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

MUSCOGEE (CREEK) NATION,
a federally recognized Indian Tribe,

Plaintiff,

v.

CITY OF TULSA; G.T. BYNUM, in his official capacity as Mayor of City of Tulsa; WENDELL FRANKLIN, in his official capacity as Chief of Police, Tulsa Police Department; and JACK BLAIR, in his official capacity as City Attorney for City of Tulsa,

Defendants.

Case No. 23-cv-00490-CVE-SH

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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In its opening brief, the Nation set forth arguments in favor of a preliminary injunction grounded in controlling precedents of the Tenth Circuit and the Supreme Court. Tulsa has elected to respond to very few, leaving the central tenets of the Nation's motion unrebutted and thus conceded. With respect to those arguments which Tulsa does address, its contentions fail.

I. A Heightened Preliminary Injunction Standard Does Not Apply.

Tulsa asserts that the Nation's injunction would "alter the status quo" and is therefore subject to a heightened standard. Tulsa Br. (Dkt. 29) 2–3. The status quo on which Tulsa relies is "125 years of City of Tulsa and Tulsa Police Department operations." *Id*. at 3. However, "[a]n injunction disrupts the status quo when it changes the last peaceable uncontested status existing between the parties before the dispute developed." *Beltronics USA, Inc. v. Midwest Inventory Distrib., LLC*, 562 F.3d 1067, 1070–71 (10th Cir. 2009) (quotation marks omitted).

Prior to *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), Tulsa argued emphatically that if the decision came out the way it did, Tulsa would lack jurisdiction to prosecute Indians in the Creek Reservation. *See* Tulsa Amicus Br., *McGirt*, 2020 WL 1433475, at *1–2, *29 (stating that if the Creek Reservation is found to be Indian country, "state criminal jurisdiction would be stripped in any crime involving an Indian perpetrator," and that "Tulsa and its courts still could not enforce Oklahoma law in crimes involving Indians"). Accordingly, when *McGirt* issued, the Nation and Tulsa were in agreement as to Tulsa's lack of jurisdiction over Indians within the Creek Reservation. That was "the last peaceable uncontested status existing between the parties," *Beltronics*, 562 F.3d at 1071 (citation omitted), and it remained so until Tulsa conjured its now discredited Curtis Act argument and began prosecuting Indians under it, and thereafter sought to buttress that authority with its claim that "*Castro-Huerta* created a major shift in what was

previously established law," Tulsa Br. 9. Tulsa's arguments hardly sound in maintenance of the status quo, and there is nothing disfavored about the Nation's request.

Even if there were, the heightened standard simply calls for "a strong showing both with regard to the likelihood of success on the merits and with regard to the balance of harms." *Beltronics*, 562 F.3d at 1071 (citation omitted). The Nation has amply met that standard, and Tulsa's arguments (to the extent they engage the Nation's at all) do not undermine that conclusion.

II. The Nation Has a Substantial Likelihood of Success on Tulsa's Curtis Act Claim.

The Nation argued in its opening brief that *Hooper v. City of Tulsa*, 71 F.4th 1270 (10th Cir. 2023), is binding on this Court and that the Nation's likelihood of success on the Curtis Act is thus not subject to serious doubt. Nation Br. (Dkt. 9) 7. It further argued that *Hooper* is binding on Tulsa under the doctrine of collateral estoppel. *Id*. at 7–8. Since the Nation filed its brief, the *Hooper* district court has closed the case, stating that "[a]s a matter of Tenth Circuit law, Section 14 of the Curtis Act no longer applies to Tulsa and therefore Tulsa no longer has jurisdiction over municipal violations committed by its Indian inhabitants[.]" Order of Dismissal (Dkt. 52) 2.[1]

Tulsa barely grapples with the Nation's arguments, contending only that *Hooper* "is still being challenged" in the state courts and is "subject to appeal[.]" Tulsa Br. 15. As to the former, no state court decision can affect this Court's obligation to follow the Circuit's interpretation of a federal statute. *See United States v. Spedalieri*, 910 F.2d 707, 709 n.2 (10th Cir. 1990) ("A district court must follow the precedent of this circuit[.]"). And Tulsa's wishful contention that

[1] Tulsa immediately made it clear that it intends to accord the district court's decision the same lack of respect as it has the Tenth Circuit's. *City of Tulsa Says Police Will Enforce All Traffic Laws Following Dismissal of Hooper Lawsuit*, News on 6, Dec. 16, 2023, https://bit.ly/Hooper_Response_12-16-23.

