Saint Louis University Law Journal

Volume 68
Number 1 *Fall 2023*

Article 9

2023

Status to Be Determined: Analyzing Indian Status Within the General Crimes Act in a Post-Castro-Huerta Landscape

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STATUS TO BE DETERMINED: ANALYZING INDIAN STATUS WITHIN THE GENERAL CRIMES ACT IN A POST-*CASTRO-HUERTA* LANDSCAPE

"The treaties are irrelevant then? . . . Our history is irrelevant?"[1]

– Justice Neil Gorsuch

ABSTRACT

The General Crimes Act, codified at 18 U.S.C. § 1152, is an older statute that pertains to federal criminal jurisdiction over crimes committed in Indian Country. The General Crimes Act is limited in scope as it only applies to cases where the alleged perpetrator of the crime is not a Native American but the victim is determined to be a Native American. But who decides how to label each party as "Indian" or "non-Indian" (to borrow language used in the courts)? And is 'Indian status' an element of the statute that the prosecution must prove or is it reserved for the defendant as an affirmative defense to rebut the prosecution? Federal appellate courts have touched on these issues in the past, but a circuit split exists over how to approach a test that may be used to determine the Indian status of the parties in all matters involving the General Crimes Act, as well as how Indian status fits within the elemental framework of the statute. In 2022, the U.S. Supreme Court released a decision in Oklahoma v. Castro-Huerta *that dramatically affected how the General Crimes Act is interpreted. But what did the Court have to say about how to determine a party's Indian status in the decision? Was it even on the Justices' minds?*

This Note takes a closer look at the circuit split over what may be thought of as an 'Indian status test' as it historically existed in the courts, and within different interpretations of the General Crimes Act. The Note then describes the status of the circuit split in the wake of the Court's decision in Castro-Huerta*. This Note concludes with predictions on how the* Castro-Huerta *decision may affect future cases involving the General Crimes Act and where, if applicable, an 'Indian status test' may be invoked.*

1. Transcript of Oral Argument at 18:18-23, Oklahoma v. Castro-Huerta, 142 S. Ct. 2486 (2022) (No. 21-429).

INTRODUCTION

Kannon Shanmugam found himself in a stressful situation for any appellate lawyer: being the target of repeated questioning by a Supreme Court Justice during an oral argument.[2] During the course of his oral argument for the case of *Oklahoma v. Castro-Huerta*[3] ("*Castro-Huerta*"), Mr. Shanmugam attempted to answer various questions from Justice Gorsuch, and a good portion of the questions pertained to how the Court should interpret its precedents that dealt with jurisdiction over crimes committed on lands ("Indian Country") reserved for Native American ("Indian") tribes.[4] Mr. Shanmugam's answers to the questions revealed a wider controversy. According to Mr. Shanmugam, the State of Oklahoma had a compelling interest in protecting the citizens of its state, including its tribal citizens, when it came to prosecuting crimes committed in Indian Country.[5] But who would be considered a tribal citizen for purposes of these kinds of prosecutions? That question was danced around during the arguments, and by the time the Justices wrapped up their questions, an explicit answer was not given.[6] Just from the perspective gleamed from the oral arguments, the Justices did not seem ready to take on an Indian status test for cases that would follow *Castro-Huerta*.[7]

Federal courts are courts of limited jurisdiction.[8] With that said, there are approximately 574 federally recognized Native American tribal nations that

2. *See id.* at 12:1-21.

3. 142 S. Ct. 2486 (2022).

4. Transcript of Oral Argument, *supra* note 1, at 12:11-25, 13:1-8, 13-22, 14:5-18, 19:9-25. For purposes of this Note, the categorical classification of someone who is deemed to be Native American shall hereafter be referred to as "Indian" because that is the term routinely used in the courts. Additionally, courts and governments routinely use the term "Indian Country" when referring to lands reserved for Native American tribes. *See Definition of Indian Country*, EPA, https://www.epa.gov/pesticide-applicator-certification-indian-country/definition-indian-country [https://perma.cc/S34E-T4PM]; *see also* 18 U.S.C. § 1151 (defining the term "Indian country" as being, among other things, any Indian reservation). Thus, the term "Indian Country" is widely used in this Note.

5. Transcript of Oral Argument, *supra* note 1, at 18:24-25, 19:1-8.

6. *See id.* at 6:6-25, 7:19-24.

7. *See id*. at 7:25, 8:1-10. Later in the oral argument after Justice Gorsuch's deluge of questions, Justice Barrett floated how there is a "possibility for a conflict" with tribal sovereignty when the dispute of Indian status of the perpetrator of the crime is brought up as a part of the legal proceedings of the prosecutions. *Id.* at 69:25, 70:1-13. Mr. Shanmugam did not proffer much of a response beyond stating, "I think that the [S]tate in good faith attempts to make that determination taking into account enrollment in the tribe as one of the factors [of tribal citizenship]." *Id.* at 71:11-19.

8. *See* Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994) (declaring that federal courts are courts of limited jurisdiction because they possess judicial authority only as vested by the Constitution and statute); 28 U.S.C. § 1331 (providing for federal jurisdiction for "all civil actions arising under the Constitution, laws, or treaties of the United States"); 28 U.S.C. § 1332

exist within the United States.[9] That fact affects prosecutorial considerations in federal courts because the allocation of jurisdiction for matters transpiring in Indian Country implicates competing interests among the federal government, state governments, and tribal governments.[10] There are two major federal statutes that cover the apportionment of jurisdiction in criminal matters that transpire in Indian Country: the General Crimes Act[11] and the Major Crimes Act.[12] The General Crimes Act ("§ 1152") provides for federal jurisdiction over non-major 'interracial' crimes that occur in Indian Country, which means that the crime must involve a non-Indian perpetrator and an Indian victim.[13] That distinction is crucial because tribal courts do not have criminal jurisdiction over non-Indians.[14] The full text of § 1152 is as follows:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
>
> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.[15]

(providing for federal jurisdiction for "all civil actions where the matter in controversy exceeds . . . $75,000 . . . and is between . . . citizens of different States").

9. *Federally Recognized Indian Tribes and Resources for Native Americans*, USA.GOV, https://www.usa.gov/tribes#:~:text=The%20U.S.%20government%20officially%20recognizes, contracts%2C%20grants%2C%20or%20compacts [https://perma.cc/33V4-EKMZ].

10. *See* Lucas v. United States, 163 U.S. 612, 614-15 (1896) (stating that the "judicial tribunals of the Indian nations shall retain exclusive jurisdiction" in criminal matters arising where members of the tribal nation shall be the only parties); Frank R. Pommersheim, *The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction*, 31 ARIZ. L. REV. 329, 332 (1989).

11. 18 U.S.C. § 1152.

12. 18 U.S.C. § 1153; Pommersheim, *supra* note 10, at 332; The names "General Crimes Act" and "Major Crimes Act" are directly taken from the U.S. Department of Justice's description of the statutes. *Criminal Resources Manual 601-699: 678. The General Crimes Act – 18 U.S.C. § 1152*, U.S. DEP'T OF JUST. ARCHIVES, https://www.justice.gov/archives/jm/criminal-resource-manual-678-general-crimes-act-18-usc-1152 [https://perma.cc/8J6H-4YLN]; *Criminal Resources Manual 601-699: 679. The Major Crimes Act – 18 U.S.C. § 1153*, U.S. DEP'T OF JUST. ARCHIVES, https://www.justice.gov/archives/jm/criminal-resource-manual-679-major-crimes-act-18-usc-1153 [https://perma.cc/35YE-2Z2E].

13. 18 U.S.C. § 1152; *see also* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 201 (1978) (describing how § 1152 extends "federal enclave law to the Indian country" but where "the only exception" to that statute is for any offense committed "by one Indian against another" in Indian Country). The determination of Indian status for jurisdictional purposes will be explained later in this Note.

