IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MCKESSON CORPORATION; CARDINAL HEALTH, INC.; AMERISOURCEBERGEN DRUG CORPORATION; CVS HEALTH CORPORATION; WALGREENS BOOTS ALLIANCE, INC.; and WAL-MART STORES, INC., Plaintiffs, vs. TODD HEMBREE, ATTORNEY GENERAL OF THE CHEROKEE NATION, in his official capacity; JUDGE CRYSTAL R. JACKSON, in her official capacity; and DOE JUDICIAL OFFICERS 1-5; Defendants.	No. 4:17-cv-00323-TCK-FHM

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND BRIEF IN SUPPORT

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Plaintiffs hereby move pursuant to Federal Rule of Civil Procedure 65 for a Preliminary Injunction enjoining Defendants from taking any action in *Cherokee Nation v. McKesson Corp., et al.*, Docket No. CV-2017-203, currently pending in the District Court of the Cherokee Nation.

INTRODUCTION

The Cherokee Nation (the "Tribe") has sued six corporations in the District Court of the Cherokee Nation (the "Tribal Court") seeking damages allegedly arising from abuse of opioid drugs by citizens of the Cherokee Nation. The lawsuit alleges that distributors and pharmacies (collectively, "Movants") violated the federal Controlled Substances Act (the "CSA"), 21 U.S.C. §§ 801-904, by distributing or selling FDA-approved medications pursuant to valid prescriptions from licensed physicians. The Movants or their relevant subsidiaries are licensed by or registered with the Drug Enforcement Administration. The Tribal Court so obviously lacks jurisdiction that, under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), this Court should enjoin the assigned Tribal Court judge and the Cherokee Nation's Attorney General from proceeding with the suit.

Because none of the Movants is a member of the Tribe and the alleged conduct did not take place in Indian country, the Tribal Court lacks jurisdiction. Except where a tribe is regulating Indians, "tribal jurisdiction is . . . cabined by geography: The jurisdiction of tribal courts does not extend beyond tribal boundaries." *Philip Morris USA, Inc. v. King Mountain Tobacco Co.*, 569 F.3d 932, 937-38 (9th Cir. 2009). The inherent "sovereignty that the Indian tribes" enjoy "is of a unique and limited character . . . center[ed] on the land held by the tribe and on tribal members within the reservation." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327 (2008) (internal quotation marks omitted). The Tribe's sovereign power simply does not extend to the conduct of non-Indians outside of Indian country. The two narrow exceptions to tribes' limited authority over non-Indians recognized in *Montana v. United States*, 450 U.S. 544, 565 (1981), are inapplicable because Movants' alleged conduct did not occur in Indian country.

The *Montana* exceptions would not apply even if the alleged conduct had occurred in Indian country. None of the alleged conduct relates to the Tribe's interest in regulating self-government or internal relations, a critical threshold showing required for either exception to apply. Nor does the alleged conduct pose a direct threat to tribal sovereignty. Clear Supreme Court precedent establishes that, in such circumstances, the Tribal Court has no jurisdiction.

Even if the Tribe had jurisdiction over the conduct of non-Indians outside of Indian country (which it does not), it still lacks jurisdiction to hear claims based on the CSA. The CSA is enforceable only by the Department of Justice, and only in federal court. The Tribe has no authority to sue for enforcement of the CSA and certainly not in Tribal Court.

Under these circumstances, where federal law plainly deprives the tribal court of jurisdiction, exhaustion of tribal remedies would serve no purpose but delay. Exhaustion would also contravene Congress's plain intent by creating the risk of imposing duplicative, inconsistent regulatory obligations on participants in the drug supply chain, rather than the uniform federal obligations the CSA requires.

The distributors and pharmacies bring this lawsuit against Defendants Todd Hembree, Attorney General of the Cherokee Nation, Judge Crystal Jackson, and Doe Judicial Officers 1-5, to whom the tribal action has been assigned, to enjoin the prosecution and adjudication of the tribal action as acts in excess of their lawful authority.[1] An injunction is necessary to stop the lawsuit now, before an enormous amount of time and money is wasted on litigation in a forum where jurisdiction is demonstrably lacking. Further, the Council of the Cherokee Nation recently enacted

[1] The Tenth Circuit has held that, notwithstanding the immunity of Indian tribes, an injunction may be entered under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), as to Tribe officials sued in their official capacity for prospective relief for acts outside their lawful authority under federal law. *See Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1154-55 (10th Cir. 2011); *Burrell v. Armijo*, 456 F.3d 1159, 1174 (10th Cir. 2006).

legislation purporting to strip defendants who are haled before the Tribal Court of any opportunity to take an interlocutory appeal of a jurisdictional ruling from the Tribal Court. Additional new laws subject Movants to a variety of new procedural and substantive provisions that greatly benefit the Tribe to the detriment of nonmember defendants.[2] Unless this Court intervenes, Movants may face years of protracted and enormously burdensome litigation in Tribal Court before having the opportunity to challenge that Court's jurisdiction over them and may be forced in the interim to pay vast sums that never can be recovered because of the Tribe's sovereign immunity. An injunction should therefore issue.

STATEMENT OF FACTS

A. The Cherokee Nation Petition.

The Tribe's Petition contains broad allegations about opioids spanning the 14-year period from 2003 to the present. *See* Ex. 1A, Petition ("Pet.") ¶¶ 66-67. Yet the Petition relies heavily on a tribal law enacted less than a year ago, well after the vast majority of the alleged conduct that allegedly gave rise to the Tribe's claims occurred. The very same attorneys who filed the Petition also authored this new law and now seek to apply these new provisions to prior acts and dramatically increase potential damages. *See* Ex. 1B, CAJA ("CAJA") §§ 11, 13 ("Author: Todd Hembree; John Young"). The entire Petition, which has been brought solely by the Tribe itself and not any of its members, rests on the *parens patriae* provisions of the legislation enacted last

[2] *See* Ex. 1B, Comprehensive Access to Justice Act of 2016, Legislative Act No. 16-16, Amending Title 12 of the Cherokee Nation Code Annotated—Civil Procedure § 19 (enacted July 13, 2016) (the "CAJA"). Among other things, the CAJA (1) eliminates any statute of limitations in actions where the Cherokee Nation is a plaintiff, *id.* § 11(B); (2) permits the Cherokee Nation to bring civil actions in *parens patriae* capacity, *id.* § 13(A); (3) entitles the Cherokee Nation to treble damages for such actions, *id.* § 13(B); and (4) permits any federally recognized Indian tribe, or any member of a federally recognized tribe, to join in any suit brought by the Cherokee Nation without waiving the sovereign immunity of the tribe, *id.* § 17.

