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August 2023

Ongoing Threats and Challenges to Tribal Nations' Sovereignty and Status Under Federal Indian Law

Summary Guide to Cases
Bringing Equal Protection Constitutional Challenges and Arguing for State Infringement on Tribal Criminal Jurisdiction

I. FEDERAL INDIAN LAW BACKGROUND.

Two Pillars. Federal Indian law rests on two pillars: (1) Tribal Nations' inherent sovereignty as self-governing political entities predating the United States; and (2) the United States' trust responsibility to Tribal Nations. Tribal Nations' inherent sovereignty exists independently, but it is also recognized by the United States in U.S. Supreme Court and other case law, in federal statutes and actions by the executive branch, and implicitly in the U.S. Constitution. The United States' trust responsibility grows from its history of making promises to Tribal Nations in treaties and other actions and from taking Tribal Nations' lands and resources and restricting Tribal Nations' exercise of our sovereign authorities. The U.S. Constitution provides the United States the authority it needs to carry out its trust responsibilities.

Tribal Law. As Tribal Nations are inherently sovereign, we should have the full expression of our sovereignty to make our own laws and be ruled by them. We should also have the legal tools necessary under federal law to successfully hold the United States responsible for carrying out its trust responsibility. Yet, the federal Indian law rules Tribal Nations and Native people must operate under, as a consequence of the current and inappropriate approach to Tribal Nation-U.S. relations, were developed in the court of the colonizer, are designed to harm rather than help Indian Country, and can change at any point to become even more harmful.

U.S. Courts Create Foundational Rules. The federal courts have carved out the foundational framework and rules for federal Indian law, often claiming to interpret the scope of inherent Tribal sovereignty and treaty or statutory Tribal rights. For example, the federal courts have set out rules that say Congress can unilaterally strip Tribal Nations of certain bargained-for and inherent rights, such as reservation boundaries and sovereign immunity, as long as it does so explicitly enough. This means, not only is Indian Country at risk of congressional and executive acts that chip away at Tribal Nations' rights, but Indian Country is also at risk of the U.S. courts changing the underlying rules that shape federal Indian law. Further, federal Indian law has grown into a complicated tangle as a result of this piecemeal chipping away and reshaping of the rules. The United States' main goal was not to create a clear, consistent, or fair jurisprudence, it was to take what it could.

II. SHIFTING GROUNDS.

Inflection Point. We are currently faced with litigating parties engineering cases for review by the U.S. Supreme Court in an attempt to undermine and change the basic rules of federal Indian law in ways that harm us, and a U.S. Supreme Court that may take these opportunities—knowing that the case-law

foundation on which federal Indian law rests could be movable. The current makeup of the U.S. Supreme Court includes six conservative Republican appointees, where such appointees tend to prioritize states' rights. Already, this group has shown its willingness to break with established precedent, including reversing course on a constitutional abortion right in the *Dobbs* case, turning the test for state criminal jurisdiction over non-Indians in Indian Country on its head in *Castro-Huerta*, and ruling colleges' affirmative action programs unconstitutional in *Students for Fair Admissions*. Further, some current and recent U.S. Supreme Court Justices have signaled they are willing to rethink federal Indian law and Tribal Nations' status as sovereign entities owed a trust responsibility.

Indian Country Must Pay Close Attention. Since so much of federal Indian law—and thus the rules we must all operate under—rests on the foundation of case law, it is important for Indian Country to pay close attention to what is happening in the courts. When the courts change the rules, it is almost never in the direction of fairness for Tribal Nations.

Examples. Below are two current examples of subject matter areas where litigating parties are using the courts in an attempt to re-shape foundational Indian law principles in ways that harm Tribal Nations.

