TESTIMONY OF CHICKASAW NATION [SENIOR COUNSEL STEPHEN GREETHAM]
CONCERNING THE HYBRID OVERSIGHT HEARING
"EXAMINING *OKLAHOMA V. CASTRO-HUERTA*: THE IMPLICATIONS OF THE SUPREME COURT'S RULING ON TRIBAL SOVEREIGNTY"
HELD BEFORE THE HOUSE RESOURCES COMMITTEE'S
SUBCOMMITTEE FOR INDIGENOUS PEOPLES OF THE UNITED STATES

(Submitted September 22, 2022)

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.

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[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/.

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.

Our latest unexpected development came on June 29, 2022, when the United States 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

[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.

[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/

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

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/).

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-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

[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.")
[12] E.g., 142 S. Ct. at 2501.

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,

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[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/.

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.