July. *See* CAJA § 13. Count I of the Petition rests on the Cherokee Nation Unfair and Deceptive Practices Act, enacted last summer. *See* CAJA §§ 21-28. The other counts assert nuisance, negligence/gross negligence, unjust enrichment, and civil conspiracy.

The Petition seeks not only compensatory damages and restitution, but punitive damages and civil penalties. The law enacted last year directs the Tribal Court to award "threefold the total damage sustained, and the cost of suit, including a reasonable attorney's fee" to the Cherokee Nation alone and purports to eliminate the statute of limitations for only the Cherokee Nation, *see id.* §§ 11(B), 13(B); *see also* Pet. at 50 (Prayer for Relief).

B. The Pharmacies and Distributors.

The six corporate defendants in the *Cherokee Nation* lawsuit and Movants here are: (1) McKesson Corporation, a Delaware corporation, headquartered in San Francisco; (2) Cardinal Health, Inc., an Ohio corporation, headquartered in Ohio; (3) AmerisourceBergen Drug Corporation, a Delaware corporation, headquartered in Pennsylvania; (4) CVS Health Corporation, a Delaware corporation, headquartered in Rhode Island; (5) Walgreens Boots Alliance, Inc., a Delaware corporation, headquartered in Illinois; and (6) Wal-Mart Stores, Inc., a Delaware corporation, headquartered in Arkansas. *See* Exs. 1-7.[3]

Three of the defendants named in the Tribe's lawsuit—CVS, Walgreens, and Wal-Mart or their relevant subsidiaries (the "Pharmacies")—are alleged to operate pharmacies from which they dispense FDA-approved medications pursuant to valid prescriptions written by DEA- and

[3] Movants note that holding corporations have been improperly named in the Tribe's lawsuit. "It is a general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation . . . is not liable for the acts of its subsidiaries." *United States v. Bestfoods*, 524 U.S. 51, 61 (1998). Movants nevertheless bring this lawsuit as the named parties in the Tribe's lawsuit, but without admission that they have been properly named therein, or that the Tribal Court has personal jurisdiction over them. Further, Movant's statements herein are made as though the Tribe had named the proper entities.

Oklahoma-licensed medical professionals. Each Pharmacy's relevant subsidiaries are licensed by the Oklahoma Board of Pharmacy and DEA. The three remaining defendants in Tribal Court—McKesson, Cardinal Health, and AmerisourceBergen (the "Distributors")—each have a business that is a wholesale distributor (McKesson and Cardinal Health) or is a wholesale distributor itself (AmerisourceBergen). Wholesale distributors are registered with the DEA and sell medications to pharmacies, not to the general public.

The Pharmacies and Distributors are not members or tribal corporations of the Cherokee Nation, and the alleged wrongful conduct did not occur in Indian country. *See* Exs. 1-7. None of the Distributors has a contractual relationship with the Cherokee Nation to distribute opioids directly to the Cherokee Nation. Nor do the Distributors maintain distribution facilities within the purported "tribal jurisdictions" identified in the Tribe's Petition, let alone within any areas that constitute Indian country. *See* Exs. 1-3.

The Pharmacies and Distributors all operate within the DEA's regulatory framework for opioids and other controlled substances. Among other things, the DEA defines schedules of controlled substances. *See* 21 U.S.C. § 811. It has defined certain opioids as Schedule II drugs, meaning they have a "high potential for abuse" but still have "a currently accepted medical use." *Id.* § 812(b)(2); 21 C.F.R. § 1308.12(b)(1)(vi), (xiii), (xiv). For these and other Schedule II controlled substances, the DEA sets production quotas "to provide for the estimated medical, scientific, research, and industrial needs of the United States, for lawful export requirements, and for the establishment and maintenance of reserve stocks." 21 U.S.C. § 826(a).

The DEA registers and inspects every level of the supply chain for controlled substances. DEA-registered manufacturers produce according to DEA-set quotas and distribute only to other DEA registrants, like the Distributors. Distributors, in turn, fill wholesale orders placed by other

DEA-registrants, like the Pharmacies. Pharmacies dispense controlled substances only to patients with a valid prescription from a licensed medical professional. Thus, neither Pharmacies nor Distributors are responsible for determining which patients ought to be prescribed opioids. And, in the case of Distributors, they cannot know even which patients are prescribed opioids.

LEGAL STANDARD

A preliminary injunction is proper where (1) the movant is substantially likely to succeed on the merits; (2) the movant will suffer irreparable injury if the injunction is denied; (3) the threatened injury outweighs the injury the opposing party will suffer under the injunction; and (4) the injunction would not be adverse to the public interest. *New Mexico Dep't of Game & Fish v. United States Dep't of the Interior*, 854 F.3d 1236, 1246 (10th Cir. 2017). The injunction requested here meets each of these elements.

ARGUMENT

The Tribal Court lacks jurisdiction over Movants for three reasons: *First*, the Tribe does not have jurisdiction over non-Indian activities that do not occur in Indian country, as defined by federal law. *Second*, even if the alleged conduct had taken place in Indian country, the Tribe could not overcome its presumptive lack of jurisdiction over non-Indians who enter Indian country by satisfying either of the two narrow *Montana* exceptions. Initially, neither exception applies because regulation of the alleged conduct is not necessary to the Tribe's self-governance or internal relations. Moreover, the Movants did not enter into consensual relationships with the Tribe or its members related to the alleged diversion of prescription opioids. Nor does the alleged conduct have a direct effect on the political integrity, economic security, or the health or welfare of the Tribe. *Third*, the tribal courts are without jurisdiction to enforce the federal CSA, because the CSA does not create a private right of action, but limits its enforcement only to federal authorities, and only to a federal forum.

Courts have not hesitated to grant preliminary relief where a lawsuit in tribal court appeared to exceed jurisdictional limitations. This Court should do the same and enjoin the Tribe from pursuing its lawsuit against Movants in Tribal Court.

