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

UNITED STATES OF AMERICA,

Plaintiff,

and

CHEROKEE NATION and
CHOCTAW NATION OF OKLAHOMA,

Intervenor Plaintiffs,

and

MUSCOGEE (CREEK) NATION,

Consolidated Plaintiff,

v.

CAROL ISKI,

Defendant.

Case No. 24-CV-0493-CVE
(BASE FILE)

Consolidated with:
Case No. 25-CV-0028-CVE

MUSCOGEE (CREEK) NATION'S RESPONSE TO MOTION TO DISMISS

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INTRODUCTION

The Tenth Circuit has not minced words: "[U]nless Congress provides an exception to the rule … states possess no authority to prosecute Indians for offenses in Indian country." *Ute Indian Tribe of the Uintah & Ouray Rsrv. v. Utah*, 790 F.3d 1000, 1004 (10th Cir. 2015) (quotation marks omitted). In *McGirt v. Oklahoma*, 591 U.S. 894 (2020), the Supreme Court reaffirmed this rule and held that "Oklahoma cannot come close" to establishing that Congress has provided such an exception with respect to the Muscogee (Creek) Reservation. *Id*. at 929.

Yet the Defendant ("District Attorney") is prosecuting Indians for conduct arising within that very Reservation.

The issues surrounding her doing so are federal to their core; grounded in the Constitution, federal treaties, statutes, and caselaw; and implicate the sovereignty of the United States and the Muscogee (Creek) Nation ("Nation"). Despite this, and despite the dispositive clarity of *Ute Indian Tribe* and *McGirt*, the District Attorney contends that this Court has no business inquiring into any of it and must abdicate its constitutional charge in favor of state courts presiding ultra vires over individual criminal defendants, where she will face none of those sovereigns as an adversary, in proceedings by which none of them will be bound.

The District Attorney proposes three bases on which to insulate her conduct from review in this Court: (1) Article III standing; (2) *Younger* abstention; and (3) *Colorado River* abstention. None has merit. Each fundamentally misconstrues the Nation's complaint and the controlling precedents that confirm the justiciability of the Nation's action.

ARGUMENT

I. The Nation Has Standing.

A. Legal Standard

"The standing inquiry, at the motion to dismiss stage, asks only whether the plaintiff has sufficiently alleged a cognizable injury, fairly traceable to the challenged conduct that is likely to be redressed by a favorable judicial decision." *Petrella v. Brownback*, 697 F.3d 1285, 1295 (10th Cir. 2012). Courts "must accept as true all material allegations in the complaint, and must construe the complaint in favor of the complaining party." *Cressman v. Thompson*, 719 F.3d 1139, 1144 (10th Cir. 2013) (citation omitted). "Standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal[.]" *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1093 (10th Cir. 2006) (brackets, quotation marks, and citation omitted). Thus, courts "assume … that the plaintiff will prevail on his merits argument—that is, that the defendant has violated the law." *Smith v. Albany Cnty. Sch. Dist. No. 1 Bd. of Trs*., 121 F.4th 1374, 1378 (10th Cir. 2024) (citation omitted).

B. The Nation Has Alleged a Cognizable Injury.

The District Attorney asserts that the Nation has not alleged a cognizable injury because her actions do not affect the Nation "in a personal and individual way," and therefore "[o]nly the individual[] [criminal defendants] can claim specific injury." Iski Br. 8. This argument is meritless. The Nation has alleged an "infringement on [its] tribal sovereignty" and "tribal self-government," Compl. ¶ 14 (citations omitted), and, as this Court recognized in its Opinion and Order granting the motion to intervene of the Cherokee Nation and Choctaw Nation of Oklahoma, "Indian tribes, like states and other governmental entities, have standing to sue to

protect sovereign interests," Op. and Order (Dkt. 61) at 5;[1] *see also Quapaw Tribe of Okla. v. Blue Tee Corp.*, 653 F. Supp. 2d 1166, 1179–80 (N.D. Okla. 2009) (Eagan, J.) (same).

The Tenth Circuit cannot have been clearer that an Indian nation's sovereign interests include freedom from the unauthorized prosecution of Indians within the nation's Indian country, where, absent congressional assent, "only the federal government or an Indian tribe may prosecute Indians[.]" *Ute Indian Tribe*, 790 F.3d at 1003. This Court again recognized the same in its intervention order. *See* Dkt. 61 at 5 ("[T]he Tenth Circuit has found that a state prosecuting Indians for conduct that occurred on Indian land may constitute an irreparable injury because the state's conduct invades tribal sovereignty.") (citing *Ute Indian Tribe*)). As the Circuit has stated, the pursuit of unauthorized prosecutions by state actors "'create[s] the prospect of significant interference with [tribal] self-government' that this [Circuit] has found sufficient to constitute 'irreparable injury.'" *Ute Indian Tribe*, 790 F.3d at 1006 (first brackets in original) (quoting *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250–51 (10th Cir. 2001)).[2]

Such injury is independent of the harm to individual Indian defendants and establishes standing in the tribe itself. In *Prairie Band*, the Tenth Circuit recognized that a state's claim of authority to issue motor vehicle citations to individual Indians within a tribe's Indian country was an "infringement on tribal self-government" and held that the "[p]rotection of that right is the foundation of federal Indian law; accordingly, we conclude that the tribe has standing." 253 F.3d

[1] This citation is to the docket in *United States v. Iski*, Case No. 24-CV-0493-CVE (Base File) (E.D. Okla.).

