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

UNITED STATES OF AMERICA, Plaintiff, and CHEROKEE NATION, CHICKASAW NATION, and CHOCTAW NATION OF OKLAHOMA, Intervenor Plaintiffs, and MUSCOGEE (CREEK) NATION, Consolidated Plaintiff, vs. MATTHEW BALLARD, District Attorney for the Twelfth Prosecutorial District of Oklahoma in his official capacity, Defendant.	)	Case No: 24-CV-0626-CVE-SH (BASE FILE) Consolidated with: Case No. 25-CV-0050-CVE-SH

COMPLAINT

Nature Of The Action

1. This is an action for declaratory and injunctive relief, brought by the Cherokee Nation, Chickasaw Nation, and Choctaw Nation of Oklahoma (collectively, "Plaintiff Nations" or "Nations"). The Nations bring this action to prevent Defendant Matthew Ballard in his official capacity as District Attorney for the Twelfth Prosecutorial District of Oklahoma from wrongfully continuing to assert that the state of Oklahoma has criminal jurisdiction over Indians in Indian country, and from unlawfully detaining and prosecuting Indians based on that claimed authority, which interferes with the Nations' inherent sovereign power to exercise criminal jurisdiction over

all Indians on their reservations, which are Indian country, 18 U.S.C. § 1151(a). This action is the only means by which the Nations' can protect these rights, as Defendant is litigating his claim to jurisdiction claim in state court proceedings to which the Nations are not, and cannot be, parties, and because the very continuation of those proceedings is the violation of federal law that this action seeks to remedy. Defendant will not stop his unlawful interference with tribal sovereignty and violations of federal law unless this Court declares his actions are contrary to law and enjoins them.

2. Defendant's assertion of jurisdiction plainly violates federal law, as shown by the Supreme Court's ruling in *McGirt v. Oklahoma*, 591 U.S. 894, 929 (2020). *McGirt* reaffirmed that "th[e Supreme] Court has long 'require[d] a clear expression of the intention of Congress' before the state or federal government may try Indians for conduct on their lands" (second alteration in original) (quoting *Ex parte Crow Dog*, 109 U.S. 556, 572 (1883)), and applied that standard to reject Oklahoma's claim that it has criminal jurisdiction over Indians in Indian country, holding that "Oklahoma doesn't claim to have complied with the requirements to assume jurisdiction voluntarily over Creek lands. Nor has Congress ever passed a law conferring jurisdiction on Oklahoma," *id.* at 932. The *McGirt* decision is binding on the State and thus on Defendant, *see DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 53 (2015), and is therefore controlling here.

3. Any reliance on *Oklahoma v. Castro-Huerta*, 597 U.S. 629 (2022), to assert state criminal jurisdiction over Indians in Indian country is meritless. The *Castro-Huerta* decision only addresses state criminal jurisdiction over non-Indians, expressly and repeatedly disclaims consideration of state criminal jurisdiction over Indians in Indian country, and does not unsettle,

much less overrule, the standard set forth in *McGirt*, 591 U.S. at 929, or the *McGirt* Court's application of that standard to reject the State's jurisdictional claim, *id.* at 931-32.

4. Even if *Castro-Huerta* could be argued to apply here (it cannot, *see infra* ¶¶ 37, 39), the result would be the same, as the *Castro-Huerta* Court cited *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973), approvingly for the "principle of federal law that … precludes state interference with tribal self-government," *id.* at 639 n.2. Applied here, *McClanahan* confirms that state criminal jurisdiction over crimes by Indians in Indian country is preempted by federal law. *See infra* ¶¶ 42-49.

Parties

5. Plaintiff Cherokee Nation is a federally-recognized Indian Tribe, *see* Indian Entities Recognized by and Eligible to Receive Services From the United States Bureau of Indian Affairs, 89 Fed. Reg. 944, 945 (Jan. 8, 2024), with a governing body duly recognized by the Department of the Interior.

6. Plaintiff Chickasaw Nation is a federally-recognized Indian Tribe, 89 Fed. Reg. at 946, with a governing body duly recognized by the Department of the Interior.

7. Plaintiff Choctaw Nation of Oklahoma is a federally-recognized Indian Tribe, 89 Fed. Reg. at 946, with a governing body duly recognized by the Department of the Interior.

8. Defendant Matthew Ballard is the District Attorney for the Twelfth Prosecutorial District of Oklahoma, which includes Craig, Mayes, and Rogers Counties, which are entirely or partially located within the boundaries of the Cherokee Nation Reservation. He is sued in his official capacity under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), and under federal common law, *see Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 850-52 (1985); *Williams v. Lee*, 358 U.S. 217, 219-20 (1959); *Ute Indian Tribe v. Lawrence* (*Lawrence*

I), 875 F.3d 539, 544 (10th Cir. 2017); *MacArthur v. San Juan County*, 309 F.3d 1216, 1224 (10th Cir. 2002).

9. Under state law, Defendant is responsible for appearing in state court to prosecute all violations of state law within the Twelfth District. Okla. Stat. tit. 19, § 215.4. His powers, duties, and the area within which he exercises jurisdiction are defined by state law. *Id.* §§ 215.1-215.5, 215.7-215.13, 215.16, 215.20. His compensation is also fixed by state law and is paid by a state agency. *Id.* § 215.30. Defendant, and state and county officers under his supervision and direction, have repeatedly exercised, or have asserted that they will exercise, criminal jurisdiction under state law over Indians within the Cherokee Nation Reservation, by seeking arrest warrants in state court against Indians based on their conduct within the Cherokee Nation Reservation and by arresting and charging Indians with violations of state law based on their conduct within the Cherokee Nation Reservation. Defendant intends to and will continue to exercise this purported authority unless enjoined by this Court.