14. *Oliphant*, 435 U.S. at 208.

15. 18 U.S.C. § 1152.

The first sentence of the second paragraph is where the statute specifically provides for its applicability only to offenses that are committed by a non-Indian perpetrator against an Indian victim (the "interracial" aspect of the statute).[16]

The Major Crimes Act provides for federal jurisdiction for the prosecution of "major" crimes like murder, manslaughter, kidnapping, burglary, robbery, and other serious offenses committed by an Indian against another Indian, or any other person.[17]

In 2021, the Fifth Circuit Court of Appeals decided the case of *United States v. Haggerty*.[18] In that case, the court considered whether the Government had properly prosecuted the defendant, Justin Haggerty, by meeting or not meeting every element of § 1152.[19] Haggerty said the Government did not properly convict him because it had failed to plead and prove, through sufficient evidence, that he was categorically non-Indian.[20] According to Haggerty, it was incumbent on the Government to plead and prove his non-Indian status because only then could he be prosecuted under § 1152; therefore, anything less than proving his non-Indian status negated his conviction.[21] The Fifth Circuit affirmed the trial court's conviction of Haggerty.[22] The U.S. Supreme Court had an opportunity to hear the *Haggerty* case on appeal, but denied Haggerty's Petition for a Writ of Certiorari in early 2022.[23] Thus, the appeal process for Haggerty was complete, but prosecutorial conundrums over § 1152 persisted into 2022.[24] The Fifth and Ninth Circuits remained split on the issue with the Tenth Circuit.[25]

Then in the summer of 2022, the Supreme Court decided *Castro-Huerta*.[26] The Court in that case held that § 1152 ultimately did not preempt Oklahoma's (or more broadly, any individual U.S. state's) authority to prosecute a crime committed by a non-Indian against an Indian victim, essentially providing for concurrent jurisdiction for federal and state prosecutors when a non-Indian defendant shall be subjected to criminal prosecution for crimes committed in Indian Country.[27] Despite that, the Court did not specifically address whether the factual determination of the perpetrator's Indian status was either a prosecutorial burden to prove as an element derived from the statute itself, or

16. *Id.*
17. 18 U.S.C. § 1153.
18. 997 F.3d 292, 303-04 (5th Cir. 2021).
19. *Id.* at 295.
20. *Id.*
21. *Id.*
22. *Id.* at 304.
23. *Haggerty*, 997 F.3d at 292 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 759 (2022) (No. 21-516).
24. *See id.*
25. Petition for Writ of Certiorari at 8-12, Haggerty v. United States, 142 S. Ct. 759 (2022) (No. 21-516), 2021 WL 4668942, at *8-12.
26. *Castro-Huerta*, 142 S. Ct. at 2486.
27. *Id.* at 2495.

whether that material fact is reserved as an affirmative defense for the defendant.[28] But regardless, the Court's majority opinion vastly affected the discussion around not just § 1152, but on the recurring issue of tribal sovereignty and its status as a legally cognizable principle.[29]

This Note discusses how the recent *Castro-Huerta* Supreme Court decision affects the circuit split in the federal circuit courts concerning whether the determination of the defendant's and the victim's Indian status in a criminal proceeding under § 1152 should be considered a burden that the prosecution must prove, or whether that determination should exist as an affirmative defense available to the defendant. In essence, this Note will address the Indian status test and the wider construction of § 1152 in the post-*Castro-Huerta* era.

Part I of this Note discusses relevant background information, namely the formulation of § 1152 including its particular elements and exceptions and a brief exploration of how Indian status has been determined for purposes of judicial proceedings. Part II discusses the relevant federal circuit court cases that provide varied interpretations of § 1152's Indian status requirement, leading to the current circuit split. Part III explains the essential facts of the *Castro-Huerta* case and examines the majority opinion and the dissent.[30] Part IV synthesizes the details on the circuit split discussed in Part II with the Court's holding in *Castro-Huerta* discussed in Part III, analyzes § 1152's re-contextualization post-*Castro-Huerta*, and provides recommendations for a review of this legal issue going forward. Part IV will discuss predictions for any future Supreme Court or federal appellate court decisions concerning jurisdiction in criminal proceedings under § 1152, followed by the conclusion.

I. BACKGROUND

A. The Composition of § 1152

As previously stated, § 1152 provides that the "general laws of the United States as to the punishment of crimes committed in any place within the sole and

28. *See id.*

29. *See* Angela R. Riley & Sarah Glenn Thompson, *Mapping Dual Sovereignty and Double Jeopardy in Indian County Crimes*, 122 COLUM. L. REV. 1899, 1910 (2022) (detailing how tribal sovereignty rests on treating tribes as distinct political entities and that "the tribal-federal framework serve[s] as a buffer against state encroachment into tribal affairs and provide[s] [a] certain measure of protection for tribal autonomy"); *see also* Grant Christensen, *Using Consent to Expand Tribal Court Criminal Jurisdiction*, CAL. L. REV. (forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4217127 [https://perma.cc/LRH3-FZAE] (writing that the Supreme Court, as a consequence of its *Castro-Huerta* decision, has "disrupted two centuries of precedent").

30. *See Castro-Huerta*, 142 S. Ct. at 2486, 2505. These portions of the Note are by no means an exhaustive examination of both the majority opinion and the dissent in *Castro-Huerta*. The reader is encouraged to read the full opinion and dissent in the case because the actual full text of the Justices' reasoning is the best possible supplement to this Note.

exclusive jurisdiction of the United States, except the District of Columbia, . . . extend to the Indian Country."[31] The statute itself is relatively short, consisting of just two sentences which in turn form two small paragraphs.[32] The statute was passed in 1817 by Congress as a means of extending federal enclave laws to Indian Country where federal jurisdiction over violations of those enclave laws may be enforceable when the perpetrator is either Indian or non-Indian and the victim is non-Indian.[33] The statute is codified in Title 18 of the U.S. Code, which is the title that covers crimes and criminal procedure.[34]

In the second sentence, the statute provides three legislative exceptions to the Government's use of § 1152 to prosecute offenses committed in Indian Country.[35] According to the statute's plain text, it does not extend to: (1) "offenses committed by one Indian against the person or property of another Indian;" (2) "to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe;" or (3) "to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively."[36]

B. Determining Indian Status

The determination of whether a party qualifies as an Indian has been an important driving force of federal criminal jurisdiction in its dealings with tribal nations and the courts alike. The process of figuring out one's Indian status is partially informed by arbitrary judicial tests and the history of tribal citizenship recognition.[37] Tribal citizenship is linked with tribal self-determination in that it often manifests as tribes arguing for their own right to oversee, and even try, individuals who are members of that tribe in criminal proceedings.[38] So the establishment of Indian status has implications for the types of cases that shall be brought in either federal court or tribal court.[39]

31. 18 U.S.C. § 1152.

32. *See id.*

33. *See* Riley & Thompson, *supra* note 29, at n.57 (explaining that federal enclave laws are "laws that apply within the maritime and territorial jurisdiction of the federal government and include offenses such as arson, assault, theft, manslaughter, murder, and various sex offenses, among others"); *see also* 18 U.S.C. § 1153.

34. *See generally* 18 U.S.C. §§ 1-2250 (showing table disposition of all sections in Title 18).

35. Riley & Thompson, *supra* note 29, at 1910.

36. 18 U.S.C. § 1152.

37. *See* United States v. Bruce, 394 F.3d 1215, 1218 (9th Cir. 2005) (explaining that jurisdiction over Indians in Indian Country is a complicated patchwork of federal, state, and tribal law, and generally "is better explained by history than by logic").

38. Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 845 (2006).