III. EQUAL PROTECTION CASES.

Background. The U.S. Constitution's equal protection requirements mandate similar treatment for those similarly situated. *Bolling v. Sharpe*, 347 U.S. 497, 498–99 (1954). If the government takes an action that treats a group of people differently on the basis of race, that action must pass strict scrutiny review, which requires narrowly tailored measures taken to further compelling governmental interests. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2162 (2023); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 224, 227 (1995). If instead the government action treats a group of people differently on a non-suspect basis, it must only pass rational basis review, which is easier to meet and requires only that an action be rationally related to a legitimate government interest. *See Williamson v. Lee Optical*, 348 U.S. 483, 487–88 (1955). Indian Country has long cited the U.S. Supreme Court's decision in *Morton v. Mancari* for the position that Native status is not a suspect racial classification but rather is a political classification and that government actions directed at Tribal Nations and Native people survive rational basis review when they "can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." 417 U.S. 535, 555 (1974).

Litigating Arguments. There are now plaintiffs attempting to secure a new U.S. Supreme Court decision narrowly interpreting *Mancari*, thereby challenging Native peoples' special political status under the U.S. Constitution for purposes of its equal protection requirements. They aim to more narrowly define *who* falls into the political classification of Native people recognized in *Mancari*, and they are attempting to establish that the *Mancari* rule only applies to *certain kinds* of government actions. They use the complicated and sometimes seemingly inconsistent equal protection case law post-dating *Mancari* to argue for *Mancari*'s narrow application.

Recent Case Teeing Up Issue: *Baby Girl*. The U.S. Supreme Court in *Adoptive Couple v. Baby Girl* said it was interpreting certain Indian Child Welfare Act (ICWA) provisions not to apply in that context, involving an absent parent, because to interpret them otherwise "would raise equal protection concerns." 570 U.S. 637, 656 (2013). In his concurring opinion, Justice Thomas said Congress lacked constitutional authority to enact ICWA and for that reason he need not address the equal protection constitutional arguments directly. *Id.* at 666, n.3 (Thomas, J., concurring).

***Brackeen* ICWA Case.** On June 15, 2023, the U.S. Supreme Court issued its decision in *Haaland v. Brackeen*, 599 U.S. ___, 143 S. Ct. 1609 (2023). The petitioners made a number of constitutional arguments, including that ICWA violates the anticommandeering doctrine, that ICWA violates the nondelegation doctrine, that Congress lacked authority under the U.S. Constitution to enact ICWA, and that ICWA violates equal protection requirements.

Background

In this case, the petitioners argued that only enrolled Tribal citizens have a political connection to their Tribal Nations and fall under *Mancari*, and thus *Mancari* does not protect ICWA because the law applies to children who are not yet enrolled Tribal citizens. Br. for Individual Pet'rs, at 20, *Brackeen*, 143 S. Ct. 1609; Br. for Pet'r State of Tex., at 46, *Brackeen*, 143 S. Ct. 1609. They also argued *Mancari* only applies to government actions regulating Tribal Nations' sovereign interests as polities, and that preferences must operate on or near reservations or be tied to Tribal self-government. Br. for Individual Pet'rs, at 25–26, *Brackeen*, 143 S. Ct. 1609; Br. for Pet'r State of Tex., at 44–45, *Brackeen*, 143 S. Ct. 1609.

This case has involved multiple court decisions that oscillated widely. The U.S. District Court for the Northern District of Texas originally struck down ICWA as unconstitutional. *Brackeen v. Zinke*, 338 F. Supp. 3d 514, 519 (N.D. Tex. 2018). A panel of three judges on the U.S. Court of Appeals for the Fifth Circuit reversed and ruled ICWA constitutional. *Brackeen v. Bernhardt*, 937 F.3d 406, 416 (5th Cir. 2019). The Fifth Circuit then agreed to reconsider the case and issued a decision on en banc review. *Brackeen v. Haaland*, 994 F.3d 249 (5th Cir. 2021) (en banc) (per curiam). That decision was over 300 pages long with holdings set forth in two separate and conflicting principal opinions and left the District Court decision in place where the judges were evenly split.