Jurisdiction And Venue

10. This Court has subject matter jurisdiction over this action under 28 U.S.C. §§ 1331 and 1362 because it states substantial questions of federal law arising under the United States Constitution, treaties between the United States and the Cherokee Nation, and federal statutory and common law, and it is brought by federally recognized Indian tribes with governing bodies duly recognized by the United States Secretary of the Interior. "[A] suit to enjoin a State from exercising jurisdiction contrary to federal law" "is an action 'arising under' federal law" over which jurisdiction exists under 28 U.S.C. §§ 1331 and 1362. *Lawrence I*, 875 F.3d at 544; *see also Timpanogos Tribe v. Conway*, 286 F.3d 1195, 1202-05 (10th Cir. 2002); *Cheyenne-Arapaho Tribes of Okla. v. Oklahoma*, 618 F.2d 665, 666 (10th Cir. 1980).

11. This action seeks declaratory and injunctive relief and presents a "case of actual controversy" under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, because "the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Hooper v. City of Tulsa*, 71 F.4th 1270, 1277 (10th Cir. 2023) (quoting *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) (quoting *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941))). This standard is satisfied by showing that this action presents a case or controversy within the meaning of Article III of the Constitution, "in other words, standing," *id*. (quoting *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021) (quoting *Raines v. Byrd*, 521 U.S. 811, 819 (1997))), which is demonstrated by the allegations recited *infra* ¶¶ 14-15.

12. Venue is proper in this Court under 28 U.S.C. § 1391(b) because Defendant's office is located in this district, Defendant is a resident of the State of Oklahoma where this district is located, and the events giving rise to the claims herein occurred within this district.

Standing

13. To establish standing, an intervenor's pleading and intervention motion must provide sufficient allegations that at least one party on the intervenors' side of the case

> (1) [has] suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

City of Colorado Springs v. Climax Molybdenum Co., 587 F.3d 1071, 1079 (10th Cir. 2009) (quoting *New Eng. Health Care Emps.' Pension Fund v. Woodruff*, 512 F.3d 1283, 1288 (10th Cir. 2008)). In addition, when an intervenor of right "seeks additional relief beyond that which the plaintiff" requests, the intervenor "must demonstrate Article III standing." *Town of Chester v.*

Laroe Ests., Inc., 581 U.S. 433, 434 (2017)); *Kane County v. United States*, 928 F.3d 877, 886 (10th Cir. 2019) (quoting *Laroe*, 581 U.S. at 435) (reaffirming Tenth Circuit's "'piggyback standing' rule" as modified by the holding of *Laroe* "that an intervenor as of right must 'meet the requirements of Article III if the intervenor wishes to pursue relief not requested' by an existing party.")

14. The Nations have piggyback standing in this case because the United States has standing, as shown by its complaint. U.S. Compl., ECF No. 2. "[A] risk of future harm" that "is sufficiently imminent and substantial" is a concrete injury for standing purposes. *TransUnion*, 594 U.S. at 435 (citing *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013); *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983); *Gubala v. Time Warner Cable, Inc.*, 846 F.3d 909, 912 (7th Cir. 2017)), and the complaint alleges present harm and a risk of future harm that is caused by Defendant and will be redressed by a favorable decision. "Oklahoma does not have jurisdiction over Indians on Indian reservations in the State," U.S. Compl. ¶ 30, but "Defendant has brought criminal charges on behalf of the State against Indians for conduct occurring in Indian country," *id.* at ¶ 35 & 35(a)-(c), and "continues to assert criminal jurisdiction over and prosecute Indians in Indian country, creating intolerable jurisdictional chaos in Indian country," *id.* at ¶ 31, which is "dangerous if permitted to stand and must be enjoined. Otherwise, Defendant's actions will continue to seriously impact the United States' ability to protect tribal sovereignty and its own prosecutorial jurisdiction both in Oklahoma and nationwide." *Id.* ¶ 40.

15. The Cherokee Nation also has standing of its own, which establishes the standing of the Chickasaw and Choctaw Nations under the piggyback rule, as they seek the same relief as does the Cherokee Nation. *See supra* ¶ 1, *infra* ¶¶ 64-65. Defendant's past, continuing, and threatened exercise of state criminal jurisdiction over Indians on the Cherokee Nation Reservation,

see supra at ¶¶ 1, 8 and *infra* at ¶¶ 50-62, constitutes an injury in fact because his actions and threatened actions deny the Cherokee Nation its federal right to exercise criminal jurisdiction over all Indians on the Cherokee Nation Reservation exclusive of the State. "[T]he prosecution of [a tribal member] [is] itself an infringement on tribal sovereignty," *Ute Indian Tribe of Uintah & Ouray Rsvr. v. Utah* (*Ute VI*), 790 F.3d 1000, 1005 (10th Cir. 2015), and unlawful state prosecution constitutes irreparable harm, *id.*; *see also Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001) (finding that the threat of continued citation by the state for motor vehicle licensing infringements "created the prospect of significant interference with [tribal] self-government." (cleaned up)). In addition, "[s]tate-court jurisdiction plainly would interfere with the [Cherokee Nation's] powers of self-government" by subjecting Indians in Indian country "to a forum other than the one they have established for themselves." *Fisher v. Dist. Ct.*, 424 U.S. 382, 387-88 (1976) (per curiam); *see also Iowa Mut. Ins. Co. v LaPlante*, 480 U.S. 9, 16 (1987) (the adjudication of any case arising on the reservation and involving Indians "by any nontribal court … infringes upon tribal law-making authority."). "There can be no doubt that to allow the exercise of state jurisdiction [over Indians] would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves." *Williams*, 358 U.S. at 223. The injury to the Nations is "fairly traceable" to Defendant, as his prosecution of Indians for conduct in Indian country causes the harm to tribal sovereignty that is the subject of the Nations' complaint, which satisfies the second standing element. *Aptive Env't, LLC v. Town of Castle Rock*, 959 F.3d 961, 977 (10th Cir. 2020) ("To satisfy the traceability requirement, the defendants conduct must have caused the injury." (quoting *Benham v. Ozark Materials River Rock, LLC*, 885 F.3d 1267, 1273 (10th Cir. 2018))). Finally, there is no question that the injury in fact resulting from Defendant's conduct will be redressed by enjoining him in his