39. *See* Pommersheim, *supra* note 10, at 330 ("[A]ctions properly brought in tribal court are not subject to *jurisdictional* attack in federal court until there is an exhaustion of tribal remedies,

1. Judicial Ruminations on the Indian Status Test

The U.S. Supreme Court came about as close as it could have in defining a test to determine a party's Indian status in the case of *United States v. Rogers*.[40] In that case, the Court stated that an individual may qualify as an Indian if that individual (1) has some Indian blood, and (2) is recognized as an Indian by a tribe or the federal government or both.[41] The Court's jurisprudence on the Indian status test was later developed in subsequent cases like *Oliphant v. Suquamish Indian Tribe*.[42] There, the Court stated that tribes should not be able to exercise jurisdiction over non-Indians.[43] According to the Court, the tribes cannot exercise such jurisdiction because Congress is doing its job in providing "effective protection for the Indians" when it assumes jurisdiction for the federal government for those crimes where the perpetrator is non-Indian but the victim is Indian.[44] It would appear that the Court wanted to position the federal government as an amicable overseer of the various affairs of the tribal nations,[45] but even more importantly, it delineated one particular scenario where tribes could not seek any judicial proceedings of their own: when the perpetrator was non-Indian and the victim was Indian (and both were somehow verified).[46]

Interestingly enough from a policy standpoint, the Court built off the establishment of a rough test for Indian status and held in the 2004 case of *United States v. Lara* that Congress could lift restrictions on Indian tribes' criminal jurisdiction over nonmember Indians.[47] The Court reached this conclusion on a theory that the Indian Commerce and Treaty Clauses within the U.S. Constitution grant Congress the plenary power necessary to legislate matters with respect to Indian tribes.[48] According to the Court, the logic of that theory

and . . . questions about the permissible limits of tribal court jurisdiction are ultimately legitimate federal questions.").

40. 45 U.S. 567 (1846).

41. *Id.* at 572-73.

42. *See* 435 U.S. 191, 197-99 (1978) (detailing how jurisdiction was handled in cases involving parties who identified as citizens of tribal nations and how that jurisdiction developed in the tribal and United States court systems).

43. *Id.* at 212.

44. *Id.* at 201.

45. Notably, this decision occurred 150 years after *Johnson v. M'Intosh*. In that case, Chief Justice Marshall wrote that the Doctrine of Discovery gave European nations an absolute right to New World lands. 21 U.S. 543, 573 (1823). Effectively, *Johnson* became part of federal law and was used to dispossess tribal nations of their lands over the ensuing decades. *Doctrine of Discovery*, UPSTANDER PROJECT, https://upstanderproject.org/learn/guides-and-resources/first-light/doctrine-of-discovery#_ftn1 [https://perma.cc/V7DT-VY7W].

46. *Oliphant*, 435 U.S. at 201.

47. 541 U.S. 193, 200 (2004); *cf. Oliphant*, 435 U.S. at 212 (ruling that tribes have lost criminal jurisdiction over non-Indians).

48. *Lara*, 541 U.S. at 200.

meant that Congress's plenary power could extend into an oversight of criminal jurisdiction.[49]

Other courts have addressed the Indian status question but used different language than the Court did in *Rogers*, and with greater scrutiny paid to the second *Rogers* prong.[50] For instance, in *United States v. Stymiest* the Eighth Circuit promulgated a five-factor list to ascertain a party's Indian status.[51] The five factors include: (1) enrollment in a tribe; (2) receiving assistance in a manner that is reserved only to Indians; (3) being subjected to tribal court jurisdiction at another time; (4) enjoying the benefits of a tribal affiliation or membership; and (5) adopting the social recognition of Indian social life such as living on a reservation (with some weight therein given to whether or not the person holds themselves out to be Indian).[52] The list is considered to be non-exhaustive.[53]

With the varied interpretations of how to deduce whether or not a party is an Indian, the judicial system remains stagnant on a clearcut approach. The Court's *Castro-Huerta* decision established the new legal precedent of concurrent state and federal jurisdiction over crimes committed in Indian Country by non-Indian perpetrators on Indian victims, allowing state trial and appellate courts to borrow tests from prior federal courts faced with the Indian status question.

II. THE CIRCUIT SPLIT

The circuit split over the Indian status question as it relates to prosecuting crimes under § 1152 is premised on the disagreement appellate courts have over the elemental breakdown of § 1152 and how the Indian status question should factor into the construction of the statute.[54] As previously addressed, § 1152 is only two sentences, leaving open the legal issue as to whether or not the statute has strict "elements" in the traditional sense of other criminal statutes.[55]

49. *See id.* at 212 (Kennedy, J., concurring).

50. *See generally* United States v. Stymiest, 581 F.3d 759, 763 (8th Cir. 2009) (ruminating on how a party to a case should be identified as an Indian, with attention paid to whether the party "is recognized as an Indian by the tribe or by the federal government or both").

51. *Id.*

52. *Id.*

53. *See* Addie C. Rolnik, *Recentering Tribal Criminal Jurisdiction*, 63 UCLA L. Rev. 1638, 1664-65 (2016) (noting that "the Seventh Circuit uses a totality of the circumstances approach" while the "Tenth Circuit also uses a totality-of-the-evidence approach").

54. *See* Petition for Writ of Certiorari at 8-12, *Haggerty*, 997 F.3d 292 (5th Cir. 2021) (No 20-50203).

55. *See* 18 U.S.C. § 1152.

A. United States v. Haggerty*: The Fifth Circuit*

In the *Haggerty* case, the Fifth Circuit examined the Indian status question within § 1152 as a matter of first impression.[56] The case dealt with a man, Justin Haggerty, who, while on land reserved to the Yselta Del Sur Indian Tribe in the region of El Paso County, Texas, stopped and approached a statue and proceeded to pour red paint over it.[57] He then placed a wooden cross in front of it.[58] The statue was of an indigenous woman named Nestora Piarote and the tribe erected the statue to honor the women of their tribe.[59] Haggerty was arrested and indicted under § 1152, along with 18 U.S.C. § 1363 ("§ 1363").[60] Haggerty was eventually convicted in district court and appealed his conviction to the Fifth Circuit.[61] In its opinion, the Fifth Circuit expressly noted that Haggerty physically appeared to be a "white male" per surveillance footage captured of him, but that "neither the stipulation nor the indictment described whether Haggerty was Indian or non-Indian."[62]

The Fifth Circuit considered the Indian status question in the context of Haggerty's proffered first issue on appeal which was that because § 1152 "does not extend to offenses committed by Indian defendants against Indian victims, the Indian/non-Indian statuses of both the defendant and victim are *essential elements of any offense prosecuted under § 1152 and therefore must be proven by the Government*."[63] The Fifth Circuit recognized the prosecution's inclusion of § 1363 in an indictment with § 1152 because § 1363 is considered to be a "federal enclave law" whereby the "situs of the offense is an element of the crime."[64] Therefore, it mattered that Haggerty conducted his crime in Indian Country because otherwise, the indictment would've been tossed out.[65] The Fifth Circuit then reasoned that § 1152 acts as the conduit to make offenses committed by "non-Indian[s]" in Indian Country against Indian victims worthy of prosecution under any other federal enclave law.[66]

56. *Haggerty*, 997 F.3d at 298.

57. *Id.*

58. *Id.* The total estimated damage was $1,800. *Id.* at 294 n.1.

59. *Id.* at 294.

60. *Id.* at 295. 18 U.S.C. § 1363 penalizes anyone who "within the special maritime and territorial jurisdiction of the United States, willfully and maliciously destroys or injures any structure, conveyance, or other real or personal property, or attempts or conspires to do such an act."

61. *Haggerty*, 997 F.3d at 295.

62. *Id.*

63. *Id.* (emphasis added).

64. *Id.* at 297 (referencing United States v. Begay, 42 F.3d 486, 498 (9th Cir. 1994)).

