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

MUSCOGEE (CREEK) NATION,	)	
	)	
Plaintiff,	)	
v.	)	**Case No. 25-cv-00227-JAR**
	)	
CITY OF HENRYETTA, OKLAHOMA,	)	
***et al.*,**	)	
	)	
	)	
Defendants.	)	

DEFENDANTS' RESPONSE IN OPPOSITION TO
PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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ATTORNEYS FOR THE CITY OF HENRYETTA

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Defendants, with this Response in Opposition to Plaintiff's Motion for Preliminary Injunction [Doc. 11], request the Court to enter an Order denying Plaintiff's request for extraordinary relief.

INTRODUCTION

Plaintiff's motion to preliminarily enjoin Defendants should be denied. As the Court knows, preliminary injunction is an extraordinary remedy, and Plaintiff cannot establish a likelihood of success on the merits, demonstrate irreparable harm, or show that the balance of equities favors an injunction and/or that an injunction serves the public interest. *See Republican Party of New Mexico v. King*, 741 F.3d 1089, 1092 (10th Cir. 2013) (setting forth the four elements).

Under the law announced by the U.S. Supreme Court in *Oklahoma v. Castro-Huerta*, 597 U.S. 629, 636-638 (2022), a state "has jurisdiction over all of its territory, including Indian country." States and their subdivisions therefore have jurisdiction to prosecute an individual accused of committing a crime within the state's Indian country unless preempted by federal law or where the exercise of jurisdiction would infringe on tribal self-governance. *Contra* Doc. No. 11 at 1 (where Plaintiff distorts the present analytical framework, and ignores the explicit rejection by the United States Supreme Court by claiming "Oklahoma and its political subdivisions may exercise criminal jurisdiction over Indians within the Reservation only with the assent of Congress.").

Neither the General Crimes Act nor any other federal law expressly preempts state jurisdiction over non-major crimes, and both the federal government and the State of Oklahoma "have concurrent jurisdiction to prosecute crimes committed in Indian country" under the General

Crimes Act. *Id*. at 639, 649. As interpreted by the Oklahoma Court of Criminal Appeals in *City of Tulsa v. O'Brien*, 2024 OK CR 31, 2024 WL 5001684 ("*O'Brien*"), which applied the law as set forth in *Castro-Huerta*, the State's exercise of criminal jurisdiction over non-Member Indians for non-major crimes committed in Indian country is likewise not foreclosed by principles of tribal self-government. The same analysis and the same conclusion holds true for Members, too.

In its Motion, Plaintiff's request for relief is as remarkable as it is legally unsupported: Plaintiff seeks to enjoin Defendant from "asserting criminal jurisdiction over Indians within the boundaries of the Muscogee (Creek) Reservation"("Creek Reservation"), purportedly based upon the U.S. Supreme Court's decision in *McGirt v. Oklahoma*, 591 U.S. 894 (2020) ("*McGirt*"). [Doc. 4 at 1]. While monumental in many respects, *McGirt* is old and, as applied here, largely inapplicable news. As the Court knows, the *McGirt* decision's holding is narrower than Plaintiff posits, and is limited to the prosecution of "tribal members for **major crimes**." *Id*. at 934 (emphasis added). And, although Plaintiff constantly encourages the Court to look the other way with respect to *Castro-Huerta*, an opinion it fought hard against then and continues to continues fight here, the Court's "proper role under Article III of the Constitution is to declare what the law is," not what Plaintiff thinks the law should be. *Castro-Huerta*, 597 U.S. at 655. A preliminary injunction should not issue.

Fatal to its requested relief, Plaintiff fails to show that it has a likelihood of success on the merits. Throughout its Motion, Plaintiff invites the Court both to adopt an incorrect legal standard and to misapply U.S. Supreme Court precedent. By way of example: Plaintiff asserts that *McGirt* and a "long line of precedent"[1] establish that States do not have criminal jurisdiction in Indian country unless Congress has expressly granted it. Such an assertion shrugs off a bedrock principle

[1] Doc. No. 11 at 14.

of Supreme Court jurisprudence: that the most recent decision becomes the governing rule for how an issue is to be treated. To restate it again, much to Plaintiff's disappointment, in *Castro-Huerta* the Supreme Court announced that "[t]he default is that States have criminal jurisdiction in Indian country unless jurisdiction is preempted." *Castro-Huerta*, 597 U.S. at 629. Plaintiff nevertheless attempts to distract the Court from that which *Castro-Huerta* plainly requires, and instead attempts to build its analytical foundation on *McGirt*, itself a case expressly limited to whether the State has authority to prosecute Indians who commit major crimes in Indian country. *McGirt*, 591 U.S. at 898, 934. Here, Plaintiff challenges Henryetta's jurisdiction to prosecute *general* crimes in Indian country, and *Castro-Huerta* undeniably foils Plaintiff's agenda.

As explained in *Castro-Huerta*, when the law is read and applied correctly, it is clear that states retain jurisdiction over all of their territory, including criminal jurisdiction in Indian country, *unless* the state's jurisdiction (1) is preempted by federal law or (2) unlawfully infringes on tribal self-government. This standard, known as the "*Bracker* test," stems from the Supreme Court's opinion in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-43 (1980).

In its Motion, however, Plaintiff proffers pre-*Castro-Huerta* analysis that was rejected by the U.S. Supreme Court. In so doing, Plaintiff urges the Court to conclude that Henryetta is without jurisdiction over a Member or non-Member's criminal conduct in Indian country unless Congress has signed a permission slip otherwise. But that's not the law. Preemption, not permission, is the exception to the general rule that a State is "entitled to the sovereignty and jurisdiction over all the territory within her limits[,]" including Indian country. *Castro-Huerta*, 597 U.S. at 636.