I. MOVANTS ARE SUBSTANTIALLY LIKELY TO SUCCEED ON THE MERITS BECAUSE THE TRIBE LACKS JURISDICTION OVER MOVANTS.

A. The Alleged Conduct Did Not Occur in Indian Country.

The Tribe lacks jurisdiction because the conduct it alleges did not take place in "Indian country," the definition of which has been codified as:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151. Indeed, tribes are powerless to regulate non-Indian conduct that occurs on land privately held in fee outside of Indian country. The inherent "sovereignty that the Indian tribes" enjoy "is of a unique and limited character . . . center[ed] on the land held by the tribe and on tribal members within the reservation." *Plains Commerce Bank*, 554 U.S. at 327 (internal quotation marks omitted). Thus, except where a tribe is regulating Indians, "tribal jurisdiction is . . . cabined by geography: The jurisdiction of tribal courts does not extend beyond tribal boundaries." *Philip Morris USA, Inc. v. King Mountain Tobacco Co.*, 569 F.3d 932, 937-38 (9th Cir. 2009) (citing *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 657 n.12 (2001)).[4]

[4] *See also, e.g.*, *DeCoteau v. Dist. Cty. Ct. for Tenth Judicial Dist.*, 420 U.S. 425, 427 n.2 (1975) (recognizing that § 1151 generally applies to questions of civil jurisdiction); *Christian Children's Fund, Inc. v. Crow Creek Sioux Tribal Ct.*, 103 F. Supp. 2d 1161, 1166 (D.S.D. 2000) (holding tribal court plainly had no jurisdiction where alleged conduct did not occur within reservation); *Progressive Specialty Ins. v. Burnette*, 489 F. Supp. 2d 955, 958 (D.S.D. 2007) ("Indian tribes are not permitted to exercise jurisdiction over the activities or conduct of non-Indians occurring

Here, the alleged conduct is plainly non-Indian conduct outside of Indian country. The conduct of the Pharmacies allegedly consists of "filling" and "dispensing" valid prescriptions, "reviewing" prescriptions, "hiring" tribal members to work as pharmacists and pharmacy technicians, and failing to adequately train or supervise employees. *E.g.*, Pet. ¶¶ 44, 128, 131, 142, 143, 144, 148, 150. These activities would have occurred, if at all, on the Pharmacies' facilities, which are located on non-Indian owned fee lands outside of Indian country. There can be no tribal jurisdiction over such conduct. *See, e.g.*, *Jackson v. Payday Fin., LLC*, 764 F.3d 765, 782, 786 (7th Cir. 2014) ("no colorable claim that the courts of the [tribe] can exercise jurisdiction over the Plaintiffs" where "the Plaintiffs have not engaged in any activities inside the reservation" (emphasis omitted)); *Atty's Process & Investig. Servs., Inc. v. Sac & Fox Tribe of the Miss. in Iowa*, 809 F. Supp. 2d 916, 928 (N.D. Iowa 2011) ("[T]ribal jurisdiction is lacking where the nonmember conduct at issue did not occur on the tribe's reservation."); *see also supra* note 4.

The Distributors, likewise, are non-Indians with no relevant connection to Indian country. The Distributors do not maintain distribution facilities within the area identified in the Petition—let alone within any areas that constitute Indian country—and they do not sell opioid medications directly to consumers in the "tribal jurisdictions" claimed in the Tribe's Petition. *See* Exs. 1-3.

The Tribe's allegations are wholly conclusory, in disregard of its burden to show that its courts have jurisdiction. *Plains Commerce Bank*, 554 U.S. at 330. If such allegations were deemed sufficient it would be a dramatic expansion of tribal jurisdiction. Indeed, if the Tribe could exercise jurisdiction here, then any distributor would be subject to tribal jurisdiction if any product it

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outside the reservation."); *Yankton Sioux Tribe Head Start Concerned Parents v. Longview Farms, LLP*, 2009 WL 891866, at *3 (D.S.D. Mar. 31, 2009) ("The Tribe does not have regulatory authority over the construction of the farrowing facility by Defendant, a non-Indian entity, because such facility is located on land which is not within reservation boundaries.").

handled ever was sold by anyone to a member of a federally recognized tribe. Under such a broad reading, the only path to avoid jurisdiction of tribal courts would be to insist that any "downstream" company in the supply chain guarantee that it will not sell to members of any tribe—a predictable, but discriminatory, result that cannot have been intended by Congress.

Where, as here, a tribe attempts to assert jurisdiction over non-Indians based on conduct that occurred outside of Indian country, courts regularly find tribal court jurisdiction plainly lacking. *See, e.g.*, *Hornell Brewing Co. v. Rosebud Sioux Tribal Ct.*, 133 F.3d 1087, 1091-93 (8th Cir. 1998) (finding it "plain" that claims concerning off-reservation manufacturing, distribution, and sale of malt liquor—which allegedly harmed the tribe's health and welfare—are outside tribe's inherent sovereign authority and not subject to tribal jurisdiction).

The Tribe admits in its Petition that it can only exercise jurisdiction over non-Indians "where the cause of action arises in land that constitutes Indian country within the Cherokee Nation." Pet. ¶ 22. While the Tribe references the "Cherokee Nation Jurisdictional Area" encompassing the whole or part of 14 Oklahoma counties, as shown on a map attached as Exhibit A to the Petition, Pet. ¶¶ 26-28, the Tribe does not allege that the "Cherokee Nation Jurisdictional Area" is Indian country, nor could it. *See also* 20 Cherokee Nation Code Ann. [CNCA] § 25 ("territorial jurisdiction of [the] Cherokee Nation District Court shall extend to include all 'Indian Country' . . . *within* the fourteen- (14) county area" (emphasis added)).

First, the Tribe does not allege that the area at issue is a reservation under § 1151(a) meeting the definition of "Indian country" under federal law. *See* 18 U.S.C. § 1151(a). Nor could it, as it has acknowledged elsewhere that its geographical area "is *not* a reservation."[5]

[5] Our History, Cherokee Nation, *available at* http://www.cherokee.org/About-The-Nation/History/Facts/Our-History (last visited June 6, 2017). Although the Tribe asserts that

Second, the land within the Cherokee Nation Jurisdictional Area does not belong to a "dependent Indian communit[y]" as defined by § 1151(b). *See United States v. Adair*, 913 F. Supp. 1503, 1516-17 (E.D. Okla. 1995), *aff'd*, 111 F.3d 770 (10th Cir. 1997). As the Supreme Court has explained, in enacting § 1151(b), "Congress indicated that [1] a federal set-aside and [2] a federal superintendence requirement must be satisfied for a finding of a 'dependent Indian community'—just as those requirements had to be met for a finding of Indian country before 18 U.S.C. § 1151 was enacted." *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 530 (1998) (emphasis omitted). The Tribe does not meet either requirement.