Hooper is "subject to appeal" is likewise a dead letter. Tulsa had its day in the Circuit, which rejected its Curtis Act claim. Petitions for certiorari from a federal Circuit Court's civil judgment must be filed "within ninety days after the entry of such judgment[.]" 28 U.S.C. § 2101(c); Sup. Ct. R. 13.1 (same). The Circuit entered judgment on June 28, 2023, so Tulsa's time to petition has expired, leaving the Court without jurisdiction to review *Hooper*. *See Bowles v. Russell*, 551 U.S. 205, 212 (2007) ("We have repeatedly held that this statute-based filing period [in § 2101(c)] for civil cases is jurisdictional."). If Tulsa chose to view Justice Kavanaugh's statement accompanying the *Hooper* stay denial—which says nothing about the time to file a certiorari petition—as somehow giving it license to disregard the jurisdictional filing requirements of an act of Congress, *see* Defs.' Joint Mot. to Dismiss and Br. in Supp. (Dkt. 28) at 4 n.1, it did so at its own peril.

III. The Nation Has a Substantial Likelihood of Success on Tulsa's *Castro-Huerta* Claim.

A. Tulsa Invites the Court To Commit Legal Error.

In its opening brief, the Nation established three related premises regarding *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2496 (2022). First, under longstanding Supreme Court and Circuit precedent, "State courts generally have no jurisdiction to try Indians for conduct committed in Indian country" absent "a clear expression of the intention of Congress," *McGirt*, 140 S. Ct. at 2459, 2477 (quotation marks and citation omitted); *Ute Indian Tribe of the Uintah and Ouray Reservation v. Utah*, 790 F.3d 1000, 1004 (10th Cir. 2015) (same). *See* Nation Br. 8–9, 15–16.

Second, *Castro-Huerta*, which involved state criminal jurisdiction over non-Indians, expressly and repeatedly disclaims any intent to reach the issue of state jurisdiction over Indians.

Id. at 1, 10; *Castro-Huerta*, 142 S. Ct. at 2501 n.6 ("We express no view on state jurisdiction over a criminal case of that kind."); *id.* at 2504 n.9.[2]

Third, and again under controlling precedent, courts may not interpret *Castro-Huerta*, which does not directly address state jurisdiction over Indians, as having implicitly overruled prior Supreme Court and Tenth Circuit decisions (including *McGirt* and *Ute Indian Tribe*) that directly address the issue. This prohibition applies regardless of whether a court views *Castro-Huerta* as having undermined prior precedent. *See* Nation Br. 10–11 (quoting, inter alia, *Bosse v. Oklahoma*, 580 U.S. 1, 3 (2016), *Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122, 136 (2023), and *United States v. Maloid*, 71 F.4th 795, 808 (10th Cir. 2023)).

Though this argument featured prominently in the Nation's brief, Tulsa does not acknowledge (much less refute) it, and has accordingly conceded it. *See, e.g.*, *Brown v. K-MAC Enters.*, 897 F. Supp. 2d 1098, 1109 (N.D. Okla. 2012) (non-movant "did not address this argument in any manner, and all arguments and authority in [movant's] motion are deemed confessed"); *United States v. Alvarez*, No. 22-2095, 2023 WL1432074, at *1 (10th Cir. Feb. 1, 2023) (party "has conceded" argument "by failing to address" it); *Williams v. City of Tulsa*, No. 11-CV-469-TCK-FHM, 2013 WL 244049, at *8 (N.D. Okla. Jan. 22, 2013) (same).