Because Plaintiff cannot show a likelihood of success on the merits, the Court need not consider the remaining factors of the preliminary injunction analysis. If, however, the Court chooses to proceed, Plaintiff also fails on the other prongs. For instance, Plaintiff fails to show that

it will suffer irreparable harm if a preliminary injunction is not issued. Although Plaintiff warns of potential disruption to tribal sovereignty and prosecutorial jurisdiction in Indian country, it fails to show how Henryetta's concurrent prosecution of general crimes, which Plaintiff is free to prosecute at the same time, infringes on the Nation's sovereignty or tribal self-government.

Furthermore, the U.S. Supreme Court has consistently declined to find an infringement on tribal self-government when the conduct of non-Member Indians, who are not constituents of the governing tribe and have no role in its political processes, are at issue. *See Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980) ("*Colville*"). The Court articulated a clear rule: "For most practical purposes," non-Members "stand on the same footing as non-Indians resident on the reservation." *Id*. Plaintiff's argument is even more significantly weakened by other examples where courts have upheld state jurisdiction over crimes committed by non-Members.

Plaintiff also fails to articulate how the balance of equities and the public interest breaks in its favor. Henryetta has a strong interest in enforcing its laws and keeping the public safe for all of its inhabitants, regardless of a tribal membership. The applicable framework handed down by the Supreme Court in *Castro-Huerta* supports State and municipal authority to prosecute Members, non-Member Indians, and non-Indian offenders for minor offenses. Precedent also supports the state and municipal government's primary role in criminal law enforcement. Plaintiff fails to show that a preliminary injunction will serve the public interest. To the contrary, the balance of equities favors Henryetta's exercise of concurrent jurisdiction over general crimes in Indian country.

As set forth below, the facts show that the Nation is not entitled to the preliminary injunction that it seeks.

FACTS SUPPORTIVE OF DENIAL OF AN INJUNCTION

1. Henryetta was established in 1901 in Indian Territory. *See* Declaration of Donna White. [Ex. 1, Declaration of Donna White]

2. Henryetta is not a charter city and has never had a city charter. [Ex. 1, Declaration of Donna White]. The City of Henryetta's form of government is the statutory council-manager form of government found in OKLA. STAT. tit. 11, § 10-102, et al.

3. Henryetta currently does not prosecute Nation members for criminal offenses within its municipal courts. The City has exercised prosecutorial discretion to dismiss any pending municipal court cases against Nation members during the pendency of this proceeding. [Ex. 2, Declaration of John Insabella].

4. Henryetta is unaware of the pending prosecution of any member of a federally-recognized tribe. [Ex. 2, Declaration of John Insabella].

5. Henryetta complies with the ruling of the Oklahoma Court of Criminal Appeals in *City of Tulsa v. O'Brien*, 2024 OK CR 31 and intends to continue prosecutions of non-Member Indians for violations of Henryetta's city ordinances. [Ex. 2, Declaration of John Insabella]. The City Attorney contends that the City's assertion of criminal jurisdiction is in accord with federal law as announced in *McGirt* and *Castro-Huerta* as set forth herein.

6. The City does not intend to prosecute any Nation Member during the pendency of this litigation for offenses within its corporate boundary absent further clarification of its jurisdiction from a Court of competent jurisdiction to clarify its concurrent jurisdiction as set forth in *Castro-Huerta*.

7. The City of Henryetta issued a warrant, W110619-16 in Case Number 87061-63, 85688, and 83433 for Heather Rodgers on or about November 6, 2019, prior to the June 2020 *McGirt v. Oklahoma* opinion. *McGirt* is not retroactive. Ms. Rodgers received a citation for

driving with an expired license, an expired tag, speeding, and failure to stop at a stop sign. The warrant was not executed until February 10, 2025. Ex. 3, Incident/Offense Report 2025-0050; Ex. 4, Warrant W110619-16; Ex. 5, Citation Records 075750].

8. Henryetta lacks any record of Ms. Rodgers asserting her Nation membership before the Municipal Court. Ms. Rodgers did not appear in Court. Henryetta lacks any record of Ms. Rodgers' excuse for failure to appear following her February 10, 2025, arrest. Henryetta regularly reschedules court appearances for persons with written proof of medical issues or placement in treatment facilities. [Ex. 2, Declaration of John Insabella; *see also* paragraph 10].

9. The Henryetta Police Department arrested Bandy Hill at the Hillcrest Medical Center in Henryetta on May 4, 2024, for public intoxication. The Police Report states, "On May 4, 2024, at approximately 1524 hours officers were dispatched to Hillcrest Medical Center in reference to an intoxicated female causing a disturbance." Officer Bryce Cook, "observed Brandy to have difficulty walking straight or standing up without going off balance. Brandy had slurred speech to which she attributed to her dentures. Brandy appeared lethargic and advised that she had just been released from the hospital and was waiting for her husband to pick her up." Officer Cook spoke with nursing staff, "who stated that Brandy had threatened to fight medical staff, tried to damage property, and was being belligerent. The staff stated that they had contacted he ex-husband Rich who stated that he was not going to pick her up and that there was mention of a protective order.." [Ex. 6, Incident/Offense Report 2024-0254]. Officer Cook further noted that from his observations, "I believed Brandy to be under the influence of narcotics…" After she failed a field sobriety test, Ms. Hill was arrested for public intoxication.