official capacity as District Attorney for the Twelfth Prosecutorial District of Oklahoma from continuing to assert that Oklahoma has criminal jurisdiction over Indians in Indian country, and from unlawfully detaining and prosecuting Indians under that claimed authority. *See Bronson v. Swensen*, 500 F.3d 1099, 1111-12 (10th Cir. 2007) (redressability prong met where state actor who is authorized to enforce a state law would be enjoined from enforcement).

Plaintiff Nations' Criminal Jurisdiction Over All Indians On Their Reservations, Exclusive Of State Jurisdiction, Is Held Under Federal Law.

16. The Plaintiff Nations remain "separate sovereigns pre-existing the Constitution." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978)), holding rights of self-government recognized by federal law. In the early days of the Republic, the Supreme Court recognized the Cherokee Nation "as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself," and made clear that "[t]he acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts."). *Cherokee Nation v. Georgia,* 30 U.S. 1, 16 (1831). "The sovereignty retained by [the Nations] includes 'the power of regulating their internal and social relations,'" *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983) (quoting *United States v. Kagama*, 118 U.S. 375, 381-82 (1886)), and the "power to punish tribal offenders," *United States v. Wheeler*, 435 U.S. 313, 328-29 (1978) (citing *Talton v. Mayes*, 163 U.S. 376 (1896)); *see also* 25 U.S.C. § 1301(2) ("recogniz[ing] and affirm[ing]" "the inherent power of Indian tribes … to exercise criminal jurisdiction over all Indians"). "State-court jurisdiction plainly would interfere with the [Cherokee Nation's] powers of self-government" by subjecting Indians in Indian country "to a forum other than the one they have established for themselves." *Fisher*, 424 U.S. at 387-88; *Williams*, 358 U.S. at 223 ("to allow the exercise of state

jurisdiction [over Indians] would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves.").

17. Plaintiff Nations' inherent power to punish Indian offenders is shielded from state interference by the settled rule that "'require[s] a clear expression of the intention of Congress' before the state or federal government may try Indians for conduct on their lands," *McGirt*, 591 U.S. at 929 (quoting *Crow Dog*, 109 U.S. at 572). That rule implements both the well-established principle that "unless and 'until Congress acts, the tribes retain' their historic sovereign authority," *Bay Mills*, 572 U.S. at 788 (quoting *Wheeler*, 435 U.S. at 323); *see also id.* at 800 ("The special brand of sovereignty the tribes retain—both its nature and its extent—rests in the hands of Congress." (citing *United States v. Lara*, 541 U.S. 193, 200 (2004); *Wheeler*, 435 U.S. at 323)) and Congress's exclusive authority over Indian tribes under the Constitution, *Haaland v. Brackeen*, 599 U.S. 255, 273 (2023) ("While under the Interstate Commerce Clause, States retain 'some authority' over trade, [the Supreme Court] ha[s] explained that 'virtually all authority over Indian commerce and Indian tribes' lies with the Federal Government." (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 62 (1996))). These settled principles of federal law also enforce the "concomitant jurisdictional limit on the reach of state law" that is an element of "the Indian sovereignty doctrine," *McClanahan*, 411 U.S. at 171, and accord with "[t]he policy of leaving Indians free from state jurisdiction and control [that] is deeply rooted in this Nation's history," *McGirt*, 591 U.S. at 928 (quoting *Rice v. Olson*, 324 U.S. 786, 789 (1945)).

18. Each Plaintiff Nation occupies and governs a reservation set aside for them by treaty. *Castro-Huerta*, 597 U.S. at 633-34 (citing *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, ¶ 15, 497 P.3d 686, 689 ("reaffirming recognition of the Cherokee, Choctaw, and Chickasaw

Reservations")). Under federal law, all land within the boundaries of an Indian reservation is Indian country. 18 U.S.C. § 1151(a).

19. The Cherokee Nation's treaties are directly relevant here because Defendant is exercising state criminal jurisdiction over Indians on the Cherokee Nation Reservation.

20. The Cherokee Nation Reservation was established by the 1828 Treaty with the Cherokee, May 6, 1828, 7 Stat. 311 ("1828 Treaty"), and the Treaty of New Echota, Dec. 29, 1835, 7 Stat. 478 ("1835 Treaty"). In the 1828 Treaty, the United States promised a "permanent home" to "the Cherokee nation of Indians," including all Cherokee living west or east of the Mississippi River. *See* 1828 Treaty prmbl.; *see also id.* art. 2. The United States defined a boundary between the Cherokee Nation Reservation and Arkansas, described the metes and bounds of a seven-million-acre Cherokee Nation Reservation, *id.* arts. 1-2, and promised that it would "remove, immediately after the running of the Eastern line from the Arkansas River to the South-West corner of Missouri, all white persons from the West to the East of said line, and also all others, should there be any there, who may be unacceptable to the Cherokees, so that no obstacles arising out of the presence of a white population, or a population of any other sort, shall exist to annoy the Cherokees," *id.* art. 3.