With regard to the equal protection arguments, the Fifth Circuit held ICWA's "Indian child" classification—defining the scope of the Native children to which ICWA extends—was not unconstitutionally race-based because there is a sufficient political connection between the child and Tribal Nation, and a Tribal Nation is a political entity with the authority to determine its own citizenship criteria. *Id.* at 267–68, 338–39. In the alternative, it reasoned, the U.S. Constitution directly refers to "Indians," either establishing Indians as a political class or acknowledging and authorizing distinctions based on Indian ancestry. *Id.* at 338 n.52. It concluded ICWA's "Indian child" classification complies with equal protection requirements because it is "based on a political classification and [is] rationally related to the fulfillment of Congress's unique obligation toward Indians." *Id.* at 361. However, the en banc court could not reach a majority on the issue of whether ICWA's third adoptive placement preference for "other Indian families" and foster care placement preference for "Indian foster home[s]" violated equal protection requirements, and thus the District Court's ruling that these provisions violated equal protection was "affirmed without a precedential opinion." *Id.* at 268.

The case was argued before the U.S. Supreme Court on November 9, 2022, in an oral argument that lasted over three hours and involved an active bench. Some Justices honed in on whether the petitioners had standing, i.e., whether these petitioners were the right parties to be in court challenging ICWA. Some Justices focused on whether ICWA is an act of the federal government that commandeers states, meaning unlawfully forces state actors to administer or enforce a federal regulatory program that demands the use of the state's legislative or executive sovereign authority. Some Justices focused on which equal protection test would be appropriate to apply to this case, while others asked about the proper test for the scope of Congress's constitutional Indian affairs powers—and often these two questions were conflated.

Worryingly, many of the Justices signaled a willingness to entertain the idea that a tie to furthering Tribal self-government may be necessary to justify ICWA and other laws—both in the context of the scope of

Congress's constitutional Indian affairs powers and in the scope of the equal protection test under *Mancari*. Such a requirement could prevent the federal government from taking actions on behalf of Tribal Nations or Native people unless those actions expressly furthered Tribal self-government in some way.

U.S. Supreme Court Decision

On June 15, 2023, the U.S. Supreme Court rejected or declined to reach each of the petitioners' challenges and upheld ICWA—but the relief comes with major caveats as to equal protection in particular. In a 7-2 opinion delivered by Justice Barrett and joined by Justices Roberts, Sotomayor, Kagan, Gorsuch, Kavanaugh, and Jackson, the Court: (1) held Congress had Article I constitutional authority to enact ICWA under its Indian affairs powers; (2) did not address the equal protection challenges on the merits due to lack of standing; (3) rejected the anticommandeering challenges; and (4) did not address the merits of the nondelegation challenges due to lack of standing. *See Brackeen*, 143 S. Ct. 1609. Below is an abbreviated summary of portions of the decision.

Enactment Authority

Much of the Court's discussion in the majority opinion and in the concurring and dissenting opinions grappled with the source and limitations of Congress's constitutional authority to enact Indian affairs legislation—a matter the Justices had discussed at the oral argument as somewhat intertwined with equal protection requirements.

The Court held that Congress had authority under Article I of the Constitution to enact ICWA, pointing to the Indian Commerce Clause as an important source of authorization and holding it extends not just to trade or commodities but also to Indian affairs more broadly. *Brackeen*, 143 S. Ct. at 1628–29, 1630–31. In its reasoning, the Court pointed to "a long line of cases" for the characterization by the Court that Congress's power to legislate with respect to Tribal Nations is "plenary and exclusive." *Id.* at 1627. The Court said its own precedent left little doubt Congress's power in the field of Indian affairs is "muscular, superseding both [T]ribal and state authority." *Id.*

However, the Court said Congress's power must derive from specific authorities within the Constitution and "not the atmosphere," stating Congress's plenary power is not "absolute" or "unbounded" but rather has "borders." *Id.* at 1627, 1629. The Court said discerning the borders of the plenary power is difficult because the Court's precedent is "unwieldy" and "rarely ties a challenged statute to a specific source of constitutional authority." *Id.* at 1629. The Court asserted the petitioners failed to "offer a theory for rationalizing this body of law," and, "[i]f there are arguments that ICWA exceeds Congress's authority as our precedent stands today, petitioners do not make them." *Id.* at 1631. Thus, the Court's opinion can be read to invite additional arguments in future cases for narrowing the scope of Congress's constitutional Indian affairs powers but calling for such arguments to both account for the Court's complicated precedent and offer a reasoned justification for why Congress's powers are limited in the ways proposed.

