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September 20, 2022

**Written Testimony of Cherokee Nation Attorney General Sara Hill
House Subcommittee for Indigenous Peoples of the United States oversight hearing on
“Examining *Oklahoma v. Castro-Huerta*: The Implications of the Supreme Court’s Ruling
on Tribal Sovereignty”**

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.