Third, to the extent any of the land within the Cherokee Nation Jurisdictional Area may qualify as Indian country as defined in § 1151(c), it is not the land on which the alleged conduct took place. In the case of the Cherokee Nation, "[t]he eastern region of Oklahoma . . . is the location of the original sixteen million acres given to the Cherokee and the other Civilized Tribes in the form of restricted allotments in exchange for those lands lost in their original territories. The federal government placed restrictions upon these allotted lands in order to protect the Indian allotees against unfair purchases of their property. These restrictions, however, have been removed over time and now protect only a small fraction of the land." *United States v. Adair*, 111 F.3d 770, 773 (10th Cir. 1997); *see also See Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1030 (8th Cir. 1999) (lands allotted to tribal members under the Dawes Act and subsequently sold to

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certain federal statutes, regulations, and compacts recognize jurisdiction for certain matters in its "jurisdictional area" in a manner equivalent to a reservation, none of these authorities purport to recognize an actual Indian reservation. Pet. ¶¶ 30-36. Rather, these authorities merely permit the Tribe to implement certain government programs and functions for the benefit of tribal members within that 14-county area, but do not grant the Tribe general regulatory or adjudicatory jurisdiction over the conduct of non-Indians on non-Indian owned fee lands in that area.

non-Indians are not Indian country). The conduct alleged in the Tribe's lawsuit did not take place on allotted land within § 1151(c).[6]

Thus, because the alleged conduct did not occur in Indian country, the Tribe plainly lacks jurisdiction over Movants, and Movants have shown a likelihood of success on the merits.[7] *See Hornell*, 133 F.3d at 1091 (where the alleged conduct occurred outside of Indian country, jurisdiction cannot be conferred under *Montana*, which does not "allow Indian tribes to exercise civil jurisdiction over the activities or conduct of non-Indians occurring *outside their reservations*"); *MacArthur v. San Juan County*, 2000 WL 35439199, at *3 (D. Utah Dec. 13, 2000) ("It is well-established that a tribe's jurisdiction will not extend to non-Indian conduct beyond the reservation's borders."). The Court need proceed no further with its analysis and should enter an injunction barring the suits against Movants in Tribal Court.

B. Even if the Conduct Had Occurred Within Indian Country (It Did Not), the Tribe Could Not Overcome the Presumption Against Jurisdiction.

Even had the alleged conduct occurred within Indian country (it did not), tribal jurisdiction over nonmember conduct within such territory is strictly limited. "In *Montana v. United States*, 450 U.S. 544[, 565] (1981), the Supreme Court laid down [the] general rule that '*the inherent*

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[6] Because the Tribe cannot show that the alleged conduct took place on an "Indian allotment[]" under § 1151(c), there is no need to address in what circumstances the Tribe's regulatory and adjudicatory power extends to land allotted to an individual Indian, as opposed to land held in trust by the United States for an Indian or a tribe. The very purpose of allotment to individual Indians was "to end tribal land ownership and to substitute private ownership." *N. Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 650 n.1 (1976). To what extent tribes nevertheless retained authority with respect to lands so allotted need not be resolved to decide the present motion.

[7] The Tribe also purports to assert broad jurisdiction under the Cherokee Treaty of 1866 as a case arising in the Cherokee Nation. Pet. ¶¶ 20-21. However, the grant of jurisdiction in the Cherokee Treaty of 1866 was superseded by federal law by congressional enactments in the 1890s. *See Alberty v. United States*, 162 U.S. 499, 502-03 (1896); Act of May 2, 1890, ch. 182, §§ 1-30, 26 Stat. 81, 81-93; 1898 Curtis Act, ch. 517, § 28, 30 Stat. 495, 504 (abolishing the Cherokee tribal courts referenced in the 1866 Treaty). The 1866 Treaty has no bearing on this case.

sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.'" *MacArthur v. San Juan County*, 497 F.3d 1057, 1068 (10th Cir. 2007) (emphasis added). The general rule is rooted in the fact that "the tribes have, by virtue of their incorporation into the American republic, lost 'the right of governing . . . person[s] within their limits *except themselves.*'" *Plains Commerce Bank*, 554 U.S. at 328 (alternations in original) (emphasis added) (quoting *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978)).

The Tribe can overcome the general rule only if it can establish the applicability of one of the two narrow *Montana* exceptions, as to which it bears the burden of proof:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians *on their reservations*, even on non-Indian fee lands. [1] A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. [2] A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Montana, 450 U.S. at 565–66 (citations omitted) (emphasis added). The Tribe cannot carry its burden as to either exception.

1. This case does not involve tribal governance or internal relations.

At the outset, neither exception applies because both are limited to regulation of tribal governance or internal relations. *See Plains Commerce Bank*, 554 U.S. at 335 (explaining first *Montana* exception as reflecting tribes' authority to "regulate nonmember behavior that implicates tribal governance and internal relations"); *see Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997) (explaining that "[k]ey" to second *Montana* exception is Court's recognition that "'[a tribe's inherent power does not reach] beyond what is necessary to protect tribal self-government or to control internal relations'" (alteration in original) (quoting *Montana*, 450 U.S. at 564)).

Exercise of tribal jurisdiction over the claims against Movants is not necessary to protect tribal governance or internal relations. This case has nothing to do with determinations of tribal membership, intrusions on the privacy of communications among tribal leaders, voting by tribe members in tribal elections, inheritance by tribe members, or other matters central to tribal governance or internal relations. The nature of its lawsuit alone demonstrates that the Tribe cannot establish the applicability of either *Montana* exception.

2. The first *Montana* exception does not apply for additional reasons.

There are at least two other reasons that this case does not fit within the first *Montana* exception for tribal jurisdiction over nonmembers who enter Indian country, which in some circumstances allows a tribe to "regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Plains Commerce Bank*, 554 U.S. at 329-30 (internal quotation marks omitted).