Justice Thomas in his dissenting opinion amplified this invitation, claiming there is no basis in the Constitution for a broad plenary power with respect to Indians, and instead that this concept grew from "loose dicta" in old Court precedent. *Id.* at 1675 (Thomas, J., dissenting). He invited future arguments by saying "the majority holds only that [the state petitioner] has failed to demonstrate that ICWA is unconstitutional" and that, although it "declines to disturb the Fifth Circuit's conclusion that ICWA is consistent with Article I," it did so "without deciding that ICWA is, in fact, consistent with Article I." *Id.* at 1683 (Thomas, J., dissenting). With regard to the constitutional appropriateness of application of state law on reservations, Justice Thomas said that, while the U.S. Supreme Court in *Worcester v. Georgia*, 31 U.S.

515 (1832), held the state there could not extend its laws over the Cherokee Nation's territory, that decision "yielded to closer analysis," and he cited *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022), for the assertion that "Indian reservations have since been treated as part of the State they are within." *Id.* at 1669 n.4 (Thomas, J., dissenting). Justice Alito in his dissenting opinion similarly stated his view that Congress lacked authority to enact ICWA, but he said Congress does have plenary power over Indian affairs even though pertinent constitutional restrictions limit that power. *Id.* at 1685–86 (Alito, J., dissenting).

Justice Gorsuch in his concurring opinion also disagreed with the majority's characterization of the scope of Congress's power, but he highlighted a path forward that is more respectful of Tribal sovereignty. He asserted that, while Congress had authority to enact ICWA under its "robust" constitutional Indian affairs powers, Congress does not have "plenary" power over Tribal Nations themselves, which retained inherent sovereignty post-contact as a matter of international law. *Id.* at 1647–48, 1653 (Gorsuch, J., concurring). He asserted "[n]othing in the [Indian Commerce] Clause grants Congress the affirmative power to reassign to the federal government inherent sovereign authorities that belong to the Tribes." *Id.* at 1657 (Gorsuch, J., concurring). He said he hoped the Court would "follow the implications of [its] decision where they lead and return us to the original bargain struck in the Constitution" and "the respect for Indian sovereignty it entails," *id.* at 1660 (Gorsuch, J., concurring)—thus also inviting a future case demarcating the bounds of Congress's constitutional Indian affairs power, but potentially in a way that is protective of Tribal Nations' sovereignty.

Equal Protection Requirements

Though the U.S. Supreme Court did not address the merits of the equal protection claim in *Brackeen*, there are concerning elements throughout the decision that reaffirm our need to stay vigilant on this issue.

Because no party had standing to make the equal protection arguments before the Court, the Court vacated the Fifth Circuit's judgment with respect to the equal protection claims and remanded with instructions to dismiss the claims for lack of jurisdiction. *Brackeen*, 143 S. Ct. at 1641. However, the Court again invited future arguments when it said in a footnote: "Of course, the individual petitioners can challenge ICWA's constitutionality in state court, as the Brackeens have done in their adoption proceedings for Y.R.J." *Id.* at 1640 n.10 (citing *Brackeen*, 994 F.3d at 294 (5th Cir. 2021) (principal opinion of Dennis, J.)).

Justice Kavanaugh issued a concurring opinion in which he described "the equal protection issue" as "serious" and said a child under ICWA can be denied a placement because of his "race," and a prospective family can be denied the opportunity to foster or adopt because of their "race." *Id.* at 1661 (Kavanaugh, J., concurring). He cited to the majority opinion for the point that a prospective foster or adoptive parent or a child could establish standing by raising the issue in a state-court foster care or adoptive proceeding, and he said such an outcome could ultimately allow the Court another opportunity to address the issue. *Id.* at 1661–62 (Kavanaugh, J., concurring).