10. Henryetta does not possess a record of Ms. Hill ever identifying herself as a Nation Member to Officer Cook or to the Henryetta Municipal Court. Ms. Hill failed to appear at her first two court dates. On June 26, 2024, Ms. Hill finally faxed a letter from a sober living facility to justify her absence from Court and presence in a treatment program. Despite the guilty finding, the Municipal Court has taken no further action since 2024. There is no warrant outstanding for Brandy Hill. [Ex. 7, Citation 075124; Ex. 2, Declaration of John Insabella]. Ms. Hill did not appeal her municipal conviction to the state district court.

11. Darius Tiger was cited for driving without a license and without insurance on February 10, 2025. Mr. Tiger was ordered to appear on February 10, 2025. Mr. Tiger began making payments on the citations on March 10, 2025. [Ex. 8, Citation 075630 and Citation 075631]. Mr. Tiger did not appeal his municipal conviction to the state district court.

12. Daniel Bear was arrested on May 11, 2025 by the Henryetta Police Department. Mr. Bear did ask for the Creek Nation police. Mr. Bear admittedly driving without a valid driver's license and without motor vehicle insurance. Mr. Bear was arrested for a City of Henryetta Warrant W100722-04, and received citations for the driving offenses. [Ex. 9, Incident/Offense Report 2025-0226].

13. Mr. Bear appeared in Court with an attorney to contest Henryetta's jurisdiction based upon his status as a member of the Nation on or about June 30, 2025. The City Attorney utilizing prosecutorial discretion dismissed the case against Mr. Bear without prejudice to refiling. [Ex. 10, Citation 076056].

14. The City of Henryetta has a population of approximately 5,640 people as of the 2020 census and a total land area of 6.6 miles. The Census estimates that approximately

1,105 persons living in Henryetta are American Indian or Alaska Natives.[2] The Census does not have data available on how many are Nation Members, non-Member Indians, or persons who identify as American Indian or Alaska Native but are not members of any federally-recognized Indian tribe.

15. Absent concurrent jurisdiction, Henryetta would face a substantial impediment to its ability to provide public safety to a substantial number of its citizens including tribal members who benefit from a robust and responsive police force. The purpose of Henryetta's municipal ordinances regarding minor offenses is not punitive but intended to protect the public through remedying unsafe behavior such as driving without a license, insurance, or speeding. [Ex. 2, Declaration of John Insabella].

ARGUMENT AND AUTHORITIES

I. Legal Standard.

A preliminary injunction is "the exception rather than the rule." *United States ex rel. Citizen Band Potawatomi Indian Tribe v. Enter. Mgmt. Consultants, Inc.*, 883 F.2d 886, 888 (10th Cir. 1989). Since it is "an extraordinary remedy, the right to relief must be clear and unequivocal." *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1261 (10th Cir. 2004) (internal quotation marks and citation omitted). "To obtain a preliminary injunction, the movant bears the burden of establishing four factors: '(1) a likelihood of success on the merits; (2) a likelihood that the moving party will suffer irreparable harm if the injunction is not granted; (3) the balance of equities is in the moving party's favor; and (4) the preliminary injunction is in the public interest.'" *Oklahoma v. Biden*, 577 F. Supp.3d 1245, 1251 (W.D. Okla. 2021) (quoting *Republican Party of N.M.*, 741 F.3d at 1092). "[W]here a movant fails to establish a likelihood of

[2] https://data.census.gov/profile/Henryetta_city,_Oklahoma?g=160XX00US4033750#race-and-ethnicity (last visited August 13, 2025).

success on the merits, it is unnecessary to address the remaining requirements for a preliminary injunction." *Id.*; *see also Warner v. Gross*, 776 F.3d 721, 736 (10th Cir. 2015).

Because certain types of preliminary injunctions "don't merely preserve the parties' relative positions pending trial," courts treat them as "disfavored" and impose on plaintiff "a heavier burden on the likelihood-of-success-on-the-merits and the balance-of-harms factors." *Free the Nipple-Fort Collins v. City of Fort Collins, Colorado*, 916 F.3d 792, 797 (10th Cir. 2019). A "disfavored injunction may exhibit any of three characteristics: (1) it mandates action (rather than prohibiting it), (2) it changes the status quo, or (3) it grants all the relief that the moving party could expect from a trial win." *Id*. To get a disfavored injunction, Plaintiff must make a "strong showing" that each of these prongs tilt in its favor. *Fish v. Kobach*, 840 F.3d 710, 724 (10th Cir. 2016).

Although the relief Plaintiff seeks (a general injunction against the defendants from "any further assertion of criminal jurisdiction over Indians within the Creek Reservation") is not well-defined, it would clearly be considered a disfavored injunction.

First, the injunction would mandate action, rather than merely prohibiting it. An injunction is considered mandatory if it "affirmatively require[s] the nonmovant to act in a particular way, and as a result . . . place[s] the issuing court in a position where it may have to provide ongoing supervision to assure the nonmovant is abiding by the injunction." *Dominion Video*, 356 F.3d at 1261. An injunction requiring Defendants to cease such prosecutions would compel affirmative action.

Second, the requested relief would change the status quo. According to the Tenth Circuit, the status quo is "the last uncontested status between the parties which preceded the controversy until the outcome of the final hearing." *Schrier v. Univ. Of Co.*, 427 F.3d 1253, 1260 (10th Cir.

2005). The jurisdictional test for Indian country allows for concurrent jurisdiction to prosecute general crimes in Henryetta, as authorized under *Castro-Huerta* and Oklahoma law. A preliminary injunction would, therefore, change the status quo.

Third, granting the injunction Plaintiff seeks would provide all the relief Plaintiff could expect from a trial win, namely: stopping the exercise of concurrent jurisdiction to prosecute general crimes. Because Plaintiff requests a disfavored preliminary injunction, Plaintiff "must make a heightened showing of the four factors to obtain the injunction." *MFE Enterprises, Inc. v. Alphanetics*, 24-CV-304-JFJ, 2024 WL 5201216, at *4 (N.D. Okla. Dec. 23, 2024). Here, Plaintiff cannot make a heightened showing, much less meet a lower bar.