65. S*ee id.*

66. *Id.* The Fifth Circuit implicitly reasoned that the victim was Indian because the Yselta Del Sur Indian Tribe was the party that suffered property damage due to Haggerty's conduct. *Id.* at 295 n.3. Therefore, the Fifth Circuit did not engage in a determination of the victim's Indian status in this case because it was plainly obvious.

The Fifth Circuit chose to consider whether the fact of the defendant's Indian status is an affirmative defense that must be raised by a defendant by looking at the plain text of § 1152 and the principles of statutory construction.[67] Doing so, the court cited the Supreme Court's rule in *McKelvey v. United States* that if a clause or provision of a criminal statute contains an exception, then that clause should be construed as an affirmative defense and not an element of the crime itself.[68] The court further reasoned that if an exception may be omitted from a statute altogether without "doing violence to the definition of the offense," then the exception is likely to be an affirmative defense.[69] The court regarded the entire second sentence of § 1152 as a list of exceptions to the first sentence, which it states is the "general definition" section.[70] Indeed, the court said that § 1152 could still be accurately described without reference to the Indian status exception as the following: "[w]hoever maliciously destroys property in Indian country is guilty of an offense."[71]

Thus, the court affirmed the Government's prosecution of Haggerty on the basis that his Indian status was really an affirmative defense left to the use of Haggerty as the defendant, and because he failed to raise such a defense, the Government had otherwise addressed every element of the prosecution.[72] In coming to this conclusion, the Fifth Circuit essentially held that the Government would only need to effectively plead and prove that the crime took place in Indian Country and not worry about the defendant's Indian status in order for an indictment brought under § 1152 to validly proceed.[73]

The Fifth Circuit noted that it was following the same logic in reaching their conclusion as the Ninth Circuit did in the 1983 case of *United States v. Hester*. As addressed below the Ninth Circuit determined that it would be far more manageable for the Indian status question to be left up to the defendant as an affirmative defense because otherwise it would be incumbent on the Government to "produce evidence that [the defendant] is not a member of any one of the hundreds of such tribes."[74]

67. *Id.* at 299 (referencing United States v. Steele, 147 F.3d 1316, 1320 (11th Cir. 1998)) (describing that Congress has the authority to specify in its statutes "whether a given factor must be pleaded by the government in the indictment as an element of an offense, or affirmatively raised by the defense as part of its case").

68. *Id.* at 299-300 (citing McKelvey v. United States, 260 U.S. 353, 357 (1922)).

69. *Id.* at 300 (referencing United States v. McArthur, 108 F.3d 1350, 1353 (11th Cir. 1997)).

70. *Id.*

71. *Id.*

72. *Id.* at 302, 304 (declaring formally that "Haggerty's conviction and sentence are AFFIRMED").

73. *Id.* at 302.

74. *Id.* at 300 n.11 (referencing United States v. Hester, 719 F.2d 1041, 1043 (9th Cir. 1983)).

B. United States v. Hester*: The Ninth Circuit*

In *Hester*, the Ninth Circuit contemplated the prosecutorial elements of § 1152 in a case where a man named Terry Lee Hester ("Hester") was convicted of child molestation crimes involving Indian pupils at a boarding school located on the Navajo Reservation.[75] Hester was found guilty of the alleged crimes by a jury and then appealed, arguing that the district court erred by not dismissing the indictment on account of the Government not alleging Hester's non-Indian status in the indictment.[76] The indictment in fact did not allege Hester's Indian status, nor imply it.[77] Rather, the indictment alleged that the victims were Indian and the offense was committed in Indian Country.[78] At oral argument, the Government stated that it did not believe that it should have to meet the burden of alleging and establishing that § 1152 would not be applicable to the defendant because he would be an Indian, and that the Government was permitted to omit any allegation relating to the defendant's Indian status.[79] The Ninth Circuit concurred in the Government's position.[80]

The Ninth Circuit established logic that the Fifth Circuit would follow in *Haggerty* thirty-eight years later.[81] The Ninth Circuit held that the Supreme Court's *McKelvey* rule should guide a court's interpretation of the elemental breakdown of § 1152.[82] Like in *Haggerty*, the Ninth Circuit emphasized the Court's reasoning in *McKelvey* that "it is incumbent on one who relies on . . . an exception [to a statute] to set it up and establish it."[83] The Ninth Circuit said that practically, the defendant should be entrusted to "shoulder the burden of producing evidence that he is a member of a federally recognized tribe" versus the Government somehow finding a way to show that he is not a member of any of the federally recognized tribes.[84] According to the Ninth Circuit, this holding would not alleviate the Government of having to carry the ultimate burden of proof on convicting the defendant of the alleged crime(s), but it would provide

75. *Hester*, 719 F.2d at 1042. The Ninth Circuit referred to § 1152 as the "Federal Enclaves Act" in this case. *Id.* Perhaps the Ninth Circuit labeled it as such because the statue functionally incorporates federal enclave laws to be applicable to Indian Country. Hester was charged with violating the federal enclave law of 18 U.S.C. § 13 which is applicable to Indian Country via § 1152. *Id.* at 1043. *See also Criminal Resources Manual 601-699: 678. The General Crimes Act – 18 U.S.C. § 1152*, *supra* note 12 (describing how the "laws" cited in the first section of the statute are those "applicable within the Special Maritime and Territorial Jurisdiction of the United States . . . popularly known as 'federal enclave laws'").

76. *Hester*, 719 F.2d at 1042.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*; *see Haggerty,* 997 F.3d at 300 n.11.

82. *Hester*, 719 F.2d at 1042.

83. *Id.* (quoting *McKelvey*, 260 U.S. at 357).

84. *Id.* at 1043.

the Government with a reasonable lightening of its responsibilities when prosecuting under § 1152.[85]

The Indian status of the defendant was also addressed.[86] As the Ninth Circuit noted, the defendant was deemed to be non-Indian on account of testimony from his former fiancée that the defendant told her that he was of German ancestry, which led to his fiancée filling out a state tax form for him and marking him as being "caucasion."[87] Furthermore, the defendant did not receive any exemptions on the taxes normally reserved for Indians.[88]

Thus, the Ninth Circuit established that the Indian status question is an issue reserved for the defendant to allege, not the Government, which the Fifth Circuit agreed with in *Haggerty*.[89]

C. United States v. Prentiss*: The Tenth Circuit*

Following the Ninth Circuit's decision in *Hester*, but about twenty years before the Fifth Circuit affirmed the Ninth Circuit in *Haggerty*, the Tenth Circuit created a definitive circuit split when it held in *United States v. Prentiss* that the Indian status question is an essential element of § 1152, which meant it was not reserved as an affirmative defense and must be alleged by the Government.[90] The defendant, Ricco Prentiss, was charged and convicted with committing arson under 18 U.S.C. § 81 as made applicable in Indian Country via § 1152.[91] He challenged his conviction on appeal, arguing that because the Government failed to allege the two elements of both his Indian status and the victim's Indian status in the indictment, the indictment itself was insufficient.[92] The Tenth Circuit held first in a divided panel, and then again in a rehearing *en banc*, that the Government should have alleged the defendant's and victim's Indian statuses.[93]

The Tenth Circuit addressed the prior *Hester* decision, as well as other Supreme Court cases, in reaching its conclusion.[94] Unlike the Ninth Circuit in *Hester*, the Tenth Circuit said it was "not persuaded" that the "status of the defendant should be treated differently from the status of the victim."[95] The Tenth Circuit viewed § 1152 as a statute that established federal jurisdiction over "interracial crimes only," meaning that it was integral to the statutory makeup

85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*; *see also Haggerty*, 997 F.3d at 302.
90. United States v. Prentiss, 256 F.3d 971, 971 (10th Cir. 2001).
91. *Id.* at 973.
92. *Id.*
93. *Id.* at 972-73.
94. *See generally id.* at 974-75, 977-78.
95. *Id.* at 978.