For now, a ruling that ICWA is unconstitutionally race-based or some other narrowing of who and what government actions fall under *Mancari* or Congress's constitutional Indian affairs powers has been avoided in *Brackeen*. But *Brackeen* makes clear that a future decision on these issues is likely to come, and there is an appetite for this to happen soon. Such a decision would have major ripple effects. At worst, many federal actions carrying out the United States' trust responsibility could be found unconstitutional. At the very least, Tribal Nations would be required to pour time and energy into defending against many cases challenging government actions against new standards.

Shoalwater and Seminole IGRA Compact Cases. The U.S. Court of Appeals for the Ninth Circuit in *Maverick Gaming LLC v. United States*, No. 23-35136 (9th Cir. appeal filed Feb. 23, 2023), and for the D.C. Circuit in *West Flagler Associates, Ltd. v. Haaland*, 71 F.4th 1059 (D.C. Cir. 2023), have before them cases in which the plaintiffs argue that compacted Tribal exclusivity rights under the Indian Gaming Regulatory Act (IGRA) violate the U.S. Constitution's equal protection requirements.

The plaintiffs in the *Maverick* case argue that *Mancari* only applies to government actions related to uniquely Tribal interests, and that the IGRA compacts fall outside *Mancari* because giving Tribal Nations the exclusive right to engage in commercial activities, even on Indian lands, has no relation to uniquely Tribal interests. Amended Compl., at 25, *Maverick Gaming LLC v. United States*, No. 3:22-CV-05325, 2023 WL 2138477 (W.D. Wash. Feb. 21, 2023). The plaintiffs in *West Flagler* similarly argue that, for *Mancari* to apply, preferences based on Native status must be tied to Indian lands, uniquely sovereign interests, or the special relationship between the federal government and Tribal Nations, and they claim that exclusivity rights outside Indian lands do not fall into any of these categories. Pls.' Mot. for Summ. J., at 34–38, *W. Flagler Assocs., Ltd. v. Haaland*, 573 F. Supp. 3d 260 (D.D.C. 2021).

The U.S. District Court for the Western District of Washington dismissed the *Maverick* case on the basis that the Shoalwater Bay Tribe was a necessary and indispensable party that could not be joined in the suit because of its sovereign immunity, and this dismissal is now on appeal to the Ninth Circuit. *See Maverick Gaming*, 2023 WL 2138477, at *8. For the time being, the equal protection argument is not the center of this case.

On the other hand, the U.S. District Court for the District of Columbia in the *West Flagler* case misconstrued the Seminole Tribe of Florida's compact to hold that it authorized off-Indian lands gaming activity and thus violated IGRA, *see W. Flagler*, 573 F. Supp. 3d at 264, which the D.C. Circuit reversed on appeal on June 30, 2023, *W. Flagler*, 71 F.4th at 1062. In the D.C. Circuit's decision, it summarily rejected the equal protection challenges. *Id.* at 1070. This case could now be the subject of a motion for rehearing before the D.C. Circuit or a petition for certiorari before the U.S. Supreme Court.

***Ultima* 8(a) Program Case.** The U.S. District Court for the Eastern District of Tennessee in *Ultima Services Corp. v. U.S. Department of Agriculture*, No. 2:20-CV-00041, 2023 WL 4633481 (E.D. Tenn. July 19, 2023), ruled the Small Business Administration (SBA) and the U.S. Department of Agriculture (USDA) violated the U.S. Constitution's equal protection requirements in their operation of the 8(a) Program.

Under the 8(a) Program, the SBA acquires procurement contracts from other government entities and awards those contracts to small businesses, and specifically to "socially and economically disadvantaged small business concerns," which are businesses majority-owned by socially and economically disadvantaged individuals. *See Ultima*, 2023 WL 4633481, at *3. In its regulations implementing the 8(a) Program, the SBA set forth a rebuttable presumption that individuals within certain minority groups are socially and economically disadvantaged and should receive contracting preference, and Native people are one such group. *See id.* at *4.