[2] Indeed, none of the cases *Castro-Huerta* relies on for the "overarching jurisdictional principle" that governs the case, 142 S. Ct. at 2494, involved state jurisdiction over Indians in Indian country. *See Nevada v. Hicks*, 533 U.S. 353 (2001) (non-Indian conduct related to off-reservation Indian conduct); *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962) (off-reservation conduct); *New York ex rel. Ray v. Martin*, 326 U.S. 496 (1946) (crime involving only non-Indians); *Draper v. United States*, 164 U.S. 240 (1896) (same); *United States v. McBratney*, 104 U.S. 621 (1881) (same); *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251 (1992) (non-Indian conduct); *New York ex rel. Cutler v. Dibble*, 62 U.S. 366 (1858) (same); *Surplus Trading Co. v. Cook*, 281 U.S. 647 (1930) (non-Indian personal property).

Tulsa would instead have the Court deem that *Castro-Huerta* "called into question the previous criminal jurisdiction analysis applied in Indian Country," that "the law that was settled for so long …. is no longer settled," and that "*Castro-Huerta* created a major shift in what was previously established law," Tulsa Br. 9, 17. This is *precisely* what the Supreme Court and the Circuit have ruled courts may not do when prior precedents address an issue directly and a later decision, as here, does not. Nation Br. 10–11. Tulsa invites this Court to commit reversible error.

B. Tulsa Overlooks the Central Legal Premise of *Castro-Huerta*'s Holding.

Even if this Court could depart from Supreme Court and Circuit precedent as Tulsa urges, Tulsa has made no valid argument that it should. *Castro-Huerta* does not raise doubts as to the continuing validity of prior precedents foreclosing state criminal jurisdiction over Indians.

In its opening brief, the Nation established that *Castro-Huerta*'s reasoning regarding state criminal jurisdiction over non-Indians is premised on states' reserved powers under the Tenth Amendment. Nation Br. 12–13. It further established that because the Constitution delegates to Congress *exclusive* criminal authority over Indians in Indian country, the Tenth Amendment reserves no such authority to the states. *Id*. 13–15 (discussing cases).

Thus, the constitutional basis for *Castro-Huerta*'s holding with respect to non-Indians does not extend to state authority over Indians, a fact underscored by the Court's repeated admonition that "[w]e express no view on state jurisdiction over a criminal case of that kind," 142 S. Ct. at 2501 n.6. Accordingly, that "States have jurisdiction to prosecute crimes committed in Indian country unless preempted," *id*. at 2494, does not help Tulsa because state jurisdiction over Indians in Indian country is preempted by the Constitution itself. *See* Nation Br. 15.

Tulsa has no answer. It instead spills considerable ink rebutting strawman statutory preemption arguments the Nation has not made. Tulsa Br. 5–7. But deflection cannot defeat a proper reading of *Castro-Huerta* and the Tenth Amendment. Nation Br. 15–16.

C. Tulsa's Reliance on Pending State Court Litigation Fails.

Tulsa asserts that "there are multiple cases in the Oklahoma State courts which indicate that the State, and thereby the City, have jurisdiction over crimes committed by Indians within the Nation's reservation boundaries based on the *Castro-Huerta* analysis, or at the very least that this is an open and important question." Tulsa Br. 8. That is vastly overstated, as Tulsa points to just one Oklahoma trial court opinion, now on appeal, finding the State to have jurisdiction over Indian defendants, with others stating that there exists an open question.