to define the defendant as being of a different race than the victim.[96] The Tenth Circuit said that neither the Supreme Court's decisions in *Lucas v. United States*[97] or *Smith v. United States*[98] established any rule that the defendant must plead his Indian status.[99] The Tenth Circuit interpreted the Court's reasoning in those two cases to mean that the Court implicitly suggested that the defendant need not bear the burden of pleading Indian status nor persuading the factfinder of it.[100] Further, the Tenth Circuit said that *Lucas* and *Smith* "treat the victim's status as an element—a constituent part of the crime that the [G]overnment must raise in the indictment."[101]

Thus, the Tenth Circuit, using statutory construction and citing Supreme Court precedent, reached an opposite holding than the Fifth and Ninth Circuits did on this issue.[102] The Tenth Circuit further clarified that if the Government alleged Indian status of the defendant and victim (as per the Tenth Circuit's logic on how to construct § 1152), but failed to prove those elements along with all other elements in the applicable federal enclave criminal statute, then the defendant would be plainly "entitled to acquittal."[103]

III. CASTRO-HUERTA

The *Castro-Huerta* case is the most recent Supreme Court case that has expressly discussed § 1152. The Court's decision did, and will continue to, severely affect the discussions pertaining to a state court's infringement on both federal and tribal jurisdictional interests.

A. Essential Facts of the Case

Victor Manuel Castro-Huerta ("Castro-Huerta") lived in Tulsa, Oklahoma, with his wife and their children, including a five-year-old stepdaughter ("child") who is Cherokee Indian.[104] One day, Castro-Huerta's sister-in-law was in his house and noticed the child was sick.[105] The child was taken to a hospital in

96. *Id.* at 974.

97. *See* Lucas v. United States, 163 U.S. 612, 618 (1896).

98. *See* Smith v. United States, 151 U.S. 50, 50 (1894).

99. *Prentiss*, 256 F.3d at 975-76. In *Lucas*, the Court held that the Indian status of the victim was a question of fact and the Government bore the burden of "sustain[ing] the jurisdiction of the court by evidence as to the status of the [victim]." *Lucas*, 163 U.S. at 616-17. In *Smith*, the Court held that the victim's Indian status was a fact that the Government had to introduce evidence to establish. *Smith*, 151 U.S. at 55.

100. *Prentiss*, 256 F.3d at 975-76.

101. *Id.*

102. *See id.* at 982.

103. *Id.*

104. *Castro-Huerta*, 142 S. Ct. at 2491.

105. *Id.*

Tulsa in critical condition, and deemed to be extremely malnourished.[106] Castro-Huerta admitted that he underfed the child during the preceding month, leading the State of Oklahoma to criminally charge him (and his wife) for child neglect.[107] He was tried, convicted, and sentenced to thirty-five years in prison.[108] He appealed this conviction.[109]

While Castro-Huerta's appeal was pending in Oklahoma state court, the Supreme Court decided the highly consequential case of *McGirt v. Oklahoma* in 2020.[110] This case required the Court to consider whether an Indian defendant was improperly convicted in Oklahoma state court on the theory that the Major Crimes Act[111] preempted state jurisdiction for McGirt's prosecution and only federal courts had jurisdiction over him.[112] McGirt noted that only Congress can diminish or outright disestablish an Indian reservation.[113] Indeed, the majority held that Congress never expressly disestablished the Creek Nation's Indian reservation, which existed in the eastern portion of Oklahoma.[114] Thus, the Creek Nation reservation remained Indian Country, which in turn meant that the entire area that the reservation covered, which included the city of Tulsa, was Indian Country.[115] That reasoning meant that because McGirt's crime transpired in Indian Country, his conviction in Oklahoma state court was improper as states should not have jurisdiction over Indian-on-Indian crime in Indian Country as per the Major Crimes Act.[116] In the majority opinion, Justice Gorsuch noted the dissent's worry that the holding would "frustrate the State's ability to prosecute crimes in the future" within its borders.[117] But Justice Gorsuch noted that § 1152 allowed for federal law to be applied to a "broader range of crimes by or against Indians in Indian country" and that "[s]tates are otherwise free to apply their criminal laws in cases of non-Indian victims and defendants, including within Indian country."[118] Thus, *McGirt* is seen as a hallmark victory for tribal sovereignty due to its reaffirmation of such sovereignty.[119]

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*; *see* 140 S. Ct. 2452 (2020).

111. 18 U.S.C. § 1153 (recall that this statute provides for federal jurisdiction in cases involving major crimes committed by an Indian against another Indian, or any other person, in Indian Country).

112. *McGirt*, 140 S. Ct. at 2452.

113. Adam Crepelle, *The Reservation and the Rule of Law: A Short Primer on Indian Country's Complexity*, 70 LA. BAR J. 192, 192 (2022).

114. *Castro-Huerta*, 142 S. Ct. at 2491.

115. *Id.* at 2491-92.

116. *See* Crepelle, *supra* note 113, at 193.

117. *McGirt*, 140 S. Ct. at 2479.

118. *Id.*

119. *See* Crepelle, *supra* note 113, at 193.

The Court had to reconcile the *McGirt* holding with the facts of *Castro-Huerta* because Castro-Huerta argued that the federal government's jurisdiction to prosecute crimes perpetrated by a non-Indian against an Indian in Indian Country was exclusive, so Oklahoma could not have prosecuted him.[120] The Court granted certiorari in *Castro-Huerta* to determine whether a state has concurrent jurisdiction with the federal government to prosecute crimes committed by non-Indians against Indians in Indian Country.[121]

B. The Majority's Holding

Writing for the majority, Justice Brett Kavanaugh held that § 1152 did not preempt state jurisdiction over crimes committed by non-Indians against Indians in Indian Country, and that the federal government and every U.S. state have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian Country.[122] The Court reasoned that a state may exert greater control over matters within its borders than previously thought, especially when compared to the majority's opinion in *McGirt* a couple years prior.[123] Justice Kavanaugh wrote that "the Constitution allows a State to exercise jurisdiction in Indian [C]ountry" because "Indian [C]ountry is part of the State, not separate from the State."[124]

The Court relied on a certain construction of § 1152 to dispel with Castro-Huerta's argument that the statute provides for exclusive federal jurisdiction in crimes committed by non-Indians against Indians in Indian Country.[125] The majority opinion held that Castro-Huerta's interpretation of § 1152 was erroneous and found § 1152 to mean something different.[126]

Justice Kavanaugh's majority opinion starts off by flatly stating that § 1152 does provide for the extension of the laws regarded as "the general laws of the United States . . . committed in any place within the sole and exclusive jurisdiction of the United States" to be applicable to Indian Country.[127] Justice Kavanagh clarifies that those "general laws" are "the federal laws that apply in federal enclaves such as military bases and national parks."[128] In refuting Castro-

120. *Castro-Huerta*, 142 S. Ct. at 2492.

121. *Id.* at 2492-93.

122. *Id.* at 2504.

123. *Id.* at 2493.

124. *Id.* Justice Kavanaugh goes on to quote single sentences from a few past Court decisions where the Court discussed how Indian territories can be viewed as being a part of the state in which the territories lie. The quote from the most recent decision, the 2001 case of *Nevada v. Hicks*, broadly exclaims that "State sovereignty does not end at a reservation's border." 533 U.S. 353, 361 (2001).

125. *See generally Castro-Huerta*, 142 S. Ct. at 2495-97.

126. *Id.* at 2496.

127. *Id.* at 2495.

