

Testimony of Mithun Mansinghani, Partner, Lehotsky Keller LLP

**Before the Subcommittee on the Indigenous Peoples of the United States
of the U.S. House of Representatives Committee on Natural Resources**

**Hearing—Examining *Oklahoma v. Castro-Huerta*:
The Implications of the Supreme Court’s Ruling on Tribal Sovereignty**

September 20, 2022

Oral Testimony for the Record

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

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.