II. Plaintiff Cannot Satisfy its Burden.

a. Plaintiff Cannot Demonstrate a Likelihood of Success on the Merits.

Plaintiff cannot demonstrate a likelihood of success on the merits and is incorrect in asserting that states lack jurisdiction unless authorized by Congress. Throughout its Motion [Doc. No. 11], Plaintiff urges the Court to adopt an incorrect legal standard. Although Plaintiff purports to rely on *McGirt*, it ignores the specific context and express limits of its holding. Instead, Plaintiff invites the Court to presume a blanket absence of state jurisdiction over all Indian criminal conduct, rather than applying the correct analysis subsequently set forth by the U.S. Supreme Court in *Castro-Huerta*.

By citing select favorite lines from *McGirt*, an opinion explicitly limited to consideration of the Major Crimes Act, Plaintiff should not be able to induce the Court to adopt a novel analytical framework to divest state and municipal jurisdiction over general crimes in Indian country. Precedent—especially *Castro-Huerta* and the authorities cited therein—simply does not support Plaintiff's position. The Court has rejected "an inflexible per se rule precluding state jurisdiction

over tribes and tribal members in the absence of express congressional consent." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214–15 (1987).

Plaintiff, quoting from a paragraph in *McGirt* that begins, "Mr. McGirt's appeal rests on the federal Major Crimes Act," argues that "[s]tate courts generally have no jurisdiction to try Indians for conduct committed in 'Indian country' absent a 'clear expression of the intention of Congress.'" 591 U.S. at 898 [Doc. No. 4 at 7]. From this, Plaintiff extrapolates the adoption of a new "inflexible per se rule" that Oklahoma lacks criminal jurisdiction over all Indians for all crimes committed in Indian country unless Congress expressly grants such authority. [Doc. No. 11]. But *McGirt*, which explicitly limited its consideration to jurisdiction over major crimes, doesn't serve Plaintiff's end: "Congress allowed only the federal government, not the States, to try tribal members for *major crimes*. All our decision today does is vindicate that replacement promise." *McGirt*, 591 U.S. at 934 (emphasis added). Simply put, *McGirt* did not address crimes governed by the General Crimes Act, like those at issue here. *See id*. at 898.

In contrast, the *Castro-Huerta* case subjected the General Crimes Act to the preemption analysis and reaffirmed the legal standard for analyzing state criminal jurisdiction in Indian country, rooted in principles of state sovereignty "dating back to the 1800s[.]" *Castro-Huerta*, 597 U.S. at 637. Under this bedrock principle, "States have jurisdiction to prosecute crimes committed in Indian country *unless preempted*." *Castro-Huerta*, 597 U.S. at 637 (emphasis added).

> To begin with, the Constitution allows a State to exercise jurisdiction in Indian country. Indian country is part of the State, not separate from the State. To be sure, under this Court's precedents, federal law may preempt that state jurisdiction in certain circumstances. But otherwise, as a matter of state sovereignty, a State has jurisdiction over all of its territory, including Indian country.

Id. Rephrased, the default rule is that States (and their municipalities) have criminal jurisdiction in Indian country unless that jurisdiction has been preempted by an act of Congress or unlawful

infringement on tribal self-government. *Id*. No court may "'replace the actual text with speculation as to Congress' intent." *Castro-Huerta*, 597 U.S. at 642; *see also McGirt*, 582 U.S. 79, 89 (2017) (The Court "presume[s] more modestly" "'that [the] legislature says what it means and means . . . what it says.").

Incredibly, in both its Complaint and Motion for Preliminary Injunction, Plaintiff misstates the current law and asks the Court to rely upon the same to act in its favor:

> This Court can redress the injury that the City is inflicting on the Nation and its right to self-government by **issuing a declaratory judgment that the City lacks criminal jurisdiction over Indians within the Creek Reservation absent the assent of Congress, and by enjoining the City from prosecuting Indians except where authorized by Congress going forward**.

Complaint (emphasis added). [Doc. 2 at 6, ¶ 17]. This standard is again repeated in Plaintiff's Motion for Preliminary Injunction, where Plaintiff states in its opening paragraph that "[p]ursuant to the United States Constitution and well-established precedent, **Oklahoma and its political subdivisions may exercise criminal jurisdiction over Indians within the Reservation only with the assent of Congress**." [Doc. 11 at 9 (citing *McGirt* and *Ute Indian Tribe of the Uintah and Ouray Reserv. v. Utah*, 790 F.3d 1000, 1004 (10th Cir. 2015)) (emphasis added)]. But this is not the law.

Indeed, without disclosing the same, Plaintiff invites this Court to adopt the *dissent's* view and position in *Castro-Huerta*, rather than follow the U.S. Supreme Court's majority opinion:

> [T]he dissent contends that Congress must affirmatively authorize States to exercise jurisdiction in Indian country, even jurisdiction to prosecute crimes committed by non-Indians. But under the Constitution and this Court's precedents, the default is that States may exercise criminal jurisdiction within their territory. See Amdt. 10. States do not need a permission slip from Congress to exercise their sovereign authority. In other words, the default is that States have criminal jurisdiction in Indian country unless that jurisdiction is preempted. In the dissent's view, by contrast, the default is that States do not have criminal jurisdiction in Indian country unless Congress specifically

> provides it. The dissent's view is inconsistent with the Constitution's structure, the States' inherent sovereignty, and the Court's precedents.