128. *Id.*

Huerta's central arguments, the majority posited that § 1152 "does not say that Indian [C]ountry is equivalent to a federal enclave for jurisdictional purposes[,] [n]or does the Act say that federal jurisdiction is exclusive in Indian [C]ountry, or that state jurisdiction is preempted in Indian [C]ountry."[129] Thus, the Court's strict interpretation of § 1152 points to the statute's lack of clarity in plainly declaring whether or not Indian Country is *equivalent* to a federal enclave, and thereby reserved solely for federal jurisdiction to the exclusion of the individual state's criminal justice system.[130]

The majority relied on some precedent to flush out this interpretation of § 1152. The opinion references the Court's 1891 decision in *In re Wilson* where, according to the majority, the Court stated that the phrase "sole and exclusive jurisdiction" in § 1152 "is 'only used in the description of the laws which are extended' to Indian [C]ountry, not 'to the jurisdiction extended over the Indian [C]ountry.'"[131] Thus, Justice Kavanaugh, like Justice Gorsuch who provided historical background in the dissent, pointed to older cases to advance the theory that the federal government did not enjoy sole jurisdiction over certain crimes in Indian Country, committed by certain perpetrators against Indian victims.[132]

All in all, the majority opinion established new Court precedent with its reading of § 1152: the statute does not treat Indian Country as equivalent to a federal enclave for purposes of jurisdiction, nor does the statute preempt a state's ability to enforce its laws in Indian Country.[133] The dissent laid bare the split between historical understandings.[134]

C. Justice Gorsuch's Dissent

Writing in dissent, Justice Gorsuch denounced the majority opinion, as well as the State of Oklahoma's arguments, and posited that until Congress specifically alters a tribal nation's sovereign status, that tribal nation shall enjoy full sovereign benefits in perpetuity.[135] The dissent chiefly characterized Oklahoma's efforts to transfer Castro-Huerta to a state prison as an effort to "gain a legal foothold for its *wish* to exercise [such] jurisdiction . . . on tribal lands."[136] Such an effort had not yet been successfully attempted "in over two centuries" by a single U.S. state until Justice Kavanaugh's majority opinion made it so.[137]

129. *Id.*
130. *See generally id.*
131. *Id.* (referencing In re Wilson, 140 U.S. 575, 578 (1891)).
132. *See generally id.*
133. *Id.* at 2496.
134. *Id.* at 2505 (Gorsuch, J., dissenting).
135. *Id.*
136. *Id.* at 2510 (emphasis added).
137. *Id.*

Justice Gorsuch emphasized historical promises and patterns in his dissent. Specifically, he looked at the history of tribal nations in Oklahoma being promised that only the tribe or the federal government would be able to punish crimes by or against tribal members occurring in Indian Country.[138] This historical framing included remarks from President George Washington, who said in a 1790 letter, "the United States . . . posses[es] the only authority of regulating an intercourse" with tribal nations "and redressing their grievances."[139] He also remarked how Thomas Jefferson, whom the Justice said was "the great defender of the States' powers," still "agreed that 'under the present Constitution' no 'State [has] a right to Treat with the Indians without the consent of the General Government.'"[140] Justice Gorsuch even wrote how the Constitution itself "afforded Congress authority to make war and negotiate treaties with the Tribes" whereas it "barred" the states from performing either function.[141]

Justice Gorsuch frames § 1152 as a statute conceived out of the special relationship between the tribes and the federal government.[142] Referencing the original formation of § 1152 in the 1830s, Justice Gorsuch claimed that the statute served the important purpose of furthering "a promise by the federal government 'to punish crimes . . . committed . . . by and against our own [non-Indian] citizens.'"[143] That "promise" was traced to the federal government's various treaties with the tribes in propagating § 1152, according to Justice Gorsuch.[144] This portion of the dissent emphatically states that § 1152 "remains

138. *Id.* at 2505.

139. *Id.* at 2506 (quoting Letter to T. Mifflin (Sept. 4, 1790), *in* PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 396 (D. Twohig ed., 1996)). Note that President Washington's tenure in office predated the forced relocation of the Cherokee tribe (among others) during the Trail of Tears, a policy proffered by President Jackson in the 1830s. *Multi-State: Trail of Tears National Historic Trail*, NAT'L PARK SERV., https://www.nps.gov/articles/trailof tears.htm#:~:text=Guided%20by%20policies%20favored%20by,Southeast%20in%20the%20ear ly%201800s [https://perma.cc/ZZJ9-F87Z]. Justice Gorsuch was likely using President Washington's letters to illustrate an originalist argument that tribal sovereignty was a foundational belief of the Founding Fathers in the eighteenth century.

140. *Castro-Huerta*, 142 S. Ct. at 2506 (quoting Letter to H. Knox (Aug. 10, 1791), *in* PAPERS OF THOMAS JEFFERSON 27 (C. Cullen et al. eds., 1986)).

141. *Castro-Huerta*, 142 S. Ct. at 2506.

142. *Id.* at 2507.

143. *Id.*

144. *Id.* This helps explain Justice Gorsuch's emphasis of the importance of the treaties when he questioned Mr. Shanmugam during oral arguments—a quote of which appears on the first page of this Note. Justice Gorsuch wanted to make it clear during oral argument, as well as in his dissent, that a promise between the United States and any federally recognized tribe, as solidified via a treaty, is as powerfully sealed as any modern-day agreement between the United States and a formidable foreign nation. Justice Gorsuch tactically quotes on such a treaty written *after* the Senate's adoption of § 1152—the Treaty with the Cherokee dated December 29, 1835—wherein the United States pledged that the Cherokee tribe shall remain free from "State sovereignties"

in force today more or less in [the] original form" from which it was spawned in the 1830s.[145]

Justice Gorsuch smeared the majority opinion for failing to properly construe § 1152.[146] The dissent interprets the statute to plainly provide for Indian Country to be treated like a federal enclave, which would categorically subject it to only federal control.[147] The dissent says that it wouldn't make sense, at least from a statutory construction standpoint, for the statute to extend state criminal law to Indian Country if nothing in the actual text of the statute provides any explicit manner of conferring jurisdiction.[148] Lastly, the dissent notes that the listed exceptions in the second sentence/paragraph of the statute are, first off, clearly marked, and secondly, are there to ensure that the federal government and state governments do not meddle in cases that likely implicate tribal sovereignty.[149]

A statute known as Public Law 280 is highlighted in the dissent for its potential ability to be a thorn in the side of § 1152 and for Castro-Huerta's position.[150] This statute was passed in 1953, and it granted certain U.S. states criminal jurisdiction over offenses "by or against Indians" and "established procedures by which further States could secure the same authority."[151] Justice Gorsuch importantly notes that the statute was amended after President Richard Nixon declared in 1968 that the "time ha[d] come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions."[152] The amended Public Law 280 required tribal consent before any individual state assumed jurisdiction over crimes by or against Indians in Indian Country, and that the states must amend their respective constitutions as part of this consent process.[153] Justice Gorsuch made sure to highlight Oklahoma's nonexistent effort to obtain such consent from the tribes in order to exercise criminal jurisdiction.[154] Thus, Public Law 280's applicability to the facts, in Justice Gorsuch's eyes, further reinforced the

following the Cherokee's forced removal from the southeastern portion of the United States. *Id.* at 2508.

145. *Id.* at 2507.

146. *Id.* at 2511 (writing that "the power to punish crimes by or against one's own citizens within one's own territory to the exclusion of other authorities . . . has always been among the most essential attributes of sovereignty").

147. *Id.* at 2513.

148. *Id.* (reasoning that it "would hardly make sense to apply federal general criminal law—to address all crimes ranging from murder to jaywalking—if state general criminal law already did the job").

149. *Id.* at 2514.

150. *Id.* at 2508.

151. *Id.*

152. *Id.* at 2509 (quoting Richard M. Nixon, Special Message on Indian Affairs (July 8, 1970)).