Moreover, it is irrelevant. "It is beyond cavil that [federal courts] are not bound by a state court interpretation of federal law." *Dutcher v. Matheson*, 840 F.3d 1183, 1195 (10th Cir. 2016) (brackets and citation omitted). Tulsa simply quotes a few perfunctory state court statements without any effort to defend them, and for good reason: none takes into account the Tenth Amendment foundations of *Castro-Huerta*, likely because no litigant raised the issue. And even if those cases did read *Castro-Huerta* as upending prior precedent, they would run headlong into the bedrock prohibition against lower courts interpreting a Supreme Court decision as having indirectly overruled precedent directly addressing an issue. *Supra* pp. 4–5; Nation Br. 10–11. That prohibition binds state courts no less than federal courts. *See Bosse*, 580 U.S. at 3–4 (vacating decision of Oklahoma Court of Criminal Appeals); *Mallory*, 600 U.S. at 136.

D. Tulsa Concedes the Nation's Arguments on the Import of P.L. 280.

In its opening brief, the Nation established that the text, context, and legislative

history of Public Law 280 ("P.L. 280") confirm that Congress has consistently understood that states lack criminal jurisdiction over Indians in Indian country absent statutory authorization. *See* Nation Br. 17–21. In doing so, the Nation underscored that *Castro-Huerta* makes that very point, noting—in what stands as a direct and express rejection of Tulsa's interpretation of the Court's decision—that P.L. 280 "grants States jurisdiction over crimes committed *by Indians*.… So our resolution of the narrow jurisdictional issue in this case does not negate the significance of Public Law 280 in affording States broad criminal jurisdiction over other crimes committed in Indian country, such as crimes committed by Indians." 142 S. Ct. at 2500 (citations omitted).

Yet again, Tulsa does not even acknowledge these arguments, much less attempt to explain to the Court why they are incorrect. They should accordingly be "deemed confessed," *Brown*, 897 F. Supp. 2d at 1109; *see supra* p. 4 (citing cases stating same).

* * *

In sum, the Nation has established the requisite likelihood of success on the merits of Tulsa's Curtis Act and *Castro-Huerta* claims, regardless of the standard the Court applies.

IV. The Nation Will Suffer Irreparable Harm Without a Preliminary Injunction.

In its opening brief, the Nation relied on *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234 (10th Cir. 2001), and *Ute Indian Tribe* in establishing irreparable harm. *Prairie Band* establishes that state or local government usurpation of core tribal governmental functions (which include administration of a criminal justice system for Indians, Decl. of Attorney General Geraldine Wisner (Dkt. 10) ¶¶ 26–39), constitutes irreparable harm. Nation Br. 22–23. And *Ute Indian Tribe* is on all fours with this case. Tulsa's prosecutions of Indian traffic offenses in the Creek Reservation and its continued claim to jurisdiction in defiance of Tenth Circuit precedent is precisely the behavior the Circuit found to constitute irreparable harm. Nation Br. 21–22.

Indeed, "the harm to tribal sovereignty" under such circumstances is "as serious as any to come our way in a long time," and "there's just no room to debate whether the defendants' conduct creates the prospect of significant interference with self-government that this court has found sufficient to constitute irreparable injury." 790 F.3d at 1005–06 (quotation marks and brackets omitted).

Tulsa nowhere addresses *Prairie Band.* Nor does it dispute that *Ute Indian Tribe* directly parallels this case. Its *sole* argument against *Ute Indian Tribe*'s applicability is that it is "distinguishable as preceding *Castro-Huerta*" because, after *Castro-Huerta*, "the law that was settled for so long" is "no longer settled[.]" Tulsa Br. 17. What has been said above disposes of this argument. *Castro-Huerta*'s Tenth Amendment reasoning regarding state jurisdiction over non-Indians does not extend to Indians. And even had *Castro-Huerta* cast doubt on prior precedent, the rule against lower courts holding Supreme Court precedent to have been indirectly undermined likewise protects Circuit precedent. *See, e.g.*, *Strain v. Regalado*, 977 F.3d 984, 993 (10th Cir. 2020) (later Supreme Court case that does not "pronounce its application" to an issue is an impermissible basis to depart from "our precedent" on the issue). Nation Br. 11. Here, *Castro-Huerta* not only fails to "pronounce its application" to the issue of state jurisdiction over Indians but expressly pronounces its intent *not* to reach the issue, *supra* pp. 3–4 & n.2.