The court in *Ultima* ruled unconstitutional the use of this rebuttable presumption, enjoining the SBA and USDA from using the rebuttal presumption in administering the 8(a) Program. *Id.* at *18. The court said the rebuttable presumption was a racial classification to which strict scrutiny applies, *id.* at *10, and it held the rebuttable presumption did not satisfy strict scrutiny, *see id.* at *14, 18. The court reasoned that, while the government said the use of the rebuttable presumption was to remedy the effects of past racial discrimination in federal contracting, it had not demonstrated a compelling interest because it did not support its use "with precise evidence." *Id.* at *14. The court found the SBA and USDA had not

demonstrated the government was a participant in past discrimination within the relevant industries at issue in the case and had not established goals that would allow measuring the utility of the rebuttable presumption in remedying the effects of past racial discrimination. *Id.* at *11–14. The court also held the rebuttable presumption was not narrowly tailored, as it did not have a termination date or a specific objective, the minority group categories were imprecise for measuring discrimination, and the government did not adequately explore race-neutral alternatives. *Id.* at *16–17.

The court's injunction against the SBA's and USDA's use of the rebuttal presumption for the 8(a) Program is not limited in any way. *See id.* at *18. However, as discussed above, under existing U.S. Supreme Court precedent, special programs and benefits provided by the government to Tribal Nations and Native people are not suspect racial classifications subject to strict scrutiny. Thus, the relevancy of the holding that the rebuttal presumption in the 8(a) Program does not survive strict scrutiny is questionable when applied to Native-owned businesses, and the *Ultima* court did not address this nuance. *See id.* at *10 n.6 (noting "[n]either party disputes that the rebuttable presumption is subject to strict scrutiny"). The court in *Ultima* is reserving its ruling on any further remedy subject to a hearing on August 31, 2023.

The decision in *Ultima* is part of a larger trend, where the U.S. Supreme Court has made increasingly clear that all instances where the government treats people differently on the basis of race will be subject to a rigorous application of strict scrutiny, even to remedy past discrimination and harms. At the same time, some members of the Supreme Court have indicated an interest in revisiting the *Mancari* rule that special programs and benefits for Tribal Nations and Native people are not suspect racial classifications subject to strict scrutiny. If the *Mancari* rule is overturned or narrowed, and some actions taken on behalf of Tribal Nations and Native people are deemed racial classifications, the *Ultima* decision and cases like it could make it more difficult for those actions to pass equal protection review.

IV. CRIMINAL JURISDICTION CASES.

Background. Complete jurisdictional authority is at the very heart of sovereignty. It is the power to make and enforce the rules for your people and for the activities happening on your lands. Early U.S. Supreme Court precedent recognized Tribal Nations' broad criminal jurisdiction over our people and lands. *See, e.g.*, *United States v. Wheeler*, 435 U.S. 313, 323–24 (1978); *Ex parte Crow Dog*, 109 U.S. 556, 568–69 (1883). But the United States courts and Congress have chipped away at this authority over time. In the devastating decision in *Oliphant v. Suquamish Indian Tribe*, the U.S. Supreme Court held Tribal Nations lack criminal jurisdiction over non-Native people on Tribal lands. 435 U.S. 191, 195 (1978). And statutes that provide the federal government with criminal jurisdiction, such as the Major Crimes Act, 18 U.S.C. § 1153, sometimes open the door to arguments that Tribal Nations lack jurisdiction to prosecute those same crimes. This complicated web of jurisdiction in Indian Country requires an intense and fact-specific analysis to determine who has jurisdiction for a particular crime, sometimes making enforcement harder, especially when paired with inadequate federal funding and a lack of federal prosecution. However, the general understanding has been that states do not have criminal jurisdiction, especially over Indians, within Indian Country unless authorized by Congress. *See McGirt v. Oklahoma*, 140 S. Ct. 2452, 2459 (2020); *see also Ysleta Del Sur Pueblo v. Texas*, 142 S. Ct. 1929, 1934 (2022) ("From time to time, Congress has exercised its authority to allow state law to apply on [T]ribal lands where it otherwise would not.").