Id. at 653. With the default starting point firmly resting at the presumption of State jurisdiction over all criminal matters, "a State's jurisdiction in Indian country may be preempted (i) by federal law under ordinary principles of federal preemption, or (ii) when the exercise of state jurisdiction would unlawfully infringe on tribal self-government." *Id*. at 638. It is axiomatic that this Court apply the law as interpreted by the U.S. Supreme Court, and not as Plaintiff or Justice Gorsuch's impassioned dissent wishes it to be.[3]

Starting from the default position favoring jurisdiction for Henryetta, the first question is whether the exercise of jurisdiction over Member and non-Member Indians who commit non-major crimes in Indian country is expressly preempted "by federal law under ordinary principles of federal preemption." *Castro-Huerta*, 597 U.S. at 638. There is a strong presumption against preemption of state law, so "unless that was the clear and manifest purpose of Congress," courts should not find preemption of state police powers. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009); *see also Arizona v. United States*, 567 U.S. 387, 400 (2012) ("In preemption analysis, courts should assume that 'the historic police powers of the States' are not superseded 'unless that was the clear and manifest purpose of Congress.'").

Congress has not preempted the State's jurisdiction to prosecute Indians who commit non-major crimes in Indian country. Of particular significance, the Court in *Castro-Huerta* specifically found that the General Crimes Act does not preempt state authority to prosecute crimes for conduct occurring in Indian country and, most importantly, "both the Federal Government and the State

[3] The *Castro-Huerta* Court's articulation of the default rule concerning state jurisdiction in Indian country is not limited by tribal membership status. As a matter of state sovereignty, state jurisdiction is the default under the Constitution, irrespective of an individual's Indian membership status.

have concurrent jurisdiction [under the General Crimes Act] to prosecute crimes committed in Indian country." 597 U.S. at 639–40 (emphasis added). Additionally, the Court found that "Public Law 280 contains no language that preempts States' civil or criminal jurisdiction." *Id*. at 647–48. The U.S. Supreme Court has thusly spoken on the issue. Thus, the first part of the *Bracker* test is clearly not met.

Furthermore, the General Crimes Act, Public Law 280, nor any other specific provision of federal law, expressly preempts state criminal jurisdiction in Indian country. Instead, Plaintiff's lone argument for preemption is that "the Constitution vests criminal authority over Indians in Indian country exclusively in the federal government [and] the Tenth Amendment reserves no residuum of that authority to the states." [Doc. No. 11 at 20]. Plaintiff's preemption argument, however, is merely a product of its fractured foundation. It claims that a state only has criminal jurisdiction in Indian country if Congress provides a permission slip. Again, this flies in the face of the default—and controlling—rule set out in *Castro-Huerta*.

Here, Plaintiff has not—and, at this time, cannot—provide another basis to show that federal law expressly preempts the State (and its sub-divisions) from exercising concurrent jurisdiction over general crimes in Indian Country. Accordingly, the analysis must move to the second prong, known as the *Bracker* balancing test, which looks at tribal interests, federal interests, and state interests to determine whether "the exercise of state jurisdiction" "would unlawfully infringe on tribal self-government." *Castro-Huerta*, 597 U.S. at 638 (citing *Bracker*, 448 U.S. at 145).

Regarding tribal interests, the exercise of state (and municipal) jurisdiction over misdemeanor ordinance violations would not infringe on tribal self-government. Henryetta's prosecution of Member and non-Members for misdemeanor traffic offenses occurring on public

streets and roads in Henryetta does not affect the tribe's authority to regulate its citizens for violations of Creek law. And because jurisdiction is *concurrent* with—not in lieu of—tribal jurisdiction, Henryetta's prosecution of general crimes does not displace, or diminish, Plaintiff's prosecutorial authority to try Indians for violations of its own laws. Indeed, Henryetta's concurrent jurisdiction and prosecution of misdemeanor municipal offenses would bolster Plaintiff's strong interest in public safety for its citizens in Henryetta small portion of the Nation's Reservation. Both the Nation and Henryetta have the duty to protect their residents, enforce their laws, and uphold justice within their territorial boundaries. And all of the people are safer for it.

Regarding federal interests, Henryetta's prosecution of misdemeanor traffic crimes also would not harm the federal interest in protecting Indians on the Creek Reservation. Federal jurisdiction over such crimes is concurrent to state (and municipal) jurisdiction and thus not affected. *See* 18 U.S.C. §§ 13, 1152. The federal interest in public safety on the reservation for all citizens—regardless of tribal membership—is enhanced by Henryetta's assertion of jurisdiction over these ordinance violations. That is especially so considering Henryetta already has primary responsibility for law enforcement within its own city limits, and the extremely limited role, if any, of the federal government in misdemeanor traffic offenses.

Like Henryetta, the State of Oklahoma has a strong sovereign interest in ensuring public safety on the roads and highways of its territory and in ensuring criminal justice for all citizens—Indian and non-Indian alike. Henryetta already has primary responsibility for enforcement of the laws within its city limits, particularly misdemeanor traffic offenses. Henryetta's prosecution of Members and non-Members for these crimes as part of its concurrent jurisdiction enhances the interests of both the State, city, and Nation in protecting the motoring public. This potentially reduces motor vehicle accidents and deaths across its territory, benefiting the public.