Ute Indian Tribe and *Prairie Band* accordingly govern. Tulsa's interference with the Nation's core governmental functions amply warrants injunctive relief.

V. The Balance of Harms and the Public Interest Strongly Favor an Injunction.

Ute Indian Tribe also governs the analysis (which it merges) of the balance of harms and public interest. The Court noted the harm to tribal self-government by state and local government assertions of criminal jurisdiction over Indians in Indian country and underscored the

"paramount federal policy" against such interference. 790 F.3d at 1007 (citation omitted). And even though no cross-deputization agreement existed, it dismissed the defendants' public safety concerns, which mirror Tulsa's, as overblown and described the potential for the referral of prosecutions in terms capturing perfectly the agreement between Tulsa and the Nation. Nation Br. 23–24.

Tulsa's arguments against *Ute Indian Tribe*'s applicability again fail. Tulsa has generally refused to refer Indian traffic offenders to the Nation under the cross-deputization agreement. Wisner Decl. ¶ 22; Nation Br. 25. And because of that, Tulsa has no experience to invoke in making its public safety claims. Instead, it offers only speculation by its Police Chief—*from an affidavit filed in an earlier case and that accordingly fails to respond to the Nation's declarations*—as to what would occur "*[i]f* Tulsa Police are required to apply Indian Country jurisdictional analysis to every traffic citation," Aff. of City of Tulsa Police Chief Wendell Franklin (Dkt. 29-1) ¶ 13 (emphasis added); *see also* Tulsa Br. 11 (citing Franklin affidavit for untoward consequences "if TPD officers are required to apply the complicated Indian country jurisdiction analysis[.]"). But as the Nation's Attorney General and Deputy Police Chief explain, based on years of adherence to cross-deputization agreements by the Nation and other local governments and state agencies within the Reservation, non-tribal and tribal police do not need to undertake complex jurisdictional analyses in the field to apply the agreements' provisions. They make reasoned judgments about the Indian status of a defendant and the status of the land where offenses were committed, just as they do about numerous other issues, with final determinations made later, including in the courts if necessary. Wisner Decl. ¶¶ 13–18; Decl. of Daniel Wind III, Lighthorse Deputy Chief of Special Operations (Dkt. 14) ¶¶ 13–20; Nation Br. 24–25. The Attorney General's declaration further confirms that Tulsa officers do not need to

write tickets under the Nation's code, *contra* Franklin Aff. ¶ 16, but can cite to the relevant Tulsa provisions, with prosecutors subsequently doing the appropriate translation. Wisner Decl. ¶ 18e.

Tulsa calls into question none of this. Indeed, it does not dispute that it has adhered to its cross-deputization agreement in referring Indian suspects on an array of non-traffic criminal matters to the Nation. *See* Wisner Decl. ¶ 21(a)–(b). If Tulsa's officers were burdened by complex jurisdictional and Indian status determinations in the field when apprehending those suspects, it would have more than conjecture to offer here.[3]

Grasping at straws, Tulsa warns of the "potential liability" for its police officers in "civil rights lawsuit[s]" in cases of mistaken Indian status. Tulsa Br. 19. Setting aside that these warnings are pure conjecture, nothing about them is specific to traffic offenses. Again, Tulsa has