21. In the 1835 Treaty, "[o]nce again, the United States assured the Indians that they would not be forced to move from their new lands: a patent would issue to convey those lands in fee simple, and they would never be embraced within the boundaries of any State or Territory." *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 626 (1970). Under the 1835 Treaty, the Cherokee Nation ceded to the United States "all the lands owned claimed or possessed by them east of the Mississippi river," 1835 Treaty art. 1, in exchange for the new homeland in present day Oklahoma of seven million acres, *see supra* ¶ 20, as well as "a perpetual outlet west, and a free and unmolested

use of all the country west of the western boundary of said seven millions of acres, as far west as the sovereignty of the United States and their right of soil extend," 1835 Treaty art. 2 (incorporating 1833 Treaty of Fort Gibson, Feb. 14, 1833, 7 Stat. 414), and an "additional tract of land situated between the west line of the State of Missouri and the Osage reservation," which was purchased from the United States by the Cherokee Nation and "estimated to contain eight hundred thousand acres of land," *id.* The boundaries of each of these parcels were explicitly set forth in the 1835 Treaty. *Id.* All of these lands were to "be included in one patent executed to the Cherokee nation of Indians by the President of the United States according to the provisions of the [Indian Removal Act]." *Id.* art. 3.

22. The 1835 Treaty also guaranteed the Cherokee Nation rights of self-government and jurisdiction over all persons and property belonging to their members or persons connected with the Cherokee Nation within the boundaries of their Reservation and promised that no state shall interfere with those rights in the following terms:

> The United States hereby covenant and agree that the lands ceded to the Cherokee Nation in the foregoing article shall, in no future time without their consent, be included within the territorial limits or jurisdiction of any State of Territory. But they shall secure to the Cherokee nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country belonging to their people or such persons as have connected themselves with them: provided always that they shall not be inconsistent with the constitution of the United States and such acts of Congress as have been or may be passed regulating trade and intercourse with the Indians; and also, that they shall not be considered as extending to such citizens and army of the United States as may travel or reside in the Indian country by permission according to the laws and regulations established by the Government of the same.

Id. art. 5. These rights include the right to exercise criminal jurisdiction over all Indians within the boundaries of the Cherokee Nation Reservation, and the right to do so exclusive of state authority.

23. In 1846, political factions of the Cherokee Nation resolved disputes within the Nation by signing a treaty with the United States. 1846 Treaty of Washington with the Cherokee, Aug. 6, 1846, 9 Stat. 871 ("1846 Treaty"). It protected individual rights, expressly providing that Cherokee paramilitary forces would be abolished, civil authority over the entire Nation restored, and that "[n]o one shall be punished for any crime or misdemeanor except on conviction by a jury of his country, and the sentence of a court duly authorized by law to take cognizance of the offense." 1846 Treaty art. 2. This protected people within the Cherokee Nation Reservation from being prosecuted in a court of law unless jurisdiction was authorized by applicable federal or tribal law.

24. In 1866, the Cherokee Nation and the United States entered into the Treaty of Washington with the Cherokee, July 19, 1866, 14 Stat. 799 ("1866 Treaty"), pursuant to which the boundaries of the Cherokee Nation Reservation, as set forth in the 1835 Treaty, were modified as follows. The 1866 Treaty authorized the United States to "settle friendly Indians in any part of the Cherokee country west of 96 degrees" (these are the lands referred to as the "perpetual outlet west" in Article 2 of the 1835 Treaty, and are known as the Cherokee Outlet), *id.* art. 16,[1] and further provided

> Said lands thus disposed of to be paid for to the Cherokee Nation at such price as may be agreed on between the said parties in interest, subject to the approval of the President; and if they should not agree, then the price to be fixed by the President.
>
> The Cherokee Nation to retain the right of possession of and jurisdiction over all of said country west of 96 degrees of longitude until thus sold and occupied, after which their jurisdiction and right of possession to terminate forever as to each of said districts thus sold and occupied.

[1] The cession of the Cherokee Outlet lands was finalized in the Act of Mar. 3, 1893, ch. 209, § 10, 27 Stat. 612, 640-43.

Id. In addition, the Cherokee Nation ceded to the United States the additional eight hundred thousand acres of land that the Nation had purchased from the United States pursuant to Article 2 of the 1835 Treaty, as well as "that strip of the land ceded to the nation by the fourth article of [the 1835 T]reaty which is included in the State of Kansas." *Id.* art. 17. The 1866 Treaty also provided that

> It being difficult to learn the precise boundary line between the Cherokee country and the States of Arkansas, Missouri, and Kansas, it is agreed that the United States shall, at its own expense, cause the same to be run as far west as the Arkansas, and marked by permanent and conspicuous monuments, by two commissioners, one of whom shall be designated by the Cherokee national council.

Id. art. 21. No other lands of the Cherokee Nation Reservation were ceded by the 1866 Treaty. Defendant is asserting, and has asserted, the power to exercise state criminal jurisdiction over Indians within the Reservation boundaries described in the 1835 and 1866 Treaties.

25. The 1866 Treaty also "guarantee[d] to the people of the Cherokee Nation the quiet and peaceable possession of their country," and promised that "[t]hey shall also be protected against interruptions or intrusion from all unauthorized citizens of the United States who may attempt to settle on their lands or reside in their territory." *Id.* art. 26.