[2] The Circuit so held even though the case did not involve pending state proceedings, *see* 253 F.3d at 1238 (challenged citations had been "dismissed" or "resolved"), such that the tribe's injury turned on the "threat" and "prospect" of future citations, *id*. at 1250 (citation omitted); *see also Quapaw Tribe*, 653 F. Supp. 2d at 1180 (Eagan, J.) (*Prairie Band* held that a "tribe had standing to sue Kansas to *prevent* … infringement on tribe's right to self-government" (emphasis added)).

at 1242. In *Moe v. Confederated Salish & Kootenai Tribes of Flathead Rsrv.*, 425 U.S. 463 (1976), where a state sought to tax individual Indians within a tribe's reservation, the Supreme Court explained that

> the Tribe, Qua Tribe, has a discrete claim of injury … so as to confer standing upon it apart from the monetary injury asserted by the individual Indian plaintiffs. Since the substantive interest which Congress has sought to protect is tribal self-government, such a conclusion is quite consistent with other doctrines of standing.

Id. at 468 n.7. So too here. The District Attorney's actions threaten not only the rights of individuals but the Nation's right of self-government, and the Nation has standing to protect that right.[3]

The District Attorney additionally argues that state prosecution of Indians does not impair the Nation's self-government because "an individual may be prosecuted by separate sovereigns for the same conduct." Iski Br. 9. But this Court again rejected the same argument in its intervention ruling, holding that "regardless of the Nations' ability to exercise their own jurisdiction …, the Nations show actual and concrete injuries in fact because they allege that defendant's conduct infringes on their sovereignty." Dkt. 61 at 5–6 (citing *Williams v. Lee*, 358 U.S. 217, 223 (1959), and *Ute Indian Tribe*, 790 F.3d at 1005).

This Court's reasoning is plainly correct. The separate sovereigns doctrine assumes that both sovereigns have lawful jurisdiction, an assumption this Court cannot indulge on this motion. *See Smith*, 121 F.4th at 1378; *Initiative and Referendum Inst.*, 450 F.3d at 1093. Even if it could, the argument fails. The states and tribes involved in *Ute Indian Tribe* and *Prairie Band* were

[3] The District Attorney suggests that it is telling that the relevant cases "have not involved Indian tribes as parties[.]" Iski Br. 8. *But see, e.g.*, *Ute Indian Tribe*; *Prairie Band*; *Wyandotte Nation v. Sebelius*, 443 F.3d 1247 (10th Cir. 2006); *Cheyenne-Arapaho Tribes of Okla. v. Oklahoma*, 618 F.2d 665 (10th Cir.1980).

separate sovereigns and the Circuit found irreparable harm to tribal self-government in both cases. Indeed, the Supreme Court considered the issue in *Oklahoma v. Castro-Huerta*, 597 U.S. 629 (2022), and concluded that the prosecution of the defendant there

> would not deprive the tribe of any of its prosecutorial authority. *That is because* … Indian tribes [generally] lack criminal jurisdiction to prosecute crimes committed by non-Indians …. [and] a state prosecution of a non-Indian does not involve the exercise of state power over any Indian or over any tribe.

Id. at 650 (emphasis added). Here, the converse is true on both counts. The Nation has "'criminal jurisdiction over *all* Indians,' including nonmembers," within its boundaries, *United States v. Lara*, 541 U.S. 193, 198 (2004) (quoting 25 U.S.C. § 1301(2)), and the District Attorney claims criminal jurisdiction over those same Indians. Accordingly, state "prosecution of [a tribal member is] itself an infringement on tribal sovereignty." Dkt. 61 at 6 (brackets in original) (quoting *Ute Indian Tribe*, 790 F.3d at 1005); *see also, e.g.*, *Fisher v. Dist. Ct.*, 424 U.S. 382, 387–88 (1976) ("State-court jurisdiction plainly would interfere with the powers of self-government" by subjecting Indians in Indian country "to a forum other than the one they have established for themselves.").

C. The Nation Does Not Seek To Enjoin Off-Reservation Prosecutions.

A subheading to the District Attorney's brief states that the Nation "takes issue" with prosecutions "for conduct that occurred outside the Nation's historical boundaries" and that it has therefore not suffered a cognizable injury. Iski Br. 7 (emphasis omitted). The Nation assumes this contention was included inadvertently, as the substance of the District Attorney's argument accurately reflects that the prosecutions challenged by the Nation are limited to conduct arising "in the Nation's historical boundaries," *id.* at 9. Moreover, the Nation's complaint is clear that it seeks declaratory and injunctive relief only for prosecutions occurring within the Nation's boundaries. *See* Compl., Prayer for Relief ¶¶ A, B.

D. That the District Attorney Has Limited Her Claims of Jurisdiction to Non-Member Indians Does Not Undermine the Nation's Standing.

The District Attorney asserts that her actions pose no threat to the Nation's rights of self-government because her pending prosecutions "concern non-member Indians[.]" Iski Br. 9. Thus, her conduct "doesn't implicate Plaintiff's sovereignty[.]" *Id*.

This argument is foreclosed on a motion to dismiss for lack of standing, where the merits of the Nation's arguments regarding the illegality of state prosecution of non-member Indians and its corresponding irreparable injury to tribal self-government are assumed. *See Initiative and Referendum Inst.*, 450 F.3d at 1093; *Smith*, 121 F.4th at 1378.