Litigating Arguments. States have increasingly asserted criminal and other forms of jurisdiction for actions taking place in Indian Country. Those who seek to expand state jurisdiction and shrink Tribal jurisdiction argue the disjointed jurisdictional landscape the courts created and the federal government's failure to fund and provide criminal justice services justifies further chipping away at Tribal jurisdiction and increasing state jurisdiction.

Recent Case Teeing Up Issue: *Castro-Huerta*. The U.S. Supreme Court recently issued a decision in *Oklahoma v. Castro-Huerta* that held states have concurrent jurisdiction with the federal government over certain crimes committed by non-Indians against Indians in Indian Country. 142 S. Ct. 2486, 2491 (2022). It grew from the earlier decision in *McGirt v. Oklahoma*, where the U.S. Supreme Court held the traditional reservation disestablishment test must be applied in Oklahoma, disrupting past practice of treating reservations in Oklahoma as disestablished. 140 S. Ct. at 2462–63. In *McGirt*, the Court found Oklahoma lacked criminal jurisdiction over the Indian defendant for a Major Crimes Act crime in what it held to be Indian Country. *Id.* at 2459–60. Oklahoma has since been aggressive in trying to limit the effects of *McGirt*. Arguing for concurrent jurisdiction in *Castro-Huerta* was one way to do that, even though it meant disrupting criminal jurisdiction jurisprudence for all of Indian Country.

The U.S. Supreme Court began the *Castro-Huerta* decision with a background discussion of the frustrations of federal prosecution, or lack thereof, in Indian Country generally, now seen in Oklahoma. 142 S. Ct. at 2492. The decision then went on to flip the jurisdictional test on its head. Where the rule had long been a presumption against state jurisdiction in Indian Country, the Court instead said the default is that states have criminal jurisdiction in Indian Country over non-Indians because Indian Country is part of the state's territory. *Id.* at 2493. It said this default is only rebutted when preempted by federal law or when state jurisdiction would infringe on Tribal-self government. *Id.* at 2494. When conducting this analysis, the Court applied the balancing test from *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), which takes into consideration state and federal interests and had not been treated as a criminal jurisdiction test. *Id.* at 2500–02.

The U.S. Supreme Court asserted that, even though courts have long repeated that states lack this jurisdiction, this was non-binding language in case law, *see id.* at 2498–99, demonstrating a clear willingness to break with long-understood federal Indian law principles.

***Hooper* Federal Court Case.** The U.S. Court of Appeals for the Tenth Circuit was asked to rule on whether municipalities have concurrent jurisdiction over crimes committed by *Indians* in Indian Country—at least for non-Major Crimes Act crimes—in *Hooper v. City of Tulsa*, 71 F.4th 1270 (10th Cir. 2023). *Hooper* is a follow-up case to *Castro-Huerta*, where the U.S. Supreme Court said, with respect to state jurisdiction, that it "express[ed] no view" on this issue. 142 S. Ct. at 2501 n.6.

Tulsa argued in this case that it had jurisdiction under the federal Curtis Act, which dates back to the 1800s and is specific to Oklahoma. Resp. Br. of Appellee City of Tulsa, at 8–14, *Hooper v. City of Tulsa*, 71 F.4th 1270 (10th Cir. 2023). Oklahoma as amicus argued more broadly that *Castro-Huerta* reversed the traditional presumption that states (and, by extension, their subdivisions) lack jurisdiction over crimes committed in Indian Country. Br. of Amicus Curiae State of Okla., at 5–7, *Hooper*, 71 F.4th 1270.

