

**Testimony to the Subcommittee for Indigenous Peoples of the United States,
Committee on Natural Resources, U.S. House of Representatives
Regarding the Implications of the Supreme Court Decision in *Oklahoma v. Castro-Huerta*
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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 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

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 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

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).

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).

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 authorize 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

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).

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 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

¹⁸ *United States v. Kagama*, 118 U.S. 375, 384 (1886).

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

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. 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.

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).

²⁸ These facts are drawn from the Transcript of Jury Trial, *Oklahoma v. Victor Manuel Castro-Huerta*, Tulsa Dist. Ct. Oct. 2-6, 2017.

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 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

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).

³⁵ Perry, *supra*, at 273.

³⁶ Roadmap, *supra*, at 6.

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.

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).