That said, membership status is a consideration when applying the *Bracker* balancing test—*i.e.*, whether tribal self-government is infringed by the state's exercise of jurisdiction. The Tenth Circuit has previously recognized that separate Indian tribes are independent entities with their own jurisdiction to regulate their own citizens. *See Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1152 (10th Cir. 2011) ("While the Creek Nation has jurisdiction to regulate its own citizens, the Thlopthlocco is an independent tribal entity that elects its own government pursuant to its own Constitution and is not itself a citizen of the Creek Nation."). And as the Supreme Court has held on multiple occasions, "[f]or most practical purposes," non-Member Indians "stand on the same footing as non-Indians resident on the reservation." *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 161 (1980) ("*Colville*"). In the seminal *Colville* decision, the Supreme Court upheld the state's authority to impose taxes on on-reservation purchases by non-Member Indians. *Id.* at 138. In addressing the argument related to tribal self-government, the Court noted that the "imposition of [the] tax on these purchasers [would not] contravene the principle of tribal self-government, for the simple reason that nonmembers are not constituents of the governing Tribe." *Id.* at 161. Thus, when a Supreme Court decision "refers to 'non-Indians,' the logic of the opinion applies to non-members of a tribe, including other independent Indian tribes." *Thlopthlocco Tribal Town v. Stidham*, 762 F.3d 1226, 1234 (10th Cir. 2014).

For purposes of criminal jurisdiction, the U.S. Supreme Court has likewise held that since non-Member Indians "share relevant jurisdictional characteristics of non-Indians" (*i.e.*, non-Members cannot "vote, hold office, or serve on a jury" of the reservation tribe), they also "share the same jurisdictional status." *Duro v. Reina*, 495 U.S. 676, 688, 693, 696 (1990) ("*Duro*"). Following *Duro*, Congress enacted the so-called "*Duro* fix" by defining tribal "powers of self-

government" to include the power "to exercise criminal jurisdiction over all Indians," including non-member Indians. *See* 25 U.S.C. § 1301. But that statutory amendment only redefined and expanded the scope of tribal jurisdiction; it did nothing to curtail or preempt the concurrent exercise of state jurisdiction. *See, e.g.*, *State v. Shale*, 345 P.3d 776, 779 (Wash. 2015) ("Nothing in the act itself addressed whether this *post-Duro* tribal jurisdiction is exclusive of any state jurisdiction."); *LaRock v. Wisconsin Dep't of Revenue*, 621 N.W.2d 907, 914 (Wisc. 2001) (rejecting argument that the *Duro* fix overturned the inherent jurisdiction of states over non-member Indians within Indian country and holding that the "distinction between nonmember Indians on the lands of another tribe and tribal members on their own lands—as stressed in *Colville* and reasserted in *Duro*—remains valid"). Even after the *Duro* fix, the Supreme Court has continued to recognize the "limited character" of tribal sovereignty and to cite *Duro* for the principles on which it relied, including concerns regarding the application of full tribal jurisdiction to those "who do not belong to the tribe and consequently had no say in creating the laws that would be applied to them." *United States v. Cooley*, 593 U.S. 345, 352–53 (2021).

The Oklahoma Court of Criminal Appeals recognized this important distinction in *City of Tulsa v. O'Brien*, holding that State and municipal "prosecution of non-member Indians of the Muscogee (Creek) tribe for … offenses occurring on public streets and roads in Tulsa does not affect the tribe's authority to regulate its own citizens for violations of Creek tribal law. In fact, such a prosecution would not involve prosecuting any citizen of the Muscogee (Creek) tribe." 2024 OK CR 31, ¶ 32. Indeed, "prosecution of non-member Indians would bolster the tribe's strong interest in public safety for its citizens in this part of the Creek reservation." *Id*. Accordingly, the *O'Brien* court found that State jurisdiction was not preempted under the *Bracker* balancing test because the state's exercise of jurisdiction "would not unlawfully infringe upon tribal self-

government." *Id*. ¶ 35. In short, Henryetta's exercise of concurrent jurisdiction over general crimes committed within its borders does not unlawfully infringe on tribal self-government. And as applied to non-Members, when Henryetta or the State prosecutes a non-Member Indian who commits a non-major crime in Indian country, there is minimal, if any, impact on the Nation's right to self-govern.

Applying the correct legal standard as mandated in *Castro-Huerta*, it is clear that: (1) State jurisdiction is not expressly preempted by federal law and that (2) Henryetta's exercise of concurrent jurisdiction does not unlawfully interfere with the Nation's right to self-government. Plaintiff is unlikely to succeed on the merits, and the Court should deny its request for a preliminary injunction.

Of further import when analyzing the likeliness of success on the merits, the Court should also consider the Statement of Justice Kavanaugh—the majority opinion author of *Castro-Huerta*, as it relates to a Tenth Circuit panel opinion in *Hooper v. City of Tulsa*, 71 F.4th 1270 (10th Cir. 2023). In *Hooper*, the Tenth Circuit held that Section 14 of The Curtis Act ("Curtis Act") no longer applied to City of Tulsa, precluding Tulsa from enforcing its traffic laws against Indians.[4] After *Hooper* was issued, the City of Tulsa initially applied for and obtained a temporary stay from the United States Supreme Court, and an extension of that stay. The stay was subsequently lifted,

[4] Section 14 provided municipalities in Indian Territory with authority over "*all* inhabitants of such cities and towns, *without regard to race*," and provides that individuals, including tribal members, "*shall be subject to all laws and ordinances of such city or town governments* [ ]." Curtis Act, § 14, 30 Stat. 499, 500 (emphasis added). The circuit court's primary argument against City of Tulsa's reliance upon the Curtis Act was the fact that City of Tulsa adopted a new charter after statehood, reincorporating under Oklahoma law. 71 F.4th at 1285. As such, "Tulsa is no longer entitled to Congress's limited grant of jurisdiction in Section 14." *Id*. Like Tulsa, Henryetta organized pre-statehood in late 1901 and fell under Section 14 of the Curtis Act.[4] Unlike Tulsa, however, Henryetta did *not* reincorporate or adopt a new charter after statehood.[4] Accordingly, Henryetta is still protected by Section 14 of the Curtis Act, which has not been repealed by Congress.