Even absent any such assumption, the argument runs headlong into the federal law, which does not draw a distinction for purposes of tribal powers of self-government between prosecutions of member and non-member Indians. To the contrary, Congress has proclaimed, and the Supreme Court has confirmed, that tribes' "'powers of self-government' … include 'the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over *all* Indians,' including nonmembers." *Lara*, 541 U.S. at 198 (quoting 25 U.S.C. § 1301(2)).

Indeed, the defendant in *McGirt* was "an enrolled member of the Seminole Nation … [whose] crimes took place on the Creek Reservation." 591 U.S. at 898. Far from concluding, as the District Attorney would have it, that the Nation has no sovereign interests at stake in such a prosecution, the Court explained that "Mr. McGirt's personal interests wind up implicating the Tribe's" interests in its own (and the federal government's) jurisdiction over "Indians" within its Reservation, and thus the case

> winds up as a contest between State and Tribe…. [and] the stakes are not insignificant. If Mr. McGirt and the Tribe are right [that the Creek Reservation is Indian country], the State has no right to prosecute *Indians* for crimes committed

> [there]. Responsibility to try these matters would fall instead to the federal government and Tribe.

Id. at 899 (emphasis added).

The Nation's rights of self-government, then, are equally impaired whether a state prosecutes a member or a non-member Indian for conduct within the Creek Reservation, and the District Attorney's assertion that *Ute Indian Tribe* is "inapposite" because it "involved the prosecution of a member of the Ute Indian Tribe," Iski Br. 9, accordingly fails.[4]

E. The Nation's Injury Is Redressable by a Favorable Ruling from This Court.

The District Attorney contends that the Nation also lacks standing because its injury is not redressable by this Court. Even were this Court to issue an injunction, she claims, "the Ongoing Prosecutions could continue[.]" Iski Br. 10. For this, the District Attorney suggests that the Governor or the Attorney General have the authority to engage in prosecutions, and therefore, "[g]iven the Governor's and OAG's authority, an injunction would not hinder the State's ability to continue the prosecutions at issue." *Id*. The argument fundamentally misunderstands the legal concept of redressability.

The District Attorney exercises state criminal authority within the Twenty-Fifth Prosecutorial District. *See* Okla. Stat. Ann. tit. 19, § 215.4. The asserted injury here is the District Attorney acting under color of that authority to unlawfully prosecute Indians within the Creek Reservation, both presently and going forward, in violation of the Nation's rights of sovereignty

[4] While again, the merits are not at issue here, the Nation notes that its brief in support of its motion for a preliminary injunction sets forth in exhaustive fashion how state criminal jurisdiction over non-member Indians in Indian country violates federal law no less than over member Indians, and how the Oklahoma Court of Criminal Appeals' contrary reasoning in *City of Tulsa v. O'Brien*, Case Number: S-2023-715, 2024 WL 5001684 (Okl. Crim. App. Dec. 5, 2024), is pervaded by fundamental errors, including those for which that Court has already been forcefully admonished and thrice reversed by the United States Supreme Court. *See* Nation Prelim. Inj. Br. 5–21.

and self-government. "Plaintiffs suing public officials can satisfy the causation and redressability requirements of standing by demonstrating a meaningful nexus between the defendant and the asserted injury," and that nexus exists where the defendant "possess[es] authority to enforce the complained-of" law. *Kitchen v. Herbert*, 755 F.3d 1193, 1201 (10th Cir. 2014) (quotation marks and citation omitted). That is indisputably the case here.

Even if the Governor and Attorney General also possess prosecutorial authority within the Twenty-Fifth District, that would do nothing to undermine that conclusion. The District Attorney cites no authority for the proposition that harm caused by government conduct is rendered non-redressable merely because another government entity might inflict similar harm. *See* Iski Br. 10. And the law is decidedly to the contrary. *See, e.g.*, *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982) (rejecting argument that "to establish redressability, appellees must show … that there is no other means by which the State can [proceed with the challenged conduct]. We decline to impose that burden upon litigants."); *Matsumoto v. Labrador*, 122 F.4th 787, 801–02 (9th Cir. 2024) (where state law "specifically grants enforcement powers to multiple government authorities, an injunction against the exercise of those powers by any one of those authorities suffices to establish redressability. That proposition is supported by decades of Supreme Court precedent…. [A] plaintiff need not sue every defendant that may cause her harm.").

In granting the motion of the Cherokee Nation and Choctaw Nation of Oklahoma to intervene, this Court again rejected this same argument, holding that

> [t]he Nations' injuries are fairly traceable to defendant's challenged conduct because these injuries arise directly from defendant's alleged prosecution of Indians for conduct occurring in Indian country. Therefore, regardless of defendant's predictions as to future prosecutions or adjudications, a favorable judicial decision enjoining defendant from continuing to criminally prosecute Indians for conduct occurring in Indian country would redress the Nations' injury at least 'to some extent,' which is all the law requires.

Dkt. 61 at 6 (quotation marks omitted).

* * *

In sum, the Nation has established its standing, and the District Attorney has given this Court no credible basis to conclude otherwise.

II. *Younger* Abstention Does Not Apply.

A. The *Younger* Abstention Doctrine

Under the abstention doctrine set forth in *Younger v. Harris*, 401 U.S. 37 (1971), a federal court must abstain from exercising jurisdiction in "certain instances in which the prospect of undue interference with state proceedings counsels against federal relief." *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 72 (2013). *Younger* abstention "is the exception, not the rule." *Ankenbrandt v. Richards*, 504 U.S. 689, 705 (1992) (citation omitted). "It should be rarely … invoked, because the federal courts have a virtually unflagging obligation … to exercise the jurisdiction given them." *Roe # 2 v. Ogden*, 253 F.3d 1225, 1232 (10th Cir. 2001) (ellipses in original) (quotation marks omitted).