26. In addition, the 1866 Treaty affirmed all pre-existing Treaty rights not inconsistent with the 1866 Treaty, as follows:

> All provisions of treaties heretofore ratified and in force, and not inconsistent with the provisions of this treaty, are hereby re-affirmed and declared to be in full force; and nothing herein shall be construed as an acknowledgment by the United States, or as a relinquishment by the Cherokee Nation of any claims or demands under the guarantees of former treaties, except as herein expressly provided.

Id. art. 31.

27. The Cherokee Nation Reservation, as established by the 1835 Treaty, with boundaries established by that Treaty and modified by the 1866 Treaty and the Act of March 3,

1893, continues to exist and has not been disestablished. *Castro-Huerta*, 597 U.S. at 633-34 (citing *Matloff*, 2021 OK CR 21, ¶ 15, 497 P.3d at 689); *Hogner v. State*, 2021 OK CR 4, ¶¶ 9-11, 17-18, 500 P.3d 629, 631-34, 635; *Oklahoma v. U.S. Dep't of Interior*, 640 F. Supp. 3d 1110, 1119-20 (W.D. Okla. 2022).

28. Under federal law, all land within the boundaries of the Cherokee Nation Reservation, whether held in trust or fee, is Indian country. *See* 18 U.S.C. § 1151(a) (defining "Indian country" as "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation"). Section 1151 "expressly contemplates private land ownership within reservation boundaries. Nor under the statute's terms does it matter whether these individual parcels have passed hands to non-Indians." *McGirt*, 591 U.S. at 906; *see also United States v. Baker*, 894 F. 2d 1144, 1149 (10th Cir. 1990) ("[P]rivate property owned by non-Indians but situated within the boundaries of an Indian reservation is still 'Indian country' for jurisdictional purposes.").

29. The Cherokee Nation exercises criminal jurisdiction over all Indians on the Cherokee Nation Reservation under its inherent sovereign "power to punish tribal offenders," *United States v. Wheeler*, 435 U.S. 313, 328-29 (1978) (citing *Talton*); 25 U.S.C. § 1301(2) ("recogniz[ing] and affirm[ing]" "the inherent power of Indian tribes … to exercise criminal jurisdiction over all Indians") and under its own criminal code. Cherokee Nation Tribal Code, tit. 21.[2]

[2] *Available at* https://attorneygeneral.cherokee.org/media/q5wjvyoa/title-21-amendments-updated-2021-04-06.pdf.

Federal Law Preempts State Jurisdiction Over Crimes By Indians In Indian Country And Makes Tribal Jurisdiction Over Such Crimes Exclusive Of State Jurisdiction.

A. *McGirt*'s Rule Requiring Clear Congressional Authorization For State Criminal Jurisdiction To Apply To Indians In Indian Country And *McGirt*'s Rejection Of The State's Claim Under That Rule Control This Case.

30. In *McGirt*, the Supreme Court reaffirmed the standard that applies to determine whether a state may exercise criminal jurisdiction over Indians in Indian country, holding that:

> "The policy of leaving Indians free from state jurisdiction and control is deeply rooted in this Nation's history." [*Rice*, 324 U.S. at 789]. Chief Justice Marshall, for example, held that Indian Tribes were "distinct political communities, having territorial boundaries, within which their authority is exclusive … which is not only acknowledged, but guarantied by the United States," a power dependent on and subject to no state authority. *Worcester v. Georgia*, 6 Pet. 515, 557 (1832); see also [*McClanahan*, 411 U.S. at 168-69]. And in many treaties, like those now before us, the federal government promised Indian Tribes the right to continue to govern themselves. For all these reasons, this Court has long "require[d] a clear expression of the intention of Congress" before the state or federal government may try Indians for conduct on their lands. [*Crow Dog*, 109 U.S. at 572].

591 U.S. at 928-29.[3]

31. The standard set forth in *McGirt* implements Congress's exclusive constitutional authority over Indian tribes, *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985) ("The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes."), which the Court reaffirmed in *Brackeen*, 599 U.S. at 273 (2023) ("'[V]irtually all

[3] The Tenth Circuit standard is the same: "unless Congress provides an exception to the rule … states possess 'no authority' to prosecute Indians for offenses in Indian country." *Ute VI*, 790 F.3d at 1004 (quoting *Cheyenne-Arapaho*, 618 F.2d at 668; and citing 18 U.S.C. § 1162). "These limits reflect a longstanding federal policy—enforceable against the states under the federal government's plenary and exclusive constitutional authority 'to legislate in respect to Indian tribes'—of 'leaving Indians free from state jurisdiction and control.'" *Ute Indian Tribe v. Lawrence* (*Lawrence II*), 22 F.4th 892, 899-900 (10th Cir. 2022) (quoting *Lawrence I*, 875 F.3d at 541-42). "[W]hen a case brought against a tribe or its members 'aris[es] from conduct in Indian country,' state courts lack jurisdiction 'absent clear congressional authorization.'" *Id.* at 900 (second alteration in original) (quoting *Navajo Nation v. Dalley*, 896 F.3d 1196, 1204 (10th Cir. 2018)).

authority over Indian commerce and Indian tribes' lies with the Federal Government." (quoting *Seminole Tribe*, 517 U.S. at 62)), and which results from a deliberate decision of the Framers of the Constitution, *see United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 194 (1876).[4] "[S]uch power is superior and paramount to the authority of any State within whose limits are Indian tribes." *Brackeen*, 599 U.S. at 273 (quoting *Dick v. United States*, 208 U.S. 340, 353 (1908)). That power was not lost by a State's admission to the Union on an equal footing. As the Court explained in *Dick*:

> [I]n determining the extent of the power of Congress to regulate commerce with the Indian tribes, we are confronted by certain principles that are deemed fundamental in our governmental system. One is that a state, upon its admission into the Union, is thereafter upon an equal footing with every other state and has full and complete jurisdiction over all persons and things within its limits, *except as it may be restrained by the provisions of the Federal Constitution or by its own Constitution*. Another general principle, based on the express words of the Constitution, is that Congress has power to regulate commerce with the Indian tribes, *and such power is superior and paramount to the authority of any state within whose limits are Indian tribes*.

208 U.S. at 353 (emphases added); *see also United States v. Chavez*, 290 U.S. 357, 365 (1933) ("[T]he constitutional rule that the state shall be admitted into the Union on an equal footing with the original states … is not disturbed by a legitimate exertion by the United States of its

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[4] As the Court explained:

> Under the articles of confederation, the United States had the power of regulating the trade and managing all affairs with the Indians not members of any of the States; provided that the legislative right of a State within its own limits be not infringed or violated. Of necessity, these limitations rendered the power of no practical value. This was seen by the convention which framed the Constitution; and *Congress now has the exclusive and absolute power to regulate commerce with the Indian tribes,—a power as broad and as free from restrictions as that to regulate commerce with foreign nations*.

Id. (emphasis added); *see also The Federalist* No. 42 (James Madison) (Project Gutenberg ed., 2021) ("The regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the articles of Confederation, which render the provision obscure and contradictory").

constitutional power in respect of its Indian wards and their property." (footnote omitted)); *United States v. Sandoval*, 231 U.S. 28, 48-49 (1913) (affirming "congressional power under the Constitution" to prohibit importation of liquor into Pueblo communities on the ground that "[b]eing a legitimate exercise of that power, the legislation in question does not encroach upon the police power of the state, or disturb the principle of equality among the states").

32. The *McGirt* standard also implements the basic principle that "unless and 'until Congress acts, the tribes retain' their historic sovereign authority," *Bay Mills*, 572 U.S. at 788 (quoting *Wheeler*, 435 U.S. at 323); *see United States v. Cooley*, 593 U.S. 345, 350 (2021) (*United States v. Cooley*, 593 U.S. 345, 350 (2021) ("[T]ribal authority remains subject to the plenary authority of Congress," (citing *Bay Mills*, 572 U.S. at 788), and because "no treaty or statute has explicitly divested Indian tribes of the policing authority at issue," its existence turns on "whether a tribe has retained inherent sovereign authority to exercise that power.") The *McGirt* standard has also been consistently applied. In *Rice v. Rehner*, 463 U.S. 713, 719 (1983), the Court reaffirmed that "tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States," *id.* at 720 (quoting *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 154 (1980)), and held that "a presumption of a lack of state authority" applies where "a tradition of self-government in the area" at issue exists, in which case State jurisdiction only applies if "Congress indicate[s] expressly that the State has jurisdiction." *Id.* at 726, 731. That rule applies here as criminal jurisdiction over Indians in Indian country is an area in which a tradition of self-government exists as "an Indian tribe's power to punish tribal offenders is part of its own retained sovereignty." *Wheeler*, 435 U.S. at 328-29 (citing *Talton*); *see also* 25 U.S.C. § 1301(2) ("recogniz[ing] and affirm[ing]" "the inherent power of Indian tribes … to exercise criminal jurisdiction over all Indians"). In addition, in *Seymour v. Superintendent*

of Washington State Penitentiary, 368 U.S. 351 (1962), the Court held that as the Indian defendant's alleged crime had been committed within an Indian Reservation, and Congress had never authorized state criminal jurisdiction over an Indian on that Reservation, *id.* at 354-55, "the courts of Washington had no jurisdiction to try him for that offense," *id*. at 359. And Tenth Circuit law mirrors the *McGirt* standard. *See supra* ¶ 30 n.3. For all of these reasons, the *McGirt* standard applies to Defendant's claim that the State has criminal jurisdiction over Indians in Indian country.

33. In *McGirt*, the Supreme Court applied that standard to adjudicate the State's claim that it had criminal jurisdiction over Indians in Indian country pursuant to the federal statutes that controlled the assignment of criminal cases during the territorial era and the Oklahoma Enabling Act, and because unless it had such jurisdiction a jurisdictional void would exist with respect to minor offenses committed by Indians on Indians. *McGirt*, 597 U.S. at 927-30. The Court held "Oklahoma cannot come close to satisfying this standard." *Id.* at 929. With respect to the territorial era statutes, the Court held

> When Oklahoma won statehood in 1907, the [Major Crimes Act] applied immediately according to its plain terms. That statute … provided exclusive federal jurisdiction over qualifying crimes committed by Indians in [Indian country] … . By contrast, every one of the statutes the State directs us to merely discusses the assignment of cases among courts in the *Indian Territory*. They say nothing about the division of responsibilities between federal and state authorities after Oklahoma entered the Union.

Id. The State's reliance on the Oklahoma Enabling Act failed because that Act sent state-law cases to state court and federal-law cases to federal court, and crimes that were subject to the Major Crimes Act were federal law cases.[5] *Id.* The State's argument that "[i]f Oklahoma lacks the

[5] The State asserted that the Enabling Act made the State's courts "the inheritors of the federal territorial courts' sweeping authority to try Indians for crimes committed on reservations," by transferring "all nonfederal cases pending in territorial courts to Oklahoma's new state courts." *Id.* at 929-30. The State's argument failed because

jurisdiction to try Native Americans it has historically claimed, that means at the time of its entry into the Union no one had the power to try minor Indian-on-Indian crimes committed in Indian country," *id.* at 930-31, failed too. The Court held jurisdictional gaps were "hardly foreign in this area of the law," that Congress had filled many of those gaps by "reauthorizing tribal courts to hear minor crimes in Indian country," by "allow[ing] Indian tribes to consent to state criminal jurisdiction, 25 U.S.C. § 1321(a), 1326," and by "expand[ing] state criminal jurisdiction in targeted bills addressing specific States." *Id.* at 931. "But Oklahoma doesn't claim to have complied with the requirements to assume jurisdiction voluntarily over Creek lands. Nor has Congress ever passed a law conferring jurisdiction on Oklahoma." *Id.* at 932. These holdings control this case. Oklahoma has neither met the requirements necessary to assume jurisdiction voluntarily over the Cherokee Nation Reservation "[n]or has Congress ever passed a law conferring jurisdiction on Oklahoma." *Id.*

34. The *McGirt* rule for determining whether a state has criminal jurisdiction over Indians in Indian country and the *McGirt* Court's application of that rule to reject the State's claim that it has criminal jurisdiction over Indians in Indian country are binding on the State in this case because *McGirt* is a decision of the Supreme Court on a question of federal law. *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 53 (2015).

> [t]he Enabling Act … *also* transferred pending cases that arose "under the Constitution, laws, or treaties of the United States" to federal district courts. § 16, 34 Stat. 277. Pending criminal cases were thus transferred to federal court if the prosecution would have belonged there had the Territory been a State at the time of the crime. § 1, 34 Stat. 1287 (amending the Enabling Act)…. So, simply put, the Enabling Act sent state-law cases to state court and federal-law cases to federal court. And serious crimes by Indians in Indian country were matters that arose under the federal [Major Crimes Act] and thus properly belonged in federal court from day one, wherever they arose within the new State.

Id at 930.

35. Even assuming, *arguendo*, that the State was not bound by *McGirt*, federal law requires express congressional authorization for the State to have criminal jurisdiction over Indians in Indian country, as shown by *Rice v. Rehner*, *Seymour*, and decisions of the Tenth Circuit. *See supra* ¶ 30 & n.3. And the application of that standard in this case would compel the same result as does application of the *McGirt* rule because the State cannot show that Congress has expressly authorized it to exercise criminal jurisdiction over Indians in Indian country.

36. No federal statute has done so. While Public Law 83-280, 67 Stat. 588 (1953) ("P.L. 280"), expressly permits States to exercise jurisdiction over Indians in Indian country, Oklahoma has "never acquired jurisdiction over Indian country through Public Law 280." *Murphy v. Royal*, 875 F.3d 896, 937 (10th Cir. 2017), *aff'd sub nom. Sharp v. Murphy*, 591 U.S. 977 (2020) (per curiam).

37. Nor does the Oklahoma Enabling Act authorize the State to exercise criminal jurisdiction over Indians in Indian country. The *Castro-Huerta* Court only considered the Oklahoma Enabling Act "[w]ith respect to crimes committed by non-Indians against Indians in Indian country," *id.* at 655-56, and the Court's decision only "recognizes that the Federal Government and the State have concurrent jurisdiction over crimes committed by non-Indians against Indians in Indian country." *Id.* at 655; *accord id.* at 655 n.9 ("[W]e do not take a position on" "the reverse of the scenario in this case," namely "jurisdiction over crimes committed by Indians against non-Indians in Indian country."). With respect to Indians, federal law compels a different result. Section 1 of the Oklahoma Enabling Act provides that, as a condition of Oklahoma statehood,

> nothing contained in the [Oklahoma] constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation

> respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this Act had never been passed.

Ch. 3335, 34 Stat. 267, 267-68 (1906). "Section one is a general reservation of federal and tribal jurisdiction over 'Indians, their lands, [and] property,' except as extinguished by the tribes or the federal—not state—government." *Indian Country, U.S.A., Inc. v. Oklahoma ex rel. Okla. Tax Comm'n*, 829 F.2d 967, 979 (10th Cir. 1987) (alteration by the court). In short, "upon Oklahoma's admission to statehood in 1907, federal authority ended with regard to non-Indians" while "federal authority continued with regard to Indians." *Id.* at 978 (citing *United States v. Ramsey*, 271 U.S. 467, 469 (1926)).

38. Accordingly, even assuming, *arguendo*, that *McGirt* is not controlling here, the State lacks criminal jurisdiction over the conduct of Indians in Indian country, including the Cherokee Nation Reservation, which is Indian country under federal law, 18 U.S.C. § 1151(a), because Congress has never authorized Oklahoma to exercise such jurisdiction, and Oklahoma has never acquired such jurisdiction under P.L. 280.[6]

39. *Castro-Huerta* cannot be argued to authorize states to exercise criminal jurisdiction over Indians in Indian country because the Court said nothing to unsettle, much less overrule, either the standard set forth in *McGirt*, 591 U.S. at 929, or the Court's application of that standard to reject the State's claim to jurisdiction over Indians in Indian country, *id.* at 930-31. Furthermore, the *Castro-Huerta* Court only considered "whether the State [] has concurrent jurisdiction with the Federal Government" over crimes by non-Indians against Indians in Indian country, *id.* 597 U.S. at 634. In so doing, the Court expressly and repeatedly emphasized that it was *not* considering

[6] *Castro-Huerta* is not to the contrary as it only considered P.L. 280 "[w]ith respect to crimes committed by non-Indians against Indians in Indian country," 597 U.S. at 655, and because the Court limited its opinion to that issue. *See infra* ¶ 39.

state jurisdiction over Indians, *id.* at 639 n.2 (state prosecutorial authority over Indians who commit crimes in Indian country is "not before us"), *id.* at 650 n.6 (Court "express[ing] no view" on state authority over Indian criminal defendants); *see also id.* at 648 (contrasting the "narrow jurisdictional issue in this case" with state jurisdiction over Indians), expressly limited its holding to the question before it, *see id.* at 652, 655-56. For the same reasons, the *Castro-Huerta* Court's reference to the Tenth Amendment in addressing state jurisdiction to prosecute "crimes committed by *non-Indians*," *id.* 597 U.S. at 653 (emphasis added), cannot be relied on to support state jurisdiction *over Indians*.[7] The Court must be taken at its word. As the *Castro-Huerta* Court said it did not consider state jurisdiction over Indians in Indian country, it did not do so. Accordingly, the Court's opinion cannot be relied on to support state criminal jurisdiction over Indians in Indian country.

40. As Congress has not authorized Oklahoma to exercise criminal jurisdiction over Indians in Indian country, the exercise of the federal and tribal criminal jurisdiction over Indians in Indian country in Oklahoma that is authorized by federal law is exclusive of state jurisdiction.

41. Federal law expressly recognizes and affirms inherent tribal power over crimes by Indians in Indian country. *See* 25 U.S.C. § 1301(2). Congress enacted § 1301(2) to establish that Indian tribes retain inherent sovereign power to exercise criminal jurisdiction over all Indians in

[7] Furthermore, as the Constitution delegates power over Indians to the United States, *see supra* ¶ 31, that power is not reserved to the States under the Tenth Amendment. While "[t]he States unquestionably do retai[n] a significant measure of sovereign authority[,]" that authority is held only "to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government." *New York v. United States*, 505 U.S. 144, 156 (1992) (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 549 (1985)). The Constitution does just that, as a result of a deliberate decision of the Framers. *See supra* ¶ 31 n.4.

Indian country. *See Lara*, 541 U.S. at 197-98, 200-02.[8] Key to Congress's decision to pass § 1301(2) was its conclusion that tribes traditionally had exclusive jurisdiction over all Indians in their Indian country, and thus the state lacked such jurisdiction.[9] Both houses of Congress acknowledged that § 1301(2) was important because unless tribes could exercise their inherent criminal authority over Indians on reservations, the resources available to prosecute Indian criminal defendants would be significantly reduced, as States lack jurisdiction over crimes committed by Indians on reservations. S. Rep. No. 102-153, at 3 (1991) ("[I]t has long been accepted that states do not have power to exercise criminal jurisdiction over crimes involving Indians on the reservation." (quoting *Duro*, 495 U.S. at 705 n.3 (Brennan, J., dissenting))); H.R. Rep. No. 102-61, at 2 (1991) ("[U]nder 18 U.S.C. 1152 the federal government lacks misdemeanor jurisdiction over crimes committed by one Indian against another Indian, and states generally cannot assert criminal jurisdiction over Indians on reservations."). Section 1301(2)'s reaffirmation of tribal inherent power over Indians in Indian country, unaccompanied by any express authorization for states to also exercise such power, makes tribal authority under § 1301(2) exclusive of state authority.

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[8] The Supreme Court had held in *Duro v. Reina*, 495 U.S. 676 (1990), that tribes had lost this power, and § 1301(2) reversed that holding. The plain language of § 1301(2) therefore forecloses reliance on the Court's finding in *Duro*, 495 U.S. at 695-96, that Indians who are not members of the tribe on whose Indian country they are located are distinguishable from member Indians and subject to state criminal jurisdiction. *See Lara*, 541 U.S. at 200-02, 210; *United States ex rel. Cheyenne River Sioux Tribe v. South Dakota*, 105 F.3d 1552, 1559 (8th Cir. 1997) ("Congress has defined tribal powers of self government to include criminal jurisdiction over 'all Indians' ….").

[9] When Congress was considering passing § 1301(2), it was informed that "[i]n the period from the founding of the Republic until the latter part of the last [*i.e.*, nineteenth] century, … [t]ribes exercised authority over members of other tribes who married into the tribe, were adopted into its families, or otherwise became part of the tribal community voluntarily," as well as "over members of other tribes who voluntarily came to visit or to trade." *The* Duro *Decision: Criminal Misdemeanor Jurisdiction in Indian Country: Hearing Before the H. Comm. on Interior and Insular Affs.*, 102d Cong. 155 (1991) (statement of Richard Collins, Professor, Univ. of Colo.).

B. Application Of The Preemption Principles Set Forth In *McClanahan* Also Preempt State Criminal Jurisdiction Over Indians In Indian Country.

42. State jurisdiction over crimes by Indians in Indian country is also preempted under the "general pre-emption analysis" set forth in *McClanahan*, which makes clear that "State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply," 411 U.S. at 170-71 (quotation omitted), and reaffirms that with *respect to Indians*, "[e]ssentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them,'" *id.* at 171-72 (quoting *Williams*, 358 U.S. at 219-20) (footnote omitted). *McClanahan* also recognizes that the "modern cases [] tend to … look … to the applicable treaties and statutes which define the limits of state power," as "the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption." At the same time, it provides that "[t]he Indian sovereignty doctrine … provides a backdrop against which the applicable treaties and federal statutes must be read." *Id.* at 172. Applied here, *McClanahan* establishes that the State lacks criminal jurisdiction over Indians in Indian country.

43. The Indian sovereignty backdrop that applies here includes the following. Indian tribes remain "separate sovereigns pre-existing the Constitution." *Bay Mills*, 572 U.S. at 788 (quoting *Santa Clara Pueblo*, 436 U.S. at 56). "The sovereignty retained by tribes includes 'the power of regulating their internal and social relations,'" *Mescalero Apache*, 462 U.S. at 332 (quoting *Kagama*, 118 U.