153. *Id.*

154. *Id.*

notion that Oklahoma's interests did not trounce the tribes' and the United States' in utilizing § 1152.[155]

IV. ANALYSIS

A. What of the Indian Test and the Circuit Split?

The primary question to consider regarding the federal circuit split on the construction of § 1152 is to what degree does the *Castro-Huerta* decision have an effect on the statute's construction. The construction of § 1152 is at the core of the circuit split, but given the new interpretation of the statute, as opined by Justice Kavanaugh in *Castro-Huerta*, the perspective on the statute's elements and its exceptions will most likely fluctuate for subsequent cases. This section of the analysis addresses the Indian status test's value post-*Castro-Huerta*, its relevancy in each of the cases that generated the federal circuit split, and how each case in the federal circuit split's construction of § 1152 would be viewed by the Supreme Court in this new legal landscape.

1. *The Indian Status Test's Relevancy*

The importance of the Indian status test within the context of the federal circuit split is in some ways unchanged as a result of the *Castro-Huerta* decision. The majority opinion in *Castro-Huerta* creates a presumption of state jurisdiction in matters that concern § 1152.[156] That means that individual U.S. state courts would have to assume their own versions of the Indian status test, a domain previously reserved for the federal and tribal systems.[157] Up until the reconfiguration of jurisdictional understandings as a result of the *Castro-Huerta* decision, federal law and federal case law were the primary instruments by which to parse out the Indian status test.[158] It will likely unfold that individual States must either choose to incorporate the various tests proffered by the Court in past generations, or otherwise venture out on their own and draft their own unique forms of an Indian status test.[159]

Despite *Castro-Huerta*'s seismic shakeup of how jurisdiction over criminal matters transpiring in Indian Country is construed, the decision still did not appear to attempt a reformulation of the Indian status test.[160] By all accounts, the preexisting legal test derived from *Rogers* still appears to be good law in the federal courts.[161] Indeed, the *Rogers* test was not contemplated by the majority

155. *See generally id.* at 2509-10.
156. *Castro-Huerta*, 142 S. Ct. at 2495.
157. *See* Riley & Thompson, *supra* note 29, at 1913.
158. *See* Pommersheim, *supra* note 10, at 330.
159. *See Rogers*, 45 U.S. at 572-73.
160. *See generally Castro-Huerta*, 142 S. Ct. at 2491-2505.
161. *See Rogers*, 45 U.S. at 572-73.

in *Castro-Huerta*, most likely because the Court had limited its review to Castro-Huerta's jurisdictional claim and not to reposition any Indian status test.[162] The decision reads like the Court was proceeding on preexisting assumptions of who is and is not an Indian for purposes of consideration within § 1152. The *Rogers* test has been applied by states as recently as 2020 to help confirm whether a defendant has a certain amount of "blood quantum" which would clarify any legitimate claim he has to identifying as an Indian.[163] The Court did not appear willing, based on the majority opinion, to disturb the *Rogers* formula.

Additionally, the approaches that other federal circuits have in place for administering an Indian status test appear to be unaltered by the *Castro-Huerta* decision. For instance, the non-exhaustive five factor list the Eighth Circuit deployed in the *Stymiest* case does not appear to be substantially affected by *Castro-Huerta* because the Court did not venture into any discussion of the *Stymiest* case nor exercise any renewed scrutiny into the legitimacy of those factors.[164] This could also be explained by the Court's choice to make its ruling in *Castro-Huerta* a jurisdictional one.[165] Thus, a common thread is formed: the Court did not make any proclamation on an Indian status test with *Castro-Huerta*.

Thus, the Indian test, existing in more than one form, remains as relevant as it had been prior to the *Castro-Huerta* decision. § 1152 still requires the designation of the perpetrator's and the victim's Indian statuses; the Court has not yet made any determinations regarding the status falling on the prosecution as a burden to prove or the defendant to use as an affirmative defense.[166] The relaxing of tribal courts' jurisdictional powers, such as what the Court reasoned in the *Lara* case—that Congress holds plenary power to "lift the restrictions on the tribes' criminal jurisdiction over nonmember Indians" (which would have some implications for § 1152)—was never actually refuted, much less mentioned or commented upon, in the *Castro-Huerta* decision.[167] This is frustrating for tribal courts since the *Lara* Court's reasoning remains untouched even with *Castro-Huerta* now becoming the legal precedent on jurisdictional considerations for crimes falling within § 1152 transpiring in Indian Country.[168]

2. United States v. Haggerty & United States v. Hester

The Court would likely regard both the *Haggerty* and *Hester* cases to be erroneously decided given that individual States may now assume the role of

162. *See Castro-Huerta*, 142 S. Ct. at 2489.

163. *See* State v. Nobles, 838 S.E.2d 373, 377 (N.C. 2020).

164. *See generally Castro-Huerta*, 142 S. Ct. at 2491-2505.

165. *Id.* at 2489.

166. *See* 18 U.S.C. § 1152.

167. *Lara*, 541 U.S. at 193; *see generally Castro-Huerta*, 142 S. Ct. at 2491-2505 (choosing to not include any additional words for *Lara*).

168. *Castro-Huerta*, 142 S. Ct. at 2489.

prosecutor, which would likely instill a mandate for the burden to fall on the prosecution to assert Indian status in proceedings implicating § 1152.[169] The Indian status determination would now be a concern for both state and federal prosecutors given the reasoning in *Castro-Huerta* that it does not matter whether the state or the federal government chooses to prosecute a non-Indian defendant for a crime against an Indian victim in Indian Country.[170] However, as has just been discussed, the Court did not engage in any extensive discussion of how Indian status determinations should exist within § 1152 in the *Castro-Huerta* decision, but only that the statute does not preempt the state in prosecuting crimes that fall within the sphere of the statute.[171] The blanket ruling on concurrent jurisdiction nonetheless sends a message to state prosecutors to not only invoke jurisdictional oversight, as derived from the *Castro-Huerta* decision itself, but insist that it is properly asserted that the defendant is non-Indian and the victim is Indian.[172]

The Court would also likely fall back on its realignment of the scope of jurisdiction for § 1152 when responding to the Fifth Circuit's citation of the Court's *McKelvey* rule that exceptions present in criminal statutes are construed as if they are affirmative defenses.[173] The Court would point to its language in *Castro-Huerta* that allows the state to indict the non-Indian defendant for crimes committed in Indian Country against an Indian victim and agree that the state would only need to show that the crime took place in Indian Country. However, the Court would also likely hold that the prosecution must ensure that the Indian statuses of the parties are sufficiently asserted in order for the indictment to proceed.[174]

3. United States v. Prentiss

In opposite fashion to the *Haggerty* and *Hester* cases, the Court would likely hold that the *Prentiss* case was correctly decided because it is vital to satisfy the Indian statuses of the parties involved in an action arising out of § 1152.[175] The Court would likely determine that the Tenth Circuit properly determined that § 1152 concerns "interracial crimes only", thereby making it incumbent on the prosecution to find that the defendant is of a different racial background than the victim.[176] The Court would probably approve of the Tenth Circuit's invocation of the Court's prior decisions in *Lucas* and *Smith* because those decisions affirm

169. *Cf. Haggerty*, 997 F.3d at 295.
170. *Contra id.*
171. *Castro-Huerta*, 142 S. Ct. at 2489.
172. *Id.*
173. *See generally Haggerty*, 997 F.3d at 299-300 (discussing the *McKelvey* rule).
174. *Cf. id.*
175. *See Castro-Huerta*, 142 S. Ct. at 2489.
176. *See generally Prentiss*, 256 F.3d at 974.

the Tenth Circuit's reasoning that the victim's status should be a constituent part of an indictment raised under § 1152.[177]

While not disavowing the ultimate outcome in *Prentiss*, the Court would distinguish some reasoning espoused by the Tenth Circuit, such as that failing to prove that the applicable federal enclave statute exists in the case means an action under § 1152 is not permissible.[178] This is because the Court would likely not require the prosecution to plead the existence of an appropriate federal enclave statute so that it may proceed with an indictment.[179] Justice Kavanaugh plainly asserted that § 1152 "does not say that Indian [C]ountry is equivalent to a federal enclave for jurisdictional purposes."[180] Justice Kavanaugh then declared that Castro-Huerta's arguments, primarily that the text of § 1152 makes Indian Country "the jurisdictional equivalent of a federal enclave," were not persuasive.[181] Thus, the Court would dispel the Tenth Circuit's discussion of federal enclave statutes because the Court would not deem such statutes to be necessary at all under § 1152 actions.[182]

Ultimately, the Court would side with the Tenth Circuit because the Court construes § 1152 so that state and federal prosecutors possess concurrent jurisdiction.[183] As such, the Court would logically determine that the prosecution must keep track of the Indian statuses of all parties involved in the action since the pre-*Castro-Huerta* arguments of exclusive federal jurisdiction under § 1152 no longer exist as a matter of law and Court precedent.[184]

B. Predictions for Future Matters

This section of the analysis will address how potential forthcoming litigation, at both the Supreme Court and the federal appellate levels, concerning § 1152 or cases involving Indian and non-Indian parties may be affected by the Court's decision in *Castro-Huerta*.