As relevant here, *Younger* turns on three mandatory requirements: (1) an "ongoing" state criminal proceeding that the federal plaintiff seeks to enjoin; that (2) is an "adequate forum" for the federal plaintiff to adjudicate the issues raised in its complaint; and (3) involves "important state interests[.]" *Winn v. Cook*, 945 F.3d 1253, 1258 (10th Cir. 2019) (citation omitted)). "Each of these conditions must be satisfied before *Younger* abstention is warranted." *Seneca-Cayuga Tribe of Okla. v. Oklahoma ex rel. Thompson*, 874 F.2d 709, 711 (10th Cir. 1989); *see also Brown ex rel. Brown v. Day*, 555 F.3d 882, 894 n.10 (10th Cir. 2009) (where one factor not met, "we need not consider" the others). As demonstrated below, the District Attorney fails to satisfy the second and third mandatory criteria, thereby twice dooming her argument.

B. The District Attorney's Ongoing Prosecutions Are Not an Adequate Forum for the Nation To Litigate the Claims It Has Brought Before This Court.

Under the second *Younger* requirement—whether the ongoing state proceedings provide an adequate forum for the Nation to litigate its federal claims—the District Attorney devotes her entire argument to explaining the competence of state courts to adjudicate federal questions. *See* Iski Br. 13–14 (noting "state courts' ability to address federal issues," the "obligation of state courts to uphold federal law," and that "Oklahoma state courts are capable" of addressing the federal issues raised in the Nation's complaint and therefore "provide adequate forums" under the second *Younger* requirement (citation omitted)).

The District Attorney's focus is misplaced. No one questions that "state courts, as courts of general jurisdiction," can adjudicate federal issues, *Ute Indian Tribe of the Uintah & Ouray Rsrv. v. Lawrence*, 22 F.4th 892, 899 (10th Cir. 2022). But if the mere competence of state courts to do so satisfied the "adequate forum" requirement for *Younger* abstention, the requirement would be met in every case. Instead, the test is whether a state court provides an adequate forum for *the federal plaintiff* to pursue its claims. *See, e.g.*, *D.L. v. Unified Sch. Dist. No. 497*, 392 F.3d 1223, 1229 (10th Cir. 2004) ("*Younger* abstention is inappropriate when *a federal plaintiff* cannot pursue its federal contentions in the ongoing state proceeding." (emphasis added)); *Crown Point I, LLC v. Intermountain Rural Elec. Ass'n*, 319 F.3d 1211, 1215 (10th Cir. 2003) ("[W]e find that *plaintiff* does not have an adequate opportunity to raise its federal claims in state court'" (emphasis added)).

And that is where the District Attorney's argument founders. The District Attorney makes no claim that the Nation could litigate its federal claims in her ongoing state court prosecutions. Nor can she. The Nation is not a party to the ongoing prosecutions, nor is it in privity with any party. It is instead a genuine stranger to those proceedings and *Younger* does not bar federal court

jurisdiction "over the claim of a genuine stranger to an ongoing state proceeding," *D.L.*, 392 F.3d at 1230.

This principle dooms the District Attorney's *Younger* argument. Nor can she salvage it by asserting "how intertwined Plaintiff's interests are" with those of the defendants in her ongoing prosecutions, Iski Br. 18. She contends that "each criminal defendant challenges the State's jurisdiction" by invoking *McGirt* and that, therefore, the Nation's claims "are no different from" those of the criminal defendants. *Id*.

This argument is foreclosed by controlling Tenth Circuit precedent. In *D.L.*, the Court made clear that *Younger* does not bar a federal action by a non-party to the state proceedings simply because the federal action may involve legal questions "identical to those raised in state court[.]" 392 F.3d at 1230. "So long as the stranger has its own distinct claim to pursue, it may even be aligned with the state-court litigant" against the same state policy. *Id*.

For these propositions, the Court cited *Federal Home Loan Bank Bd. v. Empie*, 778 F.2d 1447 (10th Cir. 1985). There, under highly analogous facts, a federal agency sought declaratory and injunctive relief that Oklahoma had no authority to regulate private entities that the agency was charged with regulating under federal law. *Id*. at 1448. Oklahoma invoked *Younger* because the private entities were defendants in ongoing state proceedings and challenging the same state assertion of regulatory authority as the federal agency plaintiff. *Id*. at 1449. The Court rejected the argument because the federal agency's interests

> are much broader than those of Victor Federal or the other private parties. It is concerned with the stability and smooth operation of a nationwide network of savings institutions; Victor Federal, for example, is concerned only with the success of its campaign to advertise longer hours and drive-in teller windows.

Id. at 1452.

This reasoning in *D.L.* and *Federal Home Loan* applies directly here. The Nation unquestionably has a "distinct claim to pursue," *D.L.*, 392 F.3d at 1230, one that arises under the array of federal laws and policies that prohibit harm and interference with "the Nation's sovereignty" and "federally protected rights of self-government," Compl. ¶ 7. And these sovereign concerns are plainly "much broader than those of … private parties," *Fed. Home Loan*, 778 F.2d at 1452, including any private criminal defendant asserting individual rights. *See, e.g.*, Compl. ¶ 14 ("The District Attorney's ongoing criminal prosecutions of Indians for conduct within the Creek Reservation are causing irreparable injury to the Nation by interfering with its sovereignty and undermining the authority of its own criminal justice system, including the authority of its Attorney General, Lighthorse police, and courts to prosecute under the Nation's own laws criminal offenses committed by Indians within its Reservation.").

