tribes on its head.

Congress must quickly act to correct this deeply flawed decision that impacts every tribe in the United States. Justice Gorsuch laid out a road map for Congress to take this action in his strongly worded dissenting opinion. All Congress needs to do is amend 25 U.S.C. § 1152 to clarify that state authority is preempted. This will close the door to Justice Kavanaugh and the Court's attempt to create new authority for states over Indian tribes and Indian country.

Introduction and Action Needed

On June 29, 2022, Justice Brent Kavanaugh issued a decision in the Supreme Court case *Oklahoma v. Castro-Huerta* that usurps Congress's plenary authority over Indian tribes and attempts to legislate from the bench. The decision conflicts with the Constitution, laws passed by Congress, and more than 200 years of long settled federal Indian law. Instead, Justice Kavanaugh and the Court created new authority for states to have concurrent jurisdiction to prosecute non-Indians for crimes committed against Indians in Indian country.

The decision also creates an unfunded mandate for states to provide law enforcement and criminal prosecutions across more than 56 million acres in 35 different states. Prior to this decision these crimes were prosecuted by federal and tribal law enforcement based on long settled law, as well as new authorities and resources provided by Congress in the recently passed Tribal Law and Order Act (TLOA) and Violence Against Women Act (VAWA). The decision will increase crime in Indian country and conflicts with the efforts in Congress to affirm the criminal jurisdiction of tribes and ensuring a tribal role in protecting their members and culture.

The decision conflicts with the clear direction of Congress to support federal and tribal law enforcement. It also immediately sets the states and tribes at odds, as tribes have a direct interest in providing safety and security for Indians. Many tribes have already been moving to accept Congress's expanded jurisdiction over crimes in Indian country and have their law enforcement recognize federal law enforcement as well.

The decision also runs counter to the government-to-government and trust relationship between tribes and the Federal government. The decision attempts to view tribes as a racial group as opposed to independent political sovereigns. The decision attempts to erase the sovereignty of tribal governments which existed long before the United States was founded. Instead, Justice Kavanaugh and the Court are seeking a return to outdated federal policies that attempted to terminate tribal governments or "solve" the so-called Indian problem.

Congress must take action to correct the Court's egregious error which overstepped its authority. Before the impacts of this decision reach too far, Congress should simply clarify 18 U.S.C. § 1152 which was first passed by Congress in 1817. As further set out below, Congress only needs to add the phrase, "*and shall apply to preempt the application of State law and prosecutorial jurisdiction*," to the statute. This clarification would affirm that the federal government and Indian tribes have exclusive jurisdiction over crimes in Indian country where the victim was Indian.

In his strongly worded dissenting opinion, Justice Neil Gorsuch expressed shock and the Court's unfounded arguments and laid out a road map for Congress to enact legislation to fix the Court's decision. Congress should follow his lead and take action that will close the door to Justice Kavanaugh and the Court's attempt to create new authority for states over Indian tribes and Indian country.

Analysis of U.S. Supreme Court Decision *Castro-Huerta*

In its recent *Oklahoma v. Castro-Huerta* decision, the Supreme Court made an erroneous and egregious departure from over 200 years of settled law. In Justice Kavanaugh's opinion, the Court departed from the long-standing and foundational rule that states do not generally have jurisdiction to prosecute crimes against Indians in Indian country. The decision upset significant cornerstones of the juris-

dictional relationship between Indian tribes and states by holding that states have concurrent jurisdiction over such crimes in Indian country. This decision set tribes and states at immediate odds, as tribes have a direct interest in protecting their members and providing security on Indian reservations. As Justice Gorsuch stated in his well-reasoned dissent, it would be hard to fathom "a more ahistorical and mistaken statement of Indian law . . ." *Oklahoma v. Castro-Huerta*, 597 U.S. (2022) (J. Gorsuch dissenting).

The Court's suggestion that criminals will "go free" if states are not able to exercise criminal jurisdiction in Indian country is wrong and is the result of a political campaign by the State of Oklahoma. This has never been the case in Indian country as Congress clearly specified that federal and tribal governments have jurisdiction over these kinds of cases. In addition, the decision is contrary to significant steps taken by Congress in recent decades, through the passage of TLOA and tribal provisions in VAWA, to increase and improve federal and tribal law enforcement.

Justice Kavanaugh's decision to legislate from the bench is having an immense impact on state and tribal government operations across the country while providing no funding to states to fulfill new responsibilities required under the Court's decision. As suggested by Justice Gorsuch in his dissent, Congress must not "stand by as this Court sows needless confusion across the country." *Id*. at 41. A legislative fix to the *Castro-Huerta* decision is needed to uphold the United States' constitutional, treaty, and trust responsibilities to Indian tribes.