however, because the case was in an interlocutory posture. With the lift of the stay, Justice Kavanaugh—the author of *Castro-Huerta*—issued an optional Statement regarding the matter:

> The City of Tulsa's application for a stay raises an important question: whether the City may enforce its municipal laws against American Indians in Tulsa. For example, may Indians in Tulsa violate the City's traffic safety laws without enforcement by the City? . . . .
>
> Importantly, the Court of Appeals declined for now to reach an additional argument raised by the State of Oklahoma as *amicus curiae*; that the City may exercise jurisdiction under the reasoning in [*Castro-Huerta*]. On remand in the District Curt, the City may presumably raise that argument.

See Statement of KAVANAUGH, J. 600 U.S. ____(2023).[5] On remand to the Northern District of Oklahoma, the City of Tulsa did just that, requesting the district court to retain jurisdiction to address the implications of the U.S. Supreme Court's decision in *Castro-Huerta*, as referenced by Justice Kavanaugh above. Instead of addressing the issue, the district court dismissed the case, writing, "[t]he Tenth Circuit chose not to address *Castro-Huerta* in its decision and this Court similarly declines to address it." *Hooper v. City of Tulsa*, No. 21-CV-00165-WPJ-JFJ, Doc. 52 (N.D. Okla. Dec. 23, 2023). However, given the teachings of *Castro-Huerta*, and the emphasis placed on the legal issue and the import of that decision by its majority author in the above *sua sponte* Statement, Plaintiff's likeliness of ultimately succeeding upon the merits is remote. A preliminary injunction should not issue.

b. The Court Need Not Reach the Second or Third Prongs of the Preliminary Injunction Standard, but Plaintiff Still Fails to Meet its Burden.

Because Plaintiff fails to show a likelihood of success on the merits, the Court can deny Plaintiff's Motion [Doc. 11] without further inquiry. Indeed, "where a movant fails to establish a likelihood of success on the merits, it is unnecessary to address the remaining requirements for a

[5] https://www.supremecourt.gov/opinions/22pdf/23a73_gfbi.pdf.

preliminary injunction." *Oklahoma v. Biden*, 577 F.Supp.3d at 1251. Even if the Court chooses to explore the other prongs, Plaintiff still fails to satisfy its burden for a preliminary injunction.

(i) The Second Prong: Irreparable Harm.

"A showing of probable irreparable harm is the single most important prerequisite." *Dominion Video Sat., Inc. v. Echostar Sat. Corp.*, 356 F.3d 1256, 1260 (10th Cir. 2004). "[T]he moving party must first demonstrate that such injury is likely before the other requirements for the issuance of an injunction will be considered." *Id.* (quoting *Reuters Ltd. v. United Press Int'l, Inc.*, 903 F.2d 904, 907 (2d Cir. 1990) (internal quotations omitted).

To constitute irreparable harm, an injury must be certain, great, actual, "and not theoretical." *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1243 (10th Cir. 2001). Irreparable harm is not harm that is "merely serious or substantial." *Id.* at 1250 (quoting *A.O. Smith Corp. v. FTC*, 530 F.2d 515, 525 (3d Cir. 1976)). "[T]he party seeking injunctive relief must show that the injury complained of is of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm." *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003) (quoting *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674, 244 U.S. App. D.C. 349 (D.C. Cir. 1985). (emphasis in original) (brackets, citations, and internal quotation marks omitted). *Muscogee (Creek) Nation v. Oklahoma Tax Comm'n*, 09-CV-285-TCK-TLW, 2009 WL 10695371, at *3 (N.D. Okla. Nov. 19, 2009). An intrusion on tribal sovereignty by enforcing state law on Indian land *can* constitute irreparable injury, but this is not a per se rule. *Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1255 (10th Cir. 2006). However, as has previously held, the law requires more, even of an Indian tribe such as the Nation. Namely, the Nation must "offer additional details regarding precisely how [a defendant's] actions have violated [its] sovereignty." *Muscogee (Creek) Nation v. Oklahoma Tax Comm'n*, 09-CV-285-TCK-TLW, 2009 WL 10695371, at *4 (N.D. Okla. Nov. 19, 2009).

To show how Henryetta's exercise of concurrent jurisdiction with the Nation over misdemeanor general crimes violates its sovereignty, Plaintiff relies on now Justice Gorsuch's circuit court opinion in *Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah*, 790 F.3d 1000 (10th Cir. 2015) (prosecuting any Indians for conduct occurring within the Creek Reservation is "itself an infringement on tribal sovereignty."). [Doc. 11 at 28-29]. Despite what Justice Gorsuch proclaimed in *Ute Indian Tribe*, however, his view on criminal jurisdiction in Indian country and the interpretation of laws and precedent relating to the same is now the minority view of the United States Supreme Court. *See Castro-Huerta*. While *Ute* has yet to be expressly overturned, *Castro-Huerta* and the intimations of Justice Kavanaugh has it teetering precariously on that ledge.

Regarding irreparable harm, the Nation argues that it has "structured its criminal laws and enforcement mechanisms" in favor of public safety, but is being adversely impacted by Henryetta's enforcement of its own misdemeanor traffic laws against Indians, and thereby subjecting Indians to a criminal justice system other than the Nation's own. This point is without merit.