The entire premise of the District Attorney's argument—i.e., that "each criminal defendant challenges the State's jurisdiction in the same manner as Plaintiff does here," and that their respective claims are "no different," Iski Br. 18—is plainly false. *See D.L.*, 392 F.3d at 1230. Thus, the District Attorney fails the second requirement for *Younger* abstention.[5]

C. A State's Claimed Interest in Prosecuting Indians in Indian Country Is Foreclosed as a Cognizable Interest Under the *Younger* Abstention Analysis.

The District Attorney contends that the third requirement for *Younger* abstention is met because "Oklahoma's important interest in enforcing its criminal laws through proceedings in its

[5] The District Attorney's caselaw does not salvage her argument. *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975), *see* Iski Br. 17, does not address the relations between a federal plaintiff and a state defendant at all. It addresses instances in which the interests of *federal plaintiffs* are so intertwined that if *Younger* bars the claim of one, it should bar the others. *See* 422 U.S. at 928 (considering whether "all three plaintiffs should … be thrown into the same hopper for *Younger* purposes"). And *Hicks v. Miranda*, 422 U.S. 332 (1975), *see* Iski Br. 17–18, involved the plainly inapposite circumstance of the federal plaintiff having been made a defendant in the state proceedings "the day following" service of its complaint, 422 U.S. at 349.

state courts remains axiomatic." Iski Br. 15 (citation omitted). Utah made the identical argument in *Ute Indian Tribe*—*see* State of Utah's Answer Brief at 21, *Ute Indian Tribe* (No. 14-4034), 2014 WL 4180069, at *13 ("[A] state's important interest in enforcing its criminal laws through proceedings in its state courts remains axiomatic." (quotation marks omitted))—and the Court rejected it because

> where, as here, states seek to enforce state law against Indians in Indian country "[t]he presumption and the reality … are that federal law, federal policy, and federal authority are paramount" and the state's interests are insufficient "to warrant *Younger* abstention."

Ute Indian Tribe, 790 F.3d at 1008–09 (quoting *Seneca-Cayuga*, 874 F.2d at 713–14).

The relevant question, then, is not whether Oklahoma has important interests in enforcing criminal laws as a general matter. Indeed, the Tenth Circuit recognized that "Oklahoma has an important interest in prosecuting criminal cases without interference from federal courts" just a month before *Ute Indian Tribe* in a decision (joined by then Judge-Gorsuch, who authored *Ute Indian Tribe*) that did not involve Indian country issues. *Tucker v. Reeve*, 601 F. App'x 760 (10th Cir. 2015). Rather, the dispositive question in cases such as this one and *Ute Indian Tribe* turns on the state's interest in enforcing its criminal laws "*against Indians* in Indian country"—which, as *Ute Indian Tribe* confirms, states (absent congressional authorization) "have no legal entitlement to do in the first place." 790 F.3d at 1007, 1008 (emphasis added).[6]

[6] The District Attorney notes that *Seneca-Cayuga*—which *Ute Indian Tribe* quotes for its *Younger* reasoning—states that the reasoning does not apply when a state proceeding involves "non-reservation Indians, as here." Iski Br. 17 (quotation marks omitted). But in referring to "non-reservation Indians," *Seneca-Cayuga* is not referencing non-member Indians. It is referring to the situation in *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962)—*see* 874 F.2d at 713 (citing *Egan*)—which involved state regulation of Indian conduct taking place "not on any reservation" and "outside of Indian country," 369 U.S. at 75.

Ute Indian Tribe's reasoning is fatal to the District Attorney's case for *Younger* abstention, so it is no wonder she seeks to deny its continuing force, pressing arguments that this Court has already found to be "unpersuasive," Dkt. 61 at 5 n.4. She contends that the decision's *Younger* analysis has been rendered "inapplicable, if not obsolete" by *Castro-Huerta*, even though that case involved only a non-Indian defendant. Iski Br. 17. In asking this Court to endorse this argument, the District Attorney is asking it to do something it lacks authority to do—namely, to hold that a Supreme Court decision that does not reach an issue nevertheless upends direct Tenth Circuit precedent on that issue. Even a Circuit panel cannot do that. For a panel to depart from prior Circuit precedent based on a subsequent Supreme Court decision, the decision "must clearly overrule our precedent[.]" *Arostegui-Maldonado v. Garland*, 75 F.4th 1132, 1142 (10th Cir. 2023) *(*quotation marks omitted). Accordingly, Tenth Circuit precedents "remain good law unless the Supreme Court has *indisputably and pellucidly abrogated* them." *Fed. Trade Comm'n v. Elite IT Partners, Inc.*, 91 F.4th 1042, 1051 (10th Cir. 2024) (emphasis added) (quotation marks omitted), *cert. denied*, 145 S.Ct. 150 (2024); *see also, e.g.*, *Strain v. Regalado*, 977 F.3d 984, 993 (10th Cir. 2020) (stating that Supreme Court decision did not "pronounce its application" to a specific issue or "state that we should adopt" a new rule on that issue, "so we cannot overrule our precedent on this issue.").