Plainly posited, the Court will likely decide in favor of the state when it comes to contesting jurisdictional concerns with the federal government concerning § 1152 actions. The Court's decision in no uncertain terms declares that the states shall enjoy an "inherent" authority (and "sovereignty") to prosecute individuals whom it deems to be in violation of state law, even if they categorically commit such crimes in Indian Country.[185] The Court will fall back on this newly-minted precedent for years to come if it ever hears a case where

177. *See id.* at 975-76.
178. *See id.* at 982.
179. *See Castro-Huerta*, 142 S. Ct. at 2495.
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.* at 2489.
184. *See id.*
185. *Id.* at 2503.

the defendant challenges his conviction in a state court as erroneously decided given that his crime transpired in Indian Country, his victim was an Indian, and he was tried in state court. Whereas Castro-Huerta himself had such a claim prior to 2022, today, he can no longer rest on that argument to overturn his conviction.[186] This effect will trickle down to the federal circuits.

The federal circuits will likely heed the Supreme Court's precedent and rule in favor of individual states, as long as those states were able to plead the Indian statuses of the defendant and the victim. The Indian status test will likely still be deployed by the federal circuits because the Court did not make any substantial changes to preexisting tests. The jurisdictional case law that the federal circuit references with respect to prosecutions in Indian Country will likely wind up relying on the *Castro-Huerta* decision.[187]

Future cases that invoke the following two legal questions will without a doubt be determined by *Castro-Huerta.* Those questions are: (1) "whether Indian country is part of a State or instead is separate and independent from a State;" and (2) "if Indian country is part of a State, whether the State has concurrent jurisdiction with the Federal Government to prosecute crimes committed by non-Indians against Indians in Indian country."[188] These two legal issues were at the crux of Justice Kavanaugh's majority opinion. Therefore, any subsequent action in a federal, or state court that in any way resembles a challenge to either of those issues will have to contend with the majority opinion's reasoning and holdings.

Disputes in future litigation concerning parties who identify as Indian and non-Indian will no doubt raise issues of tribal sovereignty just as they did in *Castro-Huerta*.[189] Indeed, courts have already implicated the *Castro-Huerta* case in opinions wherein the court discusses principles of tribal sovereignty.[190] For instance, in one such recent case, *Mille Lacs Band of Ojibwe v. County of Mille Lacs, Minnesota*, decided in January 2023, the district court in Minnesota

186. *See id.* at 2491 (detailing *Castro-Huerta's* jurisdictional challenge).

187. *See id.* at 2489 (providing the new jurisdictional legal precedent).

188. *Id.*

189. *See id.* at 2527 (Gorsuch, J., dissenting) (writing that Oklahoma has "intrude[d] on a feature of tribal sovereignty recognized since the founding").

190. *See* Mille Lacs Band of Ojibwe v. Cnty. of Mille Lacs, Minnesota, No. 17-CV-05155, 2023 WL 146834, at *17-20, *29 (D. Minn. Jan. 10, 2023); *see also* United States v. Lussier, No. 21-CR-145, 2022 WL 17476661, at *14 (D. Minn. Oct. 11, 2022) ("Nothing in *Castro-Huerta* diminishes the Red Lake Nation's existence as a distinct sovereign entity."). The Court of Criminal Appeals in Oklahoma has also invoked *Castro Huerta* in a December 2022 decision, but that case did not directly concern tribal sovereignty issues. *See* Purdom v. State, 523 P.3d 54, 59 (Okla. Crim. App. 2022) (writing that "*Castro-Huerta* applies to cases pending on direct appeal before this Court" and the case "affects only the manner of determining the defendant's culpability and imposed only procedural changes establishing that both the State and Federal Government may prosecute cases involving non-Indian defendants who perpetrate crimes against Indian victims on the reservation").

referenced *Castro-Huerta* in its analysis of a county's claim that the tribe's interests in self-government should yield to the state of Minnesota's "primacy" interests in a certain context.[191] While the district court wrote that *Castro-Huerta* "did not involve the issue of tribal law enforcement authority" and that "state jurisdiction over Indian country crimes committed by Indians 'could implicate principles of tribal self-government,'" the act of divesting a tribe of its tribal law enforcement authority "would subvert Congress's goal in . . . improv[ing] law enforcement on reservations."[192] Thus, the case law concerning tribal interests and sovereignty disputes, as influenced by *Castro-Huerta*, has already begun to formulate and find ways to decline to extend the majority opinion. The federal circuit courts will have to choose whether or not to formulate a similar interpretation of *Castro-Huerta* as that of the Minnesota district court in *Mille Lacs Band of Ojibwe*.[193]

CONCLUSION

Justice Clarence Thomas notably wrote in *Lara* that "[f]ederal Indian policy is, to say the least, schizophrenic."[194] That sentiment holds as much truth now as it did when Justice Thomas penned those words in 2004.[195] § 1152 has been thrust into a new legal era as a consequence of a Supreme Court that chose to rescind previous interpretations of history, legislative intent, and the concerns possessed by tribal nations for decades on state encroachment on the tribal nations' sovereignty. As has been discussed, the Indian status test has somehow managed to escape relatively unscathed. While the majority in *Castro-Huerta* chose not to entangle Indian status directly into its discussions on jurisdiction, observers must remain wary that the Court may choose to reformulate how to distinguish between an Indian and a non-Indian in judicial proceedings. Such a course of action would dangerously affect tribal nations' sovereignty. The proper acknowledgment of a party's Indian status is integral to maintaining the special legal treatment that citizens who qualify as Indian should continue to enjoy in state and federal court. The prosecution, now likely to pay extra attention to correctly identifying the defendant in a criminal case arising out of Indian Country, must handle that responsibility carefully. Subsequent proceedings involving § 1152 are bound to inflame strong emotions long experienced by tribal nations.

This Note has examined the federal circuit split on the construction of § 1152, has engaged in a discussion of the *Castro-Huerta* case, and estimated the Court's prospective view on the federal circuit split. This article has also

191. Mille Lacs Band of Ojibwe, 2023 WL 146834, at *29.
192. *Id.*
193. *See generally id.* at *17, *29.
194. *Lara*, 541 U.S. at 219 (Thomas, J., concurring).
195. *See id.*

addressed some predictions on how future litigation may be affected by *Castro-Huerta*, particularly litigation concerning tribal sovereignty.

This Note should hopefully be one of many future Notes and Articles that dissect the *Castro-Huerta* case and posit its legal consequences for Indian Country and for the United States judicial system. Future Notes and Articles would be in a better position to incorporate more case law that directly invokes *Castro-Huerta* due to this Note being completed not very long after the decision came down. Speculation continues to loom as to whether states will choose to prosecute more crimes transpiring in Indian Country. One may hope that the states will want to consider that the United States' history and treaties with the tribal nations are still relevant.

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