[3] Tulsa alleges that inaccuracies exist in the Nation's declarations but makes no effort to specify what they are. Tulsa Br. 16 n.14. Its request for an evidentiary hearing "should this Court decide to hear evidence," *id.*, should accordingly be denied. An evidentiary hearing on a preliminary injunction motion is unnecessary where, as here, the party seeking it has "failed to show that any new information they would have presented at the hearing would have been critical to the district court's consideration." *Robinson v. City of Edmond*, 160 F.3d 1275, 1286 (10th Cir. 1998). Tulsa admits it prosecutes Indians for crimes within the Creek Reservation. Dkt. 28 at 12. It does not dispute the broad scope of its officers' authority under the cross-deputization agreement and admits that its officers exercise such authority for non-traffic crimes. *Id.* And importantly, it chose to rest on Chief Franklin's pre-existing affidavit in lieu of having him respond to the Nation's declarations, which establish that Tulsa officers (like others) need not spend undue time during stops to establish Indian status before issuing tickets. Nor does Tulsa (or its police chief) controvert that numerous other jurisdictions honor their cross-deputization agreements with the Nation and refer traffic prosecutions without adverse consequences. Tulsa should not be granted a hearing when it has already passed on the opportunity to address any alleged errors in the Nation's declarations or to otherwise demonstrate that a hearing would be a productive use of party and court resources. *See, e.g.*, *Northglenn Gunther Toody's, LLC v. HQ8-10410-10450 Melody Lane LLC*, 702 F. App'x 702, 705 (10th Cir. 2017) (evidentiary hearing on preliminary injunction unnecessary where party "had ample opportunity to present its arguments and evidence in written form"); *In re Aimster Copyright Litig.*, 334 F.3d 643, 653 (7th Cir. 2003) ("[A]s in any case in which a party seeks an evidentiary hearing, [such party] must be able to persuade the court that the issue is indeed genuine and material and so a hearing would be productive—[it] must show in other words that [it] has and intends to introduce evidence that if believed will so weaken the moving party's case as to affect the judge's decision on whether to issue an injunction." (citation omitted)).

referred other criminal matters involving Indians to the Nation since *McGirt. See* Wisner Decl. ¶ 21(a)–(b). If such lawsuits were a realistic problem, Tulsa would have more than unsubstantiated hypotheticals to offer this Court.

Indeed, like Attorney General Wisner, others with actual experience implementing Indian country cooperative governance agreements in Oklahoma confirm that they work. *McGirt* notes that such agreements have been effective. 142 S. Ct. at 2481. In so concluding, the Court credited the experiences of Congressman (and former Oklahoma Secretary of State) Tom Cole, along with "a former Governor, state Attorney General, cabinet members, and legislators of the State of Oklahoma, and two federally recognized Indian tribes," who submitted an amicus brief based on their "hands-on experience in resolving jurisdictional issues that arise … in the delivery of governmental services by state, local, and tribal authorities in eastern Oklahoma." Brief of Amici Curiae Tom Cole et al., *McGirt*, 2020 WL 703876, at *1. In their experience, in contrast to Tulsa's conjecture, intergovernmental cooperation "enhances policing on [the] Reservations by avoiding jurisdictional confusion and providing clear lines of authority for law enforcement," *id.* at *20, and cross-deputization in particular "*reduces* jurisdictional confusion at the most important level, namely on the street, and in so doing enhances public safety," *id*. at *22.

Nor is there merit to Tulsa's point that the City personnel who enforce its "building and electrical codes, nuisance, health, zoning, and … similar ordinances," violations of which "carry criminal penalties," are "not subject to cross-deputization agreements," Tulsa Br. 19. Nowhere does Tulsa claim that this issue is not, but for its own disinterest, resolvable. The Nation has been vocal about its willingness to cooperate on traffic matters—*see* Joint Brief of Amici Curiae Muscogee (Creek) Nation et al., *Tulsa v. Hooper*, 143 S. Ct. 2556 (2023) (No. 23A73), 2023 WL 5434289, at *21 (the Nation "stand[s] ready, in the spirit of good faith, comity, and cooperative

sovereignty, to discuss with Tulsa any additional cooperative measures Tulsa believes are needed in the area of traffic safety and enforcement—it lacks only a willing partner in Tulsa.")—and it is no less willing to cooperate on effective solutions for non-traffic issues.