Castro-Huerta not only does not "pronounce its application" to the issue of state criminal jurisdiction over Indians, much less "indisputably and pellucidly abrogate[]" *Ute Indian Tribe* or any other precedents addressing that issue, it repeatedly disavows any intent to reach the issue. *See, e.g.*, 597 U.S. at 648 (referring to state criminal jurisdiction over non-Indians in Indian country as "the narrow jurisdictional issue in this case"); *id*. at 639 n.2 (describing state jurisdiction "over crimes committed by Indians in Indian country" as "a question not before us");

id. at 650 n.6 ("We express *no view* on state jurisdiction over a criminal case of that kind." (emphasis added)); *id.* at 655 n.9 ("To reiterate, we do not take a position on that question."); *see also See Hudson v. Harpe*, No. 23-6181, 2024 WL 262695, at *1 (10th Cir. 2024) (stating, on denial of Indian criminal defendant's application for certificate of appealability, that "[b]ecause Mr. Hudson is a member of the Muscogee (Creek) Nation—and therefore, an Indian—*Castro-Huerta* does not apply to this case" and that "[n]o reasonable jurist would conclude" otherwise.

Ute Indian Tribe and *Seneca-Cayuga* accordingly remain good law in the Tenth Circuit and are binding on this Court. As such, they sound the death knell for the District Attorney's *Younger* abstention arguments. *See Johnson v. Royal*, Case No. 13-CV-0016-CVE-FHM, 2016 WL 5921081, at *27 (N.D. Okla. Oct. 11, 2016) (Eagan, J.) ("This Court may not depart from controlling legal authority clearly set forth in a published decision of the Tenth Circuit Court of Appeals."), *aff'd sub nom. Johnson v. Carpenter*, 918 F.3d 895 (2019).

D. *Younger* Does Not Apply Because the Harm Alleged to Federally Protected Rights Is Irreparable.

The Tenth Circuit is clear that "*Younger* … is inapplicable" if the federal plaintiff can show that an "irreparable injury" will result from the state proceeding, *Walck v. Edmondson*, 472 F.3d 1227, 1233 (10th Cir. 2007) (citation omitted), and that injury "cannot be eliminated by … [the federal plaintiff's] defense against a single criminal prosecution," *id.* (quoting *Younger*, 401 U.S. at 46).

That standard is met here. Absent congressional assent, state prosecution of an Indian in Indian country "'create[s] the prospect of significant interference with [tribal] self-government' that this court has found sufficient to constitute 'irreparable injury.'" *Ute Indian Tribe*, 790 F.3d at 1006 (brackets in original) (quoting *Prairie Band*, 253 F.3d at 1250–51). And the Nation cannot eliminate that threat through its defense of a state criminal prosecution, as it will not be a

defendant in any of them. Thus, even were the Court to disagree with the Nation and find all three *Younger* requirements met, *Younger* abstention is foreclosed. *See Walck*, 472 F.3d at 1233 (where threat of irreparable injury that cannot be eliminated by federal plaintiff's defense to single criminal prosecution is established, courts "need not decide … whether the three conditions for mandatory abstention exist" because "[t]he *Younger* abstention doctrine is inapplicable" (citation omitted)).

The District Attorney contends that irreparable injury cannot be shown because her "prosecution of non-member criminal defendants … does not impact Plaintiff's authority to prosecute the same criminal occurrences; thus, no injury." Iski Br. 16. Again, the District Attorney's reliance on the purported member/non-member Indian distinction finds no support in federal law—*see supra* Section I(D) & n.4—which is why her brief, top to bottom, contains not a single citation to any such support. A summary recitation of the OCCA's decisions in *City of Tulsa v. O'Brien*, Case Number: S-2023-715, 2024 WL 5001684 (Okl. Crim. App. Dec. 5, 2024), and *Stitt v. City of Tulsa*, Case No. M-2022-984, 2025 WL 719122 (Okl. Crim. App. Mar. 13, 2025), in the background section of her brief—*see* Iski Br. 2–4—does not suffice, particularly where, as set forth in the Nation's brief in support of its preliminary injunction motion, the OCCA's reasoning is pervaded by errors of federal law, including those for which it has been thrice reversed by the Supreme Court. *See* Nation Prelim. Inj. Br. 19–21; *see also Hewitt v. Parker*, No. 08-CV-227-TCK-TLW, 2012 WL 380335, at *4 (N.D. Okla. Feb. 6, 2012) ("this Court owes no deference to the OCCA's adjudication of" questions of federal law); *Dutcher v. Matheson*, 840 F.3d 1183, 1195 (10th Cir. 2016) ("[I]t is beyond cavil that we are not bound by a state court interpretation of federal law." (citation omitted)).

The District Attorney further asserts that "the Ongoing Prosecutions had been pending since as early as a year and a half prior to the filing of this lawsuit; thus, no imminency." Iski Br. 16 (citing *State v. Long*, CF-2023-86 (Rogers Co. Dist. Ct. May 30, 2023)). This argument, for which she again cites no legal authority, *see id*., fails on its face. The District Attorney's prosecutions of Indians for conduct arising within the Creek Reservation are *pending now.* The question of imminence is therefore irrelevant. As for future prosecutions, the "threat" and "prospect," *Prairie Band*, 253 F.3d at 1250 (citation omitted), of infringement of the Nation's sovereignty likewise exists *now*—as it did in *Prairie Band* despite the absence of any pending state proceeding—because the District Attorney has claimed jurisdiction over Indians within the Creek Reservation, has manifested her willingness to exercise it, and has to date foregone every opportunity to disavow her intent to exercise it going forward. *See Hooper v. City of Tulsa*, 71 F.4th 1270, 1277 (10th Cir. 2023) (reasonable fear of future unlawful prosecution constituted "imminent injury").