The U.S. District Court for the Northern District of Oklahoma held Tulsa had concurrent jurisdiction under the Curtis Act, and the parties appealed. *See Hooper v. City of Tulsa*, No. 21-cv-165, 2022 WL 1105674, at *5 (N.D. Okla. Apr. 13, 2022). The Tenth Circuit on June 28, 2023, reversed, holding the Curtis Act no longer conferred concurrent jurisdiction, *Hooper*, 71 F.4th at 1285, and refusing to rule on the question of inherent concurrent jurisdiction under *Castro-Huerta* reasoning raised by Oklahoma as amicus, *id.* at 1276 n.5. The case could now become the subject of a petition for certiorari before the U.S. Supreme Court, as Tulsa's request for a stay from the U.S. Supreme Court seems to indicate. *See* Emergency Appl. for Stay of Mandate Pending Filing & Disposition of Pet. for Writ of Cert., *City of Tulsa v. Hooper*, 600 U.S. ___, No. 23A73, 2023 WL 4990789 (stay denied Aug. 4, 2023). Further, Justice Kavanaugh, with whom Justice Alito joined, issued a statement with the stay denial noting that, "[i]mportantly," the Tenth Circuit declined

"for now" to reach Oklahoma's *Castro-Huerta* argument but that Tulsa "may presumably raise that argument" on remand. *Id.*

Oklahoma State Court Cases. Oklahoma is also seeking a ruling within its own state courts that it has concurrent criminal jurisdiction over Indians for non-Major Crimes Act crimes—potentially limiting its argument to non-member Indians, and potentially limiting its argument to non-trust land.

The state courts may have already bought into Oklahoma's argument that the *Bracker* balancing test utilized in *Castro-Huerta* should be applied to address the scope of Oklahoma's concurrent jurisdiction over Indians within Indian Country. For example, in the recent decision by the Oklahoma Court of Criminal Appeals (OCCA) in *State v. Brester*, the OCCA authorized remand for application of the *Bracker* balancing test to answer this question, although Oklahoma chose not to exercise this option. 531 P.3d 125, 138 (Okla. Crim. App. 2023). In an earlier OCCA case, *State v. Hull*, Oklahoma had attempted to litigate this issue, but it ultimately sought dismissal when the fact pattern in that case was not conducive to its argument. No. S-2021-110 (Okla. Crim. App. dismissed Mar. 9, 2023). The federal government was concerned enough about *Hull* that it was prepared to participate as amicus. Oklahoma currently has a pending OCCA appeal, *State v. Fuller*, in which it may argue for concurrent jurisdiction over Indians in Indian Country. No. S-2023-409 (Okla. Crim. App. appeal docketed May 8, 2023).

V. NEXT STEPS.

There is much at stake right now in the courts, and the decisions we see in the coming years could re-shape federal Indian law in damaging and lasting ways.

It is incumbent upon Tribal Nations and advocates to pay close attention to and, when appropriate, participate in these cases.

For example, with regard to equal protection attacks, Indian Country should strategize—not just on the best legal argument to defend a particular government action or statute—but on the best, most defensible, and most authentic overall framework for the equal protection test applicable to all government actions directed at Tribal Nations and Native people. In crafting this framework, Indian Country should take into account the U.S. Supreme Court's overall equal protection test and precedent and courts' equal protection precedent for federal Indian law specifically, provide a compelling justification based on Tribal Nations' inherent sovereignty and the history of the relationship between the United States and Tribal Nations and Native people, consider the scope of government actions that could potentially fall under various tests, and integrate what Indian Country authentically believes establishes its unique constitutional status. This will require Indian Country to consider *who* it believes falls into the special political classification, and the *types of government actions* it believes should be examined under and should satisfy the rational basis test articulated in *Mancari*. These conversations may be difficult.

It is also incumbent upon Indian Country to strategize on increasing Native and Indian Country-trained judges, as these individuals shape the very foundations of federal Indian law.

We must be vigilant and continue to defend against threats to our sacred diplomatic Nation-to-Nation relationship and sovereign political status.