As Representative Cole and his fellow amici explained, cooperative sovereignty works by "replacing jurisdictional standoffs with jurisdictional solutions," Cole Br. at *15, in a way that "accommodates the State's jurisdiction on terms which protect both tribal and state interests in, and authority over, eastern Oklahoma," *id*. at 20. The Nation has amply demonstrated its commitment to such principles. After *McGirt*, it revised its traffic code to mirror Oklahoma's to ensure clarity and consistency in traffic enforcement. *See* Muscogee (Creek) Nation Code Annotated 20-087.[4] It likewise amended its criminal code to incorporate as Creek law "any criminal offense" prescribed by other governments within its boundaries, including Tulsa, *see* Muscogee (Creek) Nation Code Annotated 22-048.[5] Tulsa, by contrast, threatens that it will refuse to cooperate with the Nation on law enforcement matters if the courts fail to recognize its novel jurisdictional theories. Dkt. 28 at 12–13 (stating that "the City could withdraw from all cross-deputization agreements" and that "[e]ven if this Court deems it appropriate to enjoin the City from filing charges against Indians in Municipal Court, this Court cannot compel Tulsa Police officers to file charges in the Nation's Courts").

If Tulsa remains unwilling to embrace the cooperative sovereignty that has elsewhere

[4] https://www.creeksupremecourt.com/wp-content/uploads/NCA-20-087.pdf.
[5] http://www.creeksupremecourt.com/wp-content/uploads/NCA-22-048.pdf. Tulsa notes that this provision is limited to laws in place as of January 1, 2021. Tulsa Br. 12. That is correct. The Nation cannot adopt new criminal laws of other governments *prospectively*—i.e., without yet knowing their substance—as that would outsource the Nation's legislative function to those governments. But the Nation stands ready to amend its code as needed, and nothing prevents the two governments from addressing "emerging issues," *id.*, through other cooperative means, should Tulsa be open to such cooperation.

proven effective, then the harms that it warns of from a preliminary injunction are of its own making, and "courts afford little weight to self-inflicted harms when conducting the balancing inquiry," *Pizza Inn, Inc. v. Allen's Dynamic Food, Inc.*, Case No. CIV-23-00164-PRW, 2023 WL 3015297, at *6 (W.D. Okla. Apr. 19, 2023) (citation omitted); *see also, e.g.*, *Dominion Video Satellite, Inc. v. EchoStar Satellite Corp.*, 269 F.3d 1149, 1157 (10th Cir. 2001) (upholding district court's balance of harms analysis in plaintiff's favor where plaintiff "will suffer irreparable harm" and defendant's harm "may be self-inflicted"); *Heartland Animal Clinic, P.A. v. Heartland SPCA Animal Med. Ctr., LLC*, 503 F. App'x 616, 623 (10th Cir. 2012) (a defendant's "self-inflicted harm can weigh in favor of granting a preliminary injunction").

In sum, nothing prevents Tulsa from engaging in proven cooperative means to avoid the harms it has alleged. Given that and the fact that Tulsa has "no legal entitlement" to the jurisdiction it asserts, its "claims to injury should an injunction issue shrink to all but the vanishing point," *Ute Indian Tribe*, 790 F.3d at 1007 (quotation marks omitted).

VI. Tulsa's *Bracker* Analysis Is Both Foreclosed by Law and Meritless in Substance.

As established above and in the Nation's opening brief, the per se rule against state criminal jurisdiction over Indians in Indian country controls here, foreclosing recourse to *Bracker* balancing. The Nation accordingly addresses Tulsa's *Bracker* analysis only briefly.

Tulsa's Interests. Tulsa asserts that its general interest in law enforcement and those of the Nation are "equally significant." Tulsa Br. 11. This fails to tip the balance in Tulsa's favor and is beside the point. As to the specific law enforcement interest in *this* case—i.e., jurisdiction over Indians—the Tenth Circuit, under directly analogous facts, has characterized the state and local interests as nearing "the vanishing point," *Ute Indian Tribe*, 790 F.3d at 1007 (citation omitted). Tulsa's arguments fit that assessment. Its purported interest in avoiding burdening its officers