* * *

In sum, the District Attorney's arguments for *Younger* abstention—which "is the exception, not the rule," *Ankenbrandt*, 504 U.S. at 705, and "should be rarely … invoked," *Roe #2*, 253 F.3d at 1232 (ellipsis in original) (quotation marks omitted)—founder for numerous reasons that, taken separately or together, confirm this Court's constitutional obligation to retain jurisdiction in this case.[7]

[7] As part of her *Younger* discussion, the District Attorney also invokes the Anti-Injunction Act, 28 U.S.C. § 2283, but simply quotes its text without any substantive arguments regarding its applicability to this case. Iski Br. 11. The argument is therefore waived. *See United States v. Draine*, 26 F.4th 1178, 1187 n.5 (10th Cir. 2022) (noting that claimant "merely quotes" text of provision in opening brief but made no argument under it, "so it is waived."). In any event, the Nation is neither a party nor in privity with a party to any relevant state proceeding, and the Act

III. *Colorado River* Abstention Does Not Apply.

Finally, the District Attorney contends that the Court should abstain from hearing the Nation's claims under the doctrine set forth in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). Iski Br. 18–20. This claim again strains the law past the breaking point.

A. The *Colorado River* Doctrine

The *Colorado River* doctrine applies to "situations involving the contemporaneous exercise of concurrent jurisdictions … by state and federal courts" and, upon a showing of "exceptional circumstances" by the party invoking the doctrine, "permits a federal court to dismiss or stay a federal action in deference to pending parallel state court proceedings[.]" *Fox v. Maulding*, 16 F.3d 1079, 1080, 1081 (10th Cir. 1994) (ellipsis in original) (citations omitted).

Under *Colorado River*, this Court's task "is not to find some substantial reason for the *exercise* of federal jurisdiction …; rather, the task is to ascertain whether there exist exceptional circumstances, the clearest of justifications, that can suffice … to justify the *surrender* of that jurisdiction." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 (1983) (quotation marks omitted). Moreover, "the presence of federal-law issues *must always be a major consideration weighing against surrender*," *id*. at 26 (emphasis added), and a court's *Colorado River* analysis in general must be

> *heavily weighted in favor of the exercise of jurisdiction*. Indeed, since "[o]nly the clearest of justifications will warrant dismissal," *Colorado River*, 424 U.S. at 819,

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does not apply to "strangers to the state court proceedings" who will not be "bound" by the state decisions, *Cnty. of Imperial Cnty*, 449 U.S. 54, 59 (1980) (citation omitted); *see also* 17A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4222 n.27 (3d ed. Apr. 2025 Update) (same).

> 96 S.Ct. at 1247, *any doubt should be resolved in favor of exercising federal jurisdiction*.

Fox, 16 F.3d at 1082 (emphases added) (quotation marks and citations omitted). Finally, a court "*cannot* … abstain under *Colorado River* …. if the state court has no jurisdiction to decide the claims" before it. *Lawrence*, 22 F.4th at 908 n.17 (emphasis added) (brackets and quotation marks omitted).[8]

B. No Parallel State Proceeding Exists To Support *Colorado River* Abstention.

For abstention under *Colorado River* to be even a possibility, the District Attorney must first identify a parallel state court proceeding with which the Nation's suit overlaps. *See United States v. City of Las Cruces*, 289 F.3d 1170, 1182 (10th Cir. 2002) (a parallel proceeding "is a threshold condition for engaging in the *Colorado River* analysis"); *Fox*, 16 F.3d at 1081 (court must find parallel proceeding "[b]efore examining" *Colorado River*'s factors).

The District Attorney cannot establish this threshold requirement. "Suits are parallel if [1] substantially the same parties litigate [2] substantially the same issues in different forums." *Fox*, 16 F.3d at 1081 (citation omitted). The *entirety* of the District Attorney's argument that this case involves "substantially the same parties" as appear in her state prosecutions is this single, unsupported sentence: "Or at the least, Iski is a party in each, and the criminal defendants in the Ongoing Prosecutions are explicitly referenced and leveraged by Plaintiff in this litigation." Iski Br. 19.

[8] Because this Court "cannot" abstain if the state courts lack jurisdiction, *Lawrence*, 22 F.4th at 908 n.17, and since their jurisdiction is the very question at issue in the Nation's action, to abstain under *Colorado River* would require this Court to *assume* state jurisdiction in the face of controlling precedent to the contrary—*see Ute Indian Tribe*, 790 F.3d at 1004; *McGirt*, 591 U.S. at 928–29 (same)—and thereby risk a grave violation of its jurisdictional obligations under federal law.

This argument is frivolous. The Nation is a stranger to those proceedings. The District Attorney makes no effort to explain (much less provide any legal support for) the vague concept that a federal plaintiff that "reference[s] and leverage[s]" a state criminal defendant in its federal complaint thereby becomes the equivalent of a co-party to the criminal defendant in the state prosecution. *See Colo. River*, 424 U.S. at 819 ("[o]nly the clearest of justifications will warrant" abstention). The argument is also waived. *See Seifert v. Unified Gov't of Wyandotte Cnty./Kansas City*, 779 F.3d 1141, 1156 (10th Cir. 2015) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." (brackets in original) (citation omitted)); *Dayan-Varnum v. Dayan*, Case No. 23-CV-00052-SEH-MTS, 2025 WL 854905, at *2 (N.D. Okla. Mar. 19, 2025) (same).