First, the exception does not give tribal courts *carte blanche* to hear tort claims against nonmembers. Adjudication of tort claims is not "regulat[ion] through taxation [or] licensing," and in general tort litigation does not qualify among the "other means" to regulate a consensual relationship anticipated by *Montana*. 450 U.S. at 565. Taxes and licenses are in general reasonably narrow impositions on a nonmember's rights. Neither involves anything close to the power tribal courts would exercise over nonmembers if they had broad authority to hear tort claims.[8] In

[8] In those rare instances where tort claims against nonmembers proceed in tribal court, they must arise directly from a type of consensual relationship not present here. For example, in *Fine Consulting, Inc. v. Rivera*, 915 F. Supp. 2d 1212, 1228 (D.N.M. 2013), the court held the first *Montana* exception applied to claims by nonmembers against officers of tribal corporations for tortious interference *with a contractual relationship* that established a consensual relationship with

discussing the kind of regulation permitted by the first *Montana* exception, the Supreme Court cited to cases involving laws or binding obligations whose application and meaning could be discerned in advance with reasonable certainty.[9]

The rationale for disallowing tribal jurisdiction over tort claims against nonmembers is clear. "[T]he actor's duty in tort is often to conduct himself in a manner *the propriety of which is to be determined ex post facto*." Restatement (Second) of Torts § 4 cmt. c (Am. Law Inst. 1965) (emphasis added). Tort-law obligations are less predictable as a general matter, but especially so in tribal courts, where they will be "influenced by the unique customs, languages, and usages of the tribes they serve" and by decisionmakers "often 'subordinate to the political branches of tribal governments.'" *Duro v. Reina*, 495 U.S. 676, 693 (1990) (quoting Felix S. Cohen, *Handbook of Federal Indian Law* 334-35 (1982 ed.)), *superseded by statute as recognized in United States v. Lara*, 541 U.S. 193 (2004).

> A tort defendant is much more [than a contract defendant] at the mercy of chance regarding the nature and extent of the liability to which he may be exposed. It is doubtful whether [movant] could ever be said to have consented to Navajo Tribal Court jurisdiction as a tort defendant, regardless of how extensively it might have done business with the tribe.

UNC Res., Inc. v. Benally, 514 F. Supp. 358, 363 (D.N.M. 1981).[10] Extending the first *Montana* exception to include this tort action would dramatically expand tribes' authority over nonmembers.

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the tribe. *Id.* at 1227-28 (citing Sarah Krakoff, *Tribal Civil Judicial Jurisdiction over Nonmembers: A Practical Guide for Judges*, 81 U. COLO. L. REV. 1187, 1234 (2010)).

[9] *Montana*, 450 U.S. at 565-66 (citing *Williams v. Lee*, 358 U.S. 217, 223 (1959)) (contract dispute); *Morris v. Hitchcock*, 194 U.S. 384 (1904) (tax on grazing livestock on tribal land); *Buster v. Wright*, 135 F. 947, 950 (8th Cir. 1905) (business permit tax); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152-54 (1980) (tax on cigarette sales)).

[10] Concerns about lack of notice are particularly acute here. The Tribe's claims depend on provisions of the Cherokee Nation Code that were not enacted until last July and were authored by the Tribe's counsel in the current litigation. *See* CAJA §§ 11(B), 13, 17, 19.

It would contravene the Supreme Court's admonition that the *Montana* exceptions cannot be permitted to "swallow the rule" that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Plains Commerce Bank*, 554 U.S. at 330 (internal quotation marks omitted).

Second, Movants did not enter commercial "consensual relationships with the [T]ribe or its members" with a nexus to the alleged conduct. *Montana*, 450 U.S. at 565. There can be no tribal jurisdiction without a direct connection between the conduct and the relationship. *Crowe & Dunlevy*, 640 F.3d at 1152 ("the dispute before the tribal court must arise directly out of that consensual relationship"). The Petition does not even attempt to demonstrate a nexus to the allegations in the Petition. None of the Distributors has a contractual relationship with the Cherokee Nation to distribute opioids directly to the Cherokee Nation. *See* Exs. 1-3. Nor do wholesale distributors sell to any members of the general public.

As the Supreme Court explained: "*Montana*'s consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself." *Atkinson*, 532 U.S. at 656. But the Tribe's claims do not arise out of any consensual relationship with Movants—rather, they arise from the alleged non-consensual diversion of opioids to the black market. Even if this were consensual, "'[a] nonmember's consensual relationship in one area . . . does not trigger tribal civil authority in another—it is not "in for a penny, in for a Pound."'" *King Mountain Tobacco Co.*, 569 F.3d at 941-42 (alterations in original) (quoting *Atkinson*, 532 U.S. at 656).

Likewise, to the extent that any of the unidentified individuals who allegedly diverted opioids may have been members of the Tribe, their relationship with Movants would be non-consensual by definition. Indeed, any such relationship—purchasing opioids from pharmacies to

divert them to improper or illegal use—would be inherently deceptive and fraudulent. The Tribe's only allegation against Movants is not that they consented to opioid diversion, but that they erred in failing to detect "red flags" of this fraud by tribal members of the Tribe. Pet. ¶¶ 4-6. The Tribe thus fails to allege any facts showing that its claims arise out of a consensual relationship necessary to protect the Tribe's self-governance. The first *Montana* exception is therefore inapplicable.

3. The second *Montana* exception does not apply for additional reasons.

The second exception in some circumstances allows a tribe to exercise "civil authority over [1] the conduct of non-Indians on fee lands within the reservation [2] when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Plains Commerce Bank*, 554 U.S. at 329-30 (internal quotation marks omitted). This exception is also inapplicable.

First, under the second exception, "the challenged conduct must be so severe as to 'fairly be called catastrophic for tribal self-government.'" *Evans v. Shoshone-Bannock Land Use Policy Comm'n*, 736 F.3d 1298, 1306 (9th Cir. 2013) (quoting *Plains Commerce Bank*, 554 U.S. at 341); *accord Strate*, 520 U.S. at 458 (even alleged conduct that "endanger[s] all in the vicinity, and surely jeopardize[s] the safety of tribal members" does not fall under *Montana*'s second exception because "if *Montana*'s second exception requires no more, the exception would severely shrink the rule"). The conduct alleged in the Tribe's lawsuit does not rise to that level.

Second, indirect effects of the conduct alleged in the Tribe's lawsuit are insufficient to support jurisdiction. The Tribe's argument is that if an alleged tort impacts members of the Tribe, tribal courts should have jurisdiction. Under that principle, tribal courts would hear a wide range of tort cases against non-Indian defendants. But, even where Indian country is involved, tribal jurisdiction to hear tort claims against nonmembers, if it exists at all, is severely limited.

> To some extent, it can be argued that torts committed by or against Indians on Indian land always "threaten[] or ha[ve] some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." But *this generalized threat that torts by or against its members pose for any society, is not what the second Montana exception is intended to capture*. Rather, the second exception envisions situations where the conduct of the nonmember poses a direct threat to tribal sovereignty.

King Mountain Tobacco Co., 569 F.3d at 943 (brackets in original) (emphasis added) (citations omitted) (quoting *Montana*, 450 U.S. at 566); *accord Strate*, 520 U.S. at 457-58. No direct threat to sovereignty is at issue; the second exception does not apply.

C. Jurisdiction Fails Because the Cherokee Nation May Not Enforce the Federal Controlled Substances Act in Tribal Court.

The Tribe's jurisdiction fails for another fundamental reason: The Tribe has no authority to regulate conduct under the CSA, for which Congress committed enforcement exclusively to the federal courts. The underlying lawsuit is a transparent attempt to bring a claim for violations of the CSA under the guise of violations of tribal common law and statutes. Indeed, the Tribe fails to allege any basis for liability other than Movants' alleged violations of the CSA. Based on the regulatory structure of the CSA, "federal courts have uniformly held that the CSA does not create a private right of action." *Smith v. Hickenlooper*, 164 F. Supp. 3d 1286, 1290 (D. Colo. 2016); *accord McCallister v. Purdue Pharma L.P.*, 164 F. Supp. 2d 783, 793 (S.D. W. Va. 2001) (finding no private cause of action under the CSA). Notably, while Congress delegated to Indian tribes authority to regulate the sale of alcohol by non-Indians within Indian reservations, *see* 18 U.S.C. § 1161; *United States v. Mazurie*, 419 U.S. 544 (1975), it has not acted similarly for the CSA.

The manufacture, distribution, and dispensing of opioids is comprehensively regulated by the CSA. The DEA is "the primary federal agency responsible for the enforcement of the Controlled Substances Act." DEA, *Practitioner's Manual* 4 (2006). In its enforcement capacity, the DEA seeks to strike a balance. It acts "to prevent diversion and abuse of [controlled

substances] while ensuring an adequate and uninterrupted supply is available to meet the country's legitimate medical, scientific, and research needs." *Id.*

A key part of the regulatory framework created by the CSA is the express grant of the power of enforcement of federal drug policy regarding prescription opioids to the federal government in federal court. "[A]ccording to its plain terms, '[t]he [CSA] is a statute enforceable only by the Attorney General and, by delegation, the Department of Justice.'" *Smith*, 164 F. Supp. 3d at 1290 (second and third alterations in original) (quoting *Schneller ex rel. Schneller v. Crozer Chester Med. Ctr.*, 387 F. App'x 289, 293 (3d Cir. 2016) (per curiam)). Only federal district courts (and courts of general jurisdiction in U.S. territories and possessions) were granted authority to enjoin violations of the CSA. 21 U.S.C. § 882(a). Tribal courts, which "cannot be courts of general jurisdiction," lack jurisdiction to enforce the CSA. *Nevada v. Hicks*, 533 U.S. 353, 367-68 (2001). In *Hicks*, the Supreme Court rejected tribal jurisdiction over section 1983 claims, noting that although "some statutes proclaim tribal-court jurisdiction over certain questions of federal law[,] . . . no provision in federal law provides for tribal-court jurisdiction over § 1983 actions." *Id.* The lack of jurisdiction is clear-cut: Congress has not only *not* authorized tribal jurisdiction over CSA violations, but has specifically committed such claims to the federal courts.

Exercise of tribal jurisdiction over the Tribe's claims, all of which allege violations of the CSA, would conflict with a "superior federal interest." *UNC Res., Inc. v. Benally*, 518 F. Supp. 1046, 1052 (D. Ariz. 1981). The federal objective of "prevent[ing] diversion and abuse of [controlled substances] while ensuring an adequate and uninterrupted supply is available to meet the country's legitimate medical, scientific, and research needs," DEA, *Practitioner's Manual* 4 (2006), could well be frustrated if tribal courts were permitted to impose damages and penalties on the basis of a party's sale or distribution of a federally-regulated controlled substance.

Courts routinely block attempts to enforce statutory duties under the guise of consumer protection and common law claims. In such cases, "plaintiffs cannot bootstrap their arguments regarding" an alleged violation of the statute into common-law tort liability. *Webster v. Pacesetter, Inc.*, 259 F. Supp. 2d 27, 36 (D.D.C. 2003) (citing *Buckman Co. v. Pls.' Legal Comm.*, 531 U.S. 341, 348 (2001)); *see also, e.g.*, *Conboy v. AT & T Corp.*, 241 F.3d 242, 258 (2d Cir. 2001) (rejecting claim where underlying statute did not provide a private cause of action as "contrary to the New York Legislature's intent and inconsistent with the statutory scheme. The Legislature, by creating a private right of action to enforce Section 349, clearly did not intend to authorize private enforcement of Section 601, especially where Section 601 contains its own enforcement provision which explicitly dictates who can enforce that section." (internal quotation marks omitted)); *Coffman v. Bank of Am., NA*, 2010 WL 3069905, at *8 (S.D. W.Va. Aug. 4, 2010) ("Plaintiff may not circumvent the [federal Office of Thrift Supervision]'s exclusive authority to implement disclosure requirements for federal savings banks through a state law claim of unconscionable inducement."). Nor may the Tribe seek injunctive relief that creates a private right of action and circumvents the exclusive authority and jurisdiction of the federal courts. *See Jones v. Hobbs*, 745 F. Supp. 2d 886, 890-94 (E.D. Ark. 2010) ("The Declaratory Judgment Act does not authorize a bypass of [the CSA's] enforcement scheme."), *aff'd*, 658 F.3d 842 (8th Cir. 2011). For these reasons as well, Movants are likely to succeed on the merits of their challenge to the Tribal Court's jurisdiction.

D. The Exhaustion Requirement Does Not Apply.

Movants need not litigate this issue to exhaustion in Tribal Court before this Court grants relief. Because exhaustion is "a prudential rule based on comity, the exhaustion rule is not without exception." *Crowe & Dunlevy*, 640 F.3d at 1150. Three exceptions apply here: (1) it is "otherwise clear that the tribal court lacks jurisdiction so that the exhaustion requirement would serve no

purpose other than delay"; (2) "the tribal court action is patently violative of express jurisdictional prohibitions"; and (3) "exhaustion would be futile because of the lack of [] adequate opportunity to challenge . . . [T]ribal court's jurisdiction." *Burrell v. Armijo*, 456 F.3d 1159, 1168 (10th Cir. 2006) (alterations and internal quotation marks omitted).

First, the Tribal Court clearly lacks jurisdiction and the exhaustion requirement would serve no purpose other than delay. There is no federal statute or treaty the Tribe can point to that authorizes it to regulate the distribution or sale of pharmaceutical products by non-Indians on land outside of Indian country. Courts have held that the exhaustion requirement does not apply to attempts like this one to assert jurisdiction outside of a reservation because it was "plain that . . . conduct outside the . . . Reservation does not fall within the Tribe's inherent sovereign authority." *Hornell Brewing Co. v. Rosebud Sioux Tribal Ct.*, 133 F.3d 1087, 1093 (8th Cir. 1998). Moreover, in *Crowe & Dunlevy*, the Tenth Circuit held that this exception was satisfied as to a tribal defendant who was "not an Indian entity" in light of the "presumption against tribal civil jurisdiction over non-Indians" and the limitation of "tribal power beyond what is necessary to protect tribal self-government or to control internal relations." 640 F.3d at 1150 (internal quotation marks omitted). "[T]he exhaustion requirement would serve no purpose, and there is no need to require further tribal court litigation before the exercise of federal jurisdiction in this case." *Id.* at 1153.

Second, exhaustion is not required because the Tribe's assertion of jurisdiction violates express jurisdictional prohibitions. As set forth above, Congress specifically committed enforcement of the CSA to the federal government in federal court. The Tribe's actions patently violate the express jurisdictional dictates of the CSA. The Supreme Court and other federal courts have held exhaustion is unnecessary where Congress expressed its intent that a claim may be brought only in a federal forum. *See El Paso Nat. Gas Co. v. Neztsosie*, 526 U.S. 473, 486-88

(1999) (where Congress divests tribal courts of jurisdiction, exhaustion of tribal remedies would invite "duplicative determinations" and interfere with "congressional aims of speed and efficiency" (internal quotation marks omitted)); *Hicks*, 533 U.S. at 368 (no exhaustion required where tribal courts had no jurisdiction over § 1983 actions arising from search warrants executed by non-Indians on tribal land).[11] Similarly here, the CSA clearly provides that its enforcement is limited to federal authorities and a federal forum. Exhaustion would serve no purpose but delay.

Third, the recently enacted tribal legislation barring all interlocutory appeals of the Cherokee Nation District Court's jurisdictional rulings, CAJA § 19, denies Movants an adequate opportunity to challenge the Cherokee Nation Court's jurisdiction. Indeed, given the timing of this enactment and the removal of all discretion regarding interlocutory appeals, that appears to be the statute's purpose. In the event a jurisdictional challenge is not successful in the District Court of the Cherokee Nation, Movants would be forced to litigate the underlying claims on the merits in the District Court of the Cherokee Nation, and then through the Tribe's Supreme Court, despite the clear lack of jurisdiction. *See* CAJA § 19.

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[11] *See also, e.g.*, *Blue Legs v. U.S. Bureau of Indian Affairs*, 867 F.2d 1094 (8th Cir. 1989) (exhaustion not required where Resource Conservation and Recovery Act required federal forum); *N. States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty.*, 991 F.2d 458 (8th Cir. 1993) (exhaustion not required where Hazardous Materials Transportation Act preempted Indian tribe's ordinance); *Vandever v. Osage Nation Enter., Inc.*, 2009 WL 702776, at *5 (N.D. Okla. Mar. 16, 2009) (exhaustion not required because Congress intended to provide "a uniform regulatory scheme" for ERISA plans and to make their regulation "exclusively a federal concern" (internal quotation marks omitted)); *Sprint Commc'ns Co., L.P. v. Native Am. Telecom, LLC*, 2010 WL 4973319 (D.S.D. Dec. 1, 2010) (exhaustion not required where Federal Communications Act preempted tribe's attempt to impose a tariff on telephone traffic); *Louis v. United States*, 967 F. Supp. 456 (D.N.M. 1997) (exhaustion not required for Federal Tort Claims Act claim, which required a federal forum).

II. MOVANTS WILL SUFFER IRREPARABLE INJURY IF THE INJUNCTION IS DENIED.

The purpose and effect of the Cherokee Nation's "Comprehensive Access to Justice Act of 2016" are transparent. The Cherokee Nation is suing Movants (1) under a statute that did not previously exist, (2) for conduct that was well beyond any reasonable statute of limitations—until all statutes of limitations were abolished, (3) by the Cherokee Nation Attorney General under a new *parens patriae* capacity, (4) for allegedly limitless damages, including $10,000 for each allegedly suspicious prescription filled,[12] and (5) under a procedure that expressly bars interlocutory challenges to jurisdiction. Absent an injunction, Movants "will be forced to expend unnecessary time, money, and effort litigating . . . [in] a court which likely does not have jurisdiction." *Crowe & Dunlevy*, 640 F.3d at 1157 (internal quotation marks omitted). While "economic loss is usually insufficient to constitute irreparable harm," it is relevant when sovereign immunity may prevent future remedy. *Id.* ("[T]he imposition of money damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury." (alteration and internal quotation marks omitted)). Because Movants may be "without recourse" to recover any award from "a sovereign entity" like the Tribe, a preliminary injunction against Defendants is warranted. *Id.*

Courts have found the irreparable-harm requirement satisfied when Defendants would be forced to litigate in a court that does not have jurisdiction over them:

> Without an injunction, UNC would be forced to appear and defend in Tribal Court; were it not to appear, the Navajo plaintiffs there could obtain default judgments that the tribe might attempt to execute against UNC's interests on the reservation. The burden on UNC of defending numerous Tribal Court actions would be substantial.

[12] Counsel for the Cherokee Nation, Richard Fields, has stated the Tribe is seeking "hundreds of millions of dollars" in damages. Michael Nedelman, *Cherokee Nation Sues Pharmacies, Drug Distributors Over Opioid Epidemic*, CNN, Apr. 24, 2017, available at http://www.cnn.com/2017/04/24/health/cherokee-nation-opioid-lawsuit/index.html (last visited June 6, 2017).

> Any judgments obtained against UNC after trial might also be executed by the tribe. In such a closed system, it would be difficult if not impossible for UNC to find recourse to another forum that could protect it from the tribe's overreaching jurisdiction. The only way adequately to protect UNC from this potentially irremediable injury is to enjoin the defendants from proceeding further in Tribal Court.

Benally, 514 F. Supp. at 363; *see Benally*, 518 F. Supp. at 1053; *accord Kerr-McGee Corp. v. Farley*, 88 F. Supp. 2d 1219, 1233 (D.N.M. 2000) ("The Court finds that Kerr-McGee will suffer irreparable damage if Tribal Claimants are not enjoined from proceeding in Navajo Court, as demonstrated by the expense and time involved in litigating this case in tribal court."); *Chiwewe v. Burlington N. & Santa Fe Ry. Co.*, 2002 WL 31924768, at *2 (D.N.M. Aug. 15, 2002). The same determination is warranted here.

III. THE TRIBE WILL NOT SUFFER ANY INJURY IF AN INJUNCTION IS GRANTED.

The threatened injury to Movants outweighs any potential inconvenience to the Tribe should preliminary relief be granted. As the Tenth Circuit held in *Crowe & Dunlevy*, where a tribal court lacks jurisdiction to regulate non-Indians, there is no offense to "the authority of . . . tribal courts" that could constitute harm. 640 F.3d at 1158. *Cf. Chiwewe*, 2002 WL 31924768, at *3 ("The Defendants have shown that they would suffer more harm from litigating in tribal court than the Plaintiffs would suffer from [] litigating in federal court only."); *Benally*, 518 F. Supp. at 1053 ("[I]t appears that the balance of hardships tips in favor of UNC since the defendants' injuries may be redressed in a federal or state court of competent jurisdiction.").

The Tribe retains its ability to file its claims in federal court. *See County of Lewis v. Allen*, 163 F.3d 509, 516 (9th Cir. 1998) (en banc) (second *Montana* exception did not apply because tribal jurisdiction over claims was "not necessary to protect Indian tribes or their members who may pursue their causes of action in state or federal court"); *accord Strate*, 520 U.S. at 459 ("Opening the Tribal Court for her optional use is not necessary to protect tribal self-government;

and requiring [non-Indian defendants] to defend against this commonplace state highway accident claim in an unfamiliar court is not crucial to 'the political integrity, the economic security, or the health or welfare of the [tribe].'" (citation and footnote omitted)). Moreover, the Tribe acknowledges that the federal government is actively involved in policing alleged violations of the CSA, including in Oklahoma. *See* Pet. ¶¶ 91-97, 105, 133, 138. Thus, the interests claimed by the Tribe in preventing opioid diversion will not go unaddressed if the Tribe is not allowed to sue in Tribal Court. To the contrary, the federal government is equipped with a panoply of resources and remedies to enforce its laws consistent with the regulatory framework under the CSA.

IV. AN INJUNCTION IS IN THE PUBLIC INTEREST.

Finally, the public interest supports a preliminary injunction because, as courts have repeatedly recognized, the public interest is served by preventing tribal courts from proceeding where they lack jurisdiction. *Crowe & Dunlevy*, 640 F.3d at 1158 ("We simply are not persuaded the exertion of tribal authority over . . . a non-consenting, nonmember, is in the public's interest."); *Benally*, 514 F. Supp. at 363 ("Nor will the public interest be harmed by an injunction preventing the defendants from participating in an unlawful exercise of tribal power.").

To allow this lawsuit to proceed in Tribal Court is particularly against the public interest because "[t]he Bill of Rights does not apply to Indian tribes." *Plains Commerce Bank*, 554 U.S. at 337 (citing *Hicks*, 533 U.S. at 383 (Souter, J., concurring)). The Indian Civil Rights Act of 1968 ("ICRA"), 25 U.S.C. § 1302, provides some procedural safeguards, but "the guarantees are not identical, and there is a definite trend by tribal courts toward the view that they have leeway in interpreting the ICRA's due process and equal protection clauses and need not follow[] U.S. Supreme Court precedents jot-for-jot." *Hicks*, 533 U.S. at 384 (Souter, J., concurring) (alteration, citation, internal quotation marks, and footnote omitted). Yet the Tribe seeks punitive damages, a remedy as to which due process protections are essential. *See, e.g.*, *State Farm Mut. Auto. Ins. v.*

Campbell, 538 U.S. 408, 416-18 (2003). The public has an interest in preventing its citizens from being haled into tribal courts that lack jurisdiction over them where their constitutional rights are not applicable, particularly when the citizens have not consented to tribal jurisdiction.

The Supreme Court has explained the dangers of extending tribal authority, noting that "nonmembers have no part in tribal government—they have no say in the laws and regulations that govern tribal territory." *Plains Commerce Bank*, 554 U.S. at 337 (citing *United States v. Lara*, 541 U.S. 193, 212 (2004) (Kennedy, J., concurring in the judgment)). Movants had no say in the recent legislation depriving defendants sued by the Tribe of procedural and substantive safeguards. Nor will nonmembers of the Cherokee Nation serve on the jury that will consider the allegations of the Cherokee Nation against the non-Cherokee defendants. 22 CNCA § 591 ("The panel of jurors shall be drawn randomly from the Registry of citizens of Cherokee Nation."). This is consequently a case to which tribal jurisdiction does not apply. A tribe's "laws and regulations may be fairly imposed on nonmembers only if the nonmember has *consented*, either expressly or by his actions. Even then, the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." *Plains Commerce Bank*, 554 U.S. at 337 (emphasis added) (citing *Montana*, 450 U.S. at 564). The public interest is therefore in preventing the Tribe from over-extending its reach and adjudicating claims where it has no jurisdiction.

CONCLUSION

For the foregoing reasons, Movants request that their motion be granted and that the Court enter a Preliminary Injunction, enjoining the Defendants, their agents, employees, successors, and assigns from taking any action or any step in *Cherokee Nation v. McKesson Corp., et al.*, Docket No. CV-2017-203, currently pending in the District Court of the Cherokee Nation.

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