Henryetta has been exercising concurrent jurisdiction to prosecute Member and non-Member Indians in Indian country. This does not inhibit the Nation from prosecuting the same persons for the same conduct through the enforcement of its own tribal laws without interference. As noted in *O'Brien*, the concurrent jurisdiction "would not displace, or diminish, the tribe's prosecutorial authority to try Indians for violations of local tribal law[.]" 2024 OK CR 31, ¶ 32. In fact, Henryetta's concurrent jurisdiction "would bolster the tribe's strong interest in public safety for its citizens in this part of the Creek reservation." *Id*. Any authority Plaintiff has to prosecute the same criminal conduct is unaffected by Henryetta's enforcement of its city ordinances. Plaintiff simply has not shown how it will be irreparably harmed if a preliminary injunction is not granted.

(ii) The Balance of Equities and Public Interest.

The third and fourth preliminary injunction standards—the balancing of the equities and the public interest—merge when the government is the party opposing the preliminary injunction. *Black Emergency Response Team v. Drummond*, 737 F. Supp. 3d 1136, 1157 (W.D. Okla. 2024) (*citing Aposhian v. Barr*, 958 F.3d 969, 978 (10th Cir. 2020)). In balancing the harms of an injunction prohibiting Defendant from exercising concurrent criminal jurisdiction over general crimes in Indian country, Plaintiff contends that this final factor weighs in its favor because "[a]ny law enforcement concerns the City may invoke will surely not be as portentous as it may assert," while the "City's actions interfere with the Nation's exercise of its own governmental authority over its citizens." [Doc. 11 at 31]. This self-serving position could not be further from the truth, and belies the benefit to the interest of the public at large.

"From the beginning of our country, criminal law enforcement has been primarily a responsibility of the States, and that remains true today." *Kansas v. Garcia*, 589 U.S. 191, 211 (2020). As the United States Supreme Court has recognized, "the States' interest in administering their criminal justice systems free from federal interference is one of the most powerful of the considerations that should influence a court . …" *Kelly v. Robinson*, 479 U.S. 36, 49 (1986). Far from trivial, the State of Oklahoma and its political sub-divisions have the utmost interest in ensuring the safety of all its citizens, regardless of tribal membership, by holding those violating misdemeanor ordinances and general laws accountable. As a sovereign entity, the State has a duty to protect its residents, enforce its laws, and uphold justice within its territorial boundaries, and the same holds true for Henryetta. The U.S. Supreme Court specifically recognized this sovereign duty in *Castro-Huerta*, finding that "the State has a strong sovereign interest in ensuring public safety and criminal justice within its territory, and in protecting all crime victims." 597 U.S. at 651. "The

State also has a strong interest in ensuring that criminal offenders—especially violent offenders—are appropriately punished and do not harm others in the State." *Id.*

On the other hand, the Nation's interests in self-government are not harmed by the denial of a preliminary injunction. The Nation has the authority to prosecute the same Member and non-Member Indians, and its jurisdiction does not foreclose Henryetta's. As such, the Nation has no greater (and likely less) interest than Henryetta in prosecuting non-major crimes committed *in Henryetta*. This exercise of concurrent jurisdiction does not interfere with the Nation's right to prosecute the same individual for the same offense, as both entities derive their powers from separate sovereigns. Therefore, a second prosecution would not violate the Double Jeopardy Clause. *United States v. Lara*, 541 U.S. 193, 197-98 (2004).

The Nation's Motion asserts that it has the ability and resources to police the entirety of its reservation including the City of Henryetta, and that its criminal and traffic laws now mirror those of the State of Oklahoma to prevent confusion. What the Nation does not recognize is that each of the four tribal members submitting affidavits who received citations took actions to harm the public. The Henryetta Police Department responded to a call from Hillcrest Medical Center regarding a woman threatening staff and threatening to damage property. Ms. Hill's affidavit is remarkably different than the description set forth in the Offense/Incident Report. It is apparent, at least that the Henryetta police officer and Hillcrest staff believed Ms. Hill to be a potential danger to herself and the public. It is unknown how quickly, if at all, the Lighthorse Police would have responded. Henryetta police pulled over the other individuals receiving citations for speeding or unsafe equipment, and found the driver's without legal authority to drive a motor vehicle, and/or without proof of insurance. The Lighthorse Police could do the same and thereby hopefully provide the same incentive for these individuals to obtain insurance and keep a driver's license. But the

Nation's Lighthorse Police did not pull over these individuals or cite them for driving without a license or insurance. The City of Henryetta as the primary law enforcement agency within its city limits is on-site and able to do so in the public interest. Any hindrance on their ability is contrary to the measures which are available to encourage individuals in doing things like maintaining insurance, which is a matter of public safety for everyone in the State of Oklahoma, whether a tribal member or not.

For many of the same reasons, the public interest would be directly harmed by the proposed preliminary injunction. The people of Henryetta and the people of the Nation need public safety no matter the relation between their governments. The judicial creation of a loophole where tribal members cannot be required to maintain a driver's license, insurance, or to obey speed limits is not in the interest of anyone. Nevertheless, the Nation asks Henryetta to be enjoined from acting to protect all of persons from those who act less responsibly.

Plaintiff has failed to show that the balance of equities and public interest weighs in favor of a preliminary injunction. In fact, the balance of equities weighs against Plaintiff and favors Henryetta's continued ability to exercise jurisdiction over violations of its municipal ordinances within its own territorial boundary.

For these reasons, Plaintiff's request that the Court temporarily restrain and preliminarily enjoin Defendants should be denied.

Filed: August 14, 2025

HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2025, I electronically transmitted the foregoing Motion to Dismiss to the Clerk of Court using the ECF System for filing and transmittal of Notice of Electronic Filing and to the registered party participants of the ECF system.

s/ Keith A. Wilkes.
Keith A. Wilkes