The District Attorney "seeks abstention and thus has the burden of establishing that *Colorado River* is applicable[.]" *BNSF Ry. Co. v. City of Moore*, 536 F. Supp. 3d 1225, 1235 (W.D. Okla. 2021). Her failure to establish the "threshold" and dispositive parallel proceedings requirement therefore dooms her argument without consideration of any other factors. *Fox*, 16 F.3d at 1081; *City of Las Cruces*, 289 F.3d at 1182.

C. The Ongoing Prosecutions Are Not Adequate Vehicles To Resolve the Dispute Between the District Attorney and the Nation.

The Tenth Circuit has made clear that "to grant a stay or dismissal under the *Colorado River* doctrine would be '*a serious abuse of discretion*' unless 'the parallel state-court litigation will be an adequate vehicle for the complete and prompt resolution of the issue *between the parties*[.]" *Fox*, 16 F.3d at 1081 (emphases added) (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 28); *Phoenix Energy Mktg., Inc. v. Chase Oil Corp.*, Case No. 16-CV-0681-CVE-TLW, 2017 WL 2347188, at *8 (N.D. Okla. May 30, 2017) (Eagan, J.) (same). The District Attorney nowhere acknowledges this dispositive requirement in her *Colorado River* arguments.

The Nation is neither a party nor in privity with any party to the state court proceedings. As a matter of law, no judgment in those cases can bind the Nation. *See*, *e.g.*, *Requena v. Roberts*, 893 F.3d 1195, 1209 n.7 (10th Cir. 2018) (issue preclusion requires that "the party against whom the doctrine is invoked was a party or in privity with a party to the prior adjudication"); *Santana v. City of Tulsa*, 359 F.3d 1241, 1246 n.3 (10th Cir. 2004) (same for res judicata). Thus, even if the District Attorney prevails in each of the state proceedings, that would not resolve this case. The Nation would retain a viable federal claim as to the District Attorney's interference with its rights of self-government. *See Phoenix Energy Mktg.*, 2017 WL 2347188, at *9 (declining to dismiss under *Colorado River* because defendant was "not a party to the [State] suit" and thus "resolution of the state case might not dispose of" the controversy between the parties). Under these circumstances, the District Attorney's suggestion that this Court abstain from deciding a federal claim that cannot be resolved elsewhere is nothing less than an invitation to commit "a serious abuse of discretion," *Fox*, 16 F.3d at 1081 (citation omitted); *Phoenix Energy Mktg.*, 2017 WL 2347188, at *8 (citation omitted).

D. The Federal Nature of the Issues Weighs Heavily Against *Colorado River* Abstention.

The District Attorney also tellingly fails to acknowledge, much less address, yet another central consideration in the *Colorado River* analysis—the source of law. As the Supreme Court has explained, "the presence of federal-law issues must always be a *major consideration weighing against surrender*" of jurisdiction. *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 26 (emphasis added). As noted, whether states possess jurisdiction over Indians in Indian country, and questions of tribal sovereignty and self-government, are quintessential questions "of federal law in an area in which federal interests predominate," *Seneca-Cayuga Tribe*, 874 F.2d at 714;

Ute Indian Tribe, 790 F.3d at 1007 (same). The source-of-law consideration accordingly weighs heavily against abstention.

E. The District Attorney's Forum Convenience and Piecemeal Litigation Arguments Fail.

The District Attorney argues that "appeals from this litigation will be addressed by the Tenth Circuit, in Colorado, whereas appeals from the State court proceedings will be … addressed by the OCCA, in Oklahoma. The travel and expense associated with the former is an unnecessary burden." Iski Br. 19. Since the Tenth Circuit uses electronic filing, this argument invokes the burdens of single trip to Denver for oral argument.

By now a pattern may well be apparent to this Court. Every one of the District Attorney's standing and abstention arguments rests on the steadfast refusal to acknowledge, let alone to properly account for, the Nation's right of self-government and its role in this case. That may nowhere be more evident than here. With all respect to the District Attorney, the value of the Nation being able to speak with its own voice in defending its federally protected right to self-government—one so consistently and forcefully recognized by the Supreme Court and the Tenth Circuit—outweighs the price of a plane ticket.

The District Attorney further argues that this federal action is inconvenient because it "requires substantial briefing and expenditure of additional taxpayer dollars[.]" Iski Br. 19–20. But the inconvenience of having to litigate a matter *at all* is no basis for abstention. *Colo. River*, 424 U.S. at 817 (generally "the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court"); *Fox*, 16 F.3d at 1082 (same). Solicitude for the public fisc would be better served by not briefing standing and abstention arguments so clearly foreclosed by federal law.

Finally, the District Attorney states that avoiding "piecemeal litigation … is the paramount *Colorado River* consideration." Iski Br. 20. But the District Attorney's preferred solution of litigating the issues presented here through multiple criminal prosecutions epitomizes piecemeal litigation. And the feature all the state court proceedings share is the absence of the Nation and the United States—neither of whom will be bound by the outcomes. To abstain here would be to surrender jurisdiction in deference to a slate of state cases that embody not only a piecemeal approach to resolving the core jurisdictional issue facing this Court, but an unquestionably ineffectual one.

CONCLUSION

The Nation respectfully requests that the District Attorney's Motion to Dismiss be denied and that she be ordered to respond expeditiously to the Nation's Motion for a Preliminary Injunction.

Dated: April 15, 2025

Respectfully submitted,

/s/ Riyaz A. Kanji

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CERTIFICATE OF SERVICE

I certify that on April 15, 2025, 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.

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