with complicated jurisdictional analyses in the field, Tulsa Br. 11–12, and its claims about being unable to enforce its array of non-traffic ordinances, *id*. at 12–13, are, as discussed above, illusory. *See supra* pp. 9–12. Tulsa's warnings about a lack of jail space "if Tulsa County decides to withdraw from its contract with the Nation," Tulsa Br. 12, are unaccompanied by a whit of evidence that such an event is other than a hypothetical conjured by counsel, *id*. at 12–13. Finally, Tulsa invokes its interests in having its Indian residents avoid long-distance travel to tribal court proceedings, *id*. at 13. Not only does this assume without basis that Tulsa's Indian residents prefer to have their tickets adjudicated in municipal rather than tribal court, but the concern is baseless because defendants and arresting officers may request to participate in tribal court proceedings virtually, Wisner Decl. ¶¶ 19(c)–(d), 25(g)–(h).

Federal Interests. Tulsa's discussion, Tulsa Br. 9–10, ignores the "paramount *federal* policy" of preventing interference with tribal self-government, *Ute Indian Tribe*, 790 F.3d at 1007 (citation omitted) (emphasis added). It instead argues that the federal interests here are minimal because the Curtis Act accorded it jurisdiction. Tulsa Br. 9. Tulsa's quixotic unwillingness to accept the Tenth Circuit's decision in *Hooper* speaks for itself.

Tribal Interests. Tulsa cites *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), in its effort to minimize the Nation's interests. Tulsa Br. 14. But *Brendale* addresses tribal jurisdiction to regulate non-Indians and their use of fee land. How that sheds any light on the respective state and tribal interests in exercising criminal jurisdiction over Indians, Tulsa does not explain. It cites no case, and none exists, suggesting that the tribal interest in criminal jurisdiction over Indians in Indian country varies depending on land status.

Tulsa further asserts that "Congress has not delegated exclusive jurisdiction to the Tribes over nonmajor crimes committed by Indians in Indian country," and the Nation's interest thus

extends no further than "concurrent jurisdiction" with Tulsa. *Id.* Two flaws afflict this argument. First, a tribe's criminal jurisdiction over Indians in Indian country is not congressionally delegated; it is inherent and predates the Constitution. *See United States v. Lara*, 541 U.S. 193, 198–200 (2004); 25 U.S.C. § 1301(2); *United States v. Wheeler*, 435 U.S. 313, 322–23 (1978); *Cohen's Handbook of Federal Indian Law* 513 (2012 ed.) (under the Constitution, "Indian conduct was left exclusively to tribal governments in the absence of congressional legislation").

Second, in *Castro-Huerta*'s *Bracker* analysis, the Court found that state jurisdiction over non-Indians would not impair tribal interests only because it "does not involve the exercise of state power over any Indian" and hence, because tribes generally lack jurisdiction over non-Indians, it "would not deprive the tribe of any of its prosecutorial authority." 142 S. Ct. at 2501. The inescapable implication of this reasoning is that concurrent tribal-state jurisdiction over Indians *would* deprive a tribe of prosecutorial authority and thus impair its sovereign interests.

In the end, Tulsa contradicts itself. It argues that the Nation's jurisdiction over Indians has never been exclusive. Tulsa Br. 14. But elsewhere, in urging that *Castro-Huerta* altered settled law, it describes the Nation's "exclusive jurisdiction" over Indians as "the law that was settled for so long[.]" Tulsa Br. 17. The latter is correct. "The policy of leaving Indians free from state jurisdiction and control is deeply rooted in this Nation's history," *McGirt*, 140 S. Ct. at 2476 (citation omitted), and *Castro-Huerta* did not uproot that settled law, 142 S. Ct. at 2504 n.9 ("To reiterate, we do not take a position on that question."). The Nation has a strong interest in self-government free of interference from Tulsa, and none of Tulsa's arguments establish that this Court should do other than vindicate the longstanding precedent that safeguards that interest.

CONCLUSION

The Nation respectfully requests that its request for a preliminary injunction be granted.

Dated: December 22, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 22, 2023, this document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

/s/ *Riyaz A. Kanji*
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