Federal Constitutional, Treaty, and Trust Responsibilities

The Constitution recognizes the distinct sovereign authorities of the Federal government, tribal governments, and state governments. Over more than 200 years of treaty making, acts of Congress, and judicial decisions, the United States has exercised and affirmed a treaty and trust responsibility and government-to-government relationship with Indian tribes. This relationship does not include state governments unless specifically authorized by Congress.

In recent decades, Congress worked hard to further secure and support federal and tribal law enforcement responsibilities in Indian country. As noted in support of the Tribal Law and Order Act, "[Y]ears of court decisions and stop-gap legislation have created a jurisdictional mess . . . The losers are the people of Indian country. The result of these federal laws and Court decisions is that along with the authority that the United States imposed over Indian tribes, it incurred significant legal and moral obligations to provide for public safety on Indian lands." Senate Report No. 111-93 (2009) pg. 4, Tribal Law and Order Act of 2009 (Internal citations omitted). The United States and the Federal government must live up to these responsibilities and not let the Supreme Court rewrite history to force state authorities on tribal members.

The Court's decision giving the states concurrent jurisdiction will result in a decrease in federal prosecutions in Indian country and conflict with Congress's intent in passing TLOA and tribal provisions in VAWA. This will lead to an increase of crime in Indian country and displace the United States' legal and trust responsibilities to provide law enforcement in Indian country. Instead, the Court is creating a role for the states that defies settled, long-standing, and recent laws.

Despite the Court's decision, Indian tribes do not have a treaty and trust relationship with the states, and states are not prepared for the new law enforcement challenges, budget impacts, and legal jeopardy that will come with fulfilling federal responsibilities under the Court's decision.

Court Imposed Costs on the States

As a part of the confusion caused by the Court's decision, state governments lack the budgets and resources to take on new law enforcement responsibilities in Indian country which covers more than 56 million acres in 35 states. Most states are already suffering from short falls in their law enforcement budgets. The Court imposed an unfunded mandate on states to enforce federal and tribal responsibilities in Indian country.

In 2021, the Bureau of Justice Statistics issued a report providing data on state government law enforcement expenses. In 2017:

- County and municipal governments spent nearly $130 billion on police and corrections.
- In the 20 years from 1997 to 2017, justice system expenditures increased from $188 billion to $305 billion.
- States had nearly $50 billion in direct expenditures for corrections activities, and of this amount, 88% was for correctional institutions.[1]

In addition, the Vera Institute of Justice reported that in 2015 the total cost to house an inmate in state facilities averaged $33,274.00 a year. Overall, the amounts ranged from a low of $14,780.00 in Alabama to a high of $69,355.00 in New York.[2] This unfunded mandate will severely burden the states with increased incarceration and enforcement costs, forcing the states to choose between scrambling for funds, personnel, and infrastructure or hoping the federal government will not decline enforcement. The states interest is overridden by the combined weight of the tribes and federal governments interest in protecting all the citizenry and upholding its legal, treaty and trust relationships with the tribes.

Impacts on Indian Country

The Court's decision to legislate from the bench and upset the long-standing relationship between the federal government and tribal governments, it is having a direct impact on the people of Indian country. There are more than 570 federally recognized tribes, more than 2.6 million Native Americans, and more than 300 reservations in the United States. Since Congress granted the tribes expanded jurisdiction with the TLOA, VAWA, and other legislation Indian country crime has decreased. In 2010 there were 40,666 offenses known to tribal law enforcement, and that number had dropped to 27,119 in 2020.[3] There are multiple examples of the tribes and states having agreements to assist each other in enforcing law and order because of these efforts, but this has now needlessly been thrown into confusion.[4,5]

The federal government has moral and legal obligations to provide for public safety in Indian Country. The tribes have a direct interest in ensuring the safety and protection of its people. The federal government has long exercised exclusive jurisdiction over crimes in Indian country by non-Indians against Indians. However, the Court's decision will lead to the federal government decline in enforcement in Indian Country, referring this to states to exercise jurisdiction, even when the state is not interested in exercising that jurisdiction.[6] The states that have no trust relationship with the tribes. States that have had a historic record of taking advantage of tribes. In the case of Oklahoma's current political maneuvering, states attempt to show that without the states enforcement only lawlessness exists in Indian country. Lawlessness has never been the case in Indian country.

---

[1] Emily D. Buehler, Ph.D., BJS Statistician, *Justice Expenditures and Employment in the United States, 2017*, Bureau of Justice Statistics, (Published July 2021) https://bjs.ojp.gov/library/publications/justice-expenditures-and-employment-united-states-2017, NCJ Number 256093, Publication Series Justice Expenditure and Employment.

[2] Chris Mai and Ram Subramanian, *The Price of Prisons: Prison Spending in 2015*, Vera Institute of Justice, https://www.vera.org/publications/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends-prison-spending.

[3] *Crime in the United States, Table 11: Offenses Known to Law Enforcement, (2010 and 2020)* Tribal Crime, Bureau of Justice Statistics, https://bjs.ojp.gov/tribal-crime.

[4] "TLOA's amendment of 25 U.S.C. § 2809(a)(3), the Indian Law Enforcement Reform Act. It also confirms the [DOJ]'s January 2010 directive that 'tribal governments have the ability to create and institute successful programs when provided with the resources to develop solutions that work best for their communities.' . . . [T]he passage of TLOA with its provision of enhanced sentencing authority for qualifying Tribal courts means that more cases will be referred to Tribal courts for prosecution." *Id*.

[5] *Special Domestic Violence Criminal Jurisdiction Pilot Project Report*, National Congress of American Indians, October 29, 2015.

[6] In 2018, approximately 18 percent (179 out of 999) of Indian country declinations were referred to a different jurisdiction. *Indian Country Investigations and Prosecutions 2018*, U.S. Dept. of Justice.

Tribes have always been sovereigns, with the ability to assert standards of conduct for their societies. This was recognized before the founding of the United States and again in both the Reorganization and Self-determination Eras. The sovereignty of tribes was recognized in Court decisions even in the early 1800s.[7]

This decision throws federal, tribal, and state government relations back to the era where it was acceptable to solve the "Indian problem" by attempting to assimilate tribes, terminate tribal governments, and attempting to force tribes to accept states authority that was clearly refuted in the Constitution and centuries of decisions and legislation. This decision appears to stem from the Court's new attempts to treat tribes as a racial group rather than affirming the political status of tribal governments.

Congress has recognized the direct interest of tribal governments in the public safety of Indians and has in recent decades made a point of ensuring Indian tribes could start exercising criminal jurisdiction over non-Indian offenders where the victim was Indian.[8] "Tribal governments have an inherent right to protect their people . . .," stated President Obama.[9] A legislative fix to address the Court's decision would affirm and protect Congress's commitment to tribal governments and support tribal law enforcement.

Congressional Action and Legislative Fix Needed

Indian country needs a direct and meaningful fix that addresses the very core of what Justice Kavanaugh got wrong in the *Castro-Huerta* decision. This should be a simple amendment that leaves no doubt as to the jurisdiction of the federal government under 18 U.S.C. § 1152 and the lack of state authority. As shown in italics below, 18 U.S.C. § 1152 should be amended to provide:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to Indian country *and shall apply to preempt the application of State law and prosecutorial jurisdiction*. This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the Tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian Tribes respectively.

This simple clarification will restore the balance in Indian country, affirm over 200 years of precedent, and ensure that Indian tribes and the federal government are responsible for prosecuting crimes in Indian country involving Indians. This amendment would also relieve the states of new law enforcement burdens imposed by the Court's decision.

The Tribe does not believe that Congress should attempt a more complicated amendment or one that would also address 18 U.S.C. § 1162 also known as Public Law 280. First, Justice Kavanaugh's decision needs a quick and decisive response. Congress should directly address the flawed logic that forms the basis for his decision.

Second, it is not possible to improve on Public Law 280 with an amendment. Genocidal laws like Public Law 280, that was enacted as a part of the Federal government's policy of terminating Indian tribes, should be left in the past. Attempting to resurrect Public Law 280 with an amendment is not needed and will only modernize policies that should not have been enacted in the first place. As an example, no one is trying to improve on the General Allotment Act and its genocidal dispossession of millions of acres of tribal lands. The same is true of Public Law 280.

---

[7] *Johnson v. McIntosh*, 21 U.S. 543 (1823); *Cherokee v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832).

[8] VAWA, VAWA Reauthorization 2022 and Tribal Law and Order Act.

[9] Barack Obama, President of the United States, *President Signs 2013 VAWA—Empowering Tribes to Protect Native Women*, (March 7, 2013).

As Justice Gorsuch stated in his dissent, due to the Court's "egregious misappropriation of legislative authority 'the ball is back in Congress' court.'" *Id*. (quoting *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 661 (2007)). We agree. Congress must act quickly to correct the Court's error and restore the federal, tribal, and state relationships set out in the Constitution and enshrined in over 200 years of treaties, Congressional enactments, and judicial decisions. Tribal sovereignty and self-determination are under attack by the Supreme Court and only Congress can address this wrong and ensure that the Supreme Court does not legislate from the bench.

Conclusion

The Ute Indian Tribe asks that the Subcommittee, the Committee, and Congress take action to correct this error and overreach by the Supreme Court of the United States. Congress must defend the actions taken in passing TLOA and VAWA. The resources and jurisdiction in those laws have helped to stabilize relationships between Indian tribes, the Federal government, States. The *Castro-Huerta* decision is a step backward and an attempt to undermine the direction of Congress.

The simple fix proposed in the Tribe's testimony would allow the United States to meet its treaty and trust obligations and avoid imposing a new burden on states that cannot increase law enforcement budgets. This action is needed to correct the Court and remind the Court that the United States current and most successful federal Indian policies rely on promoting tribal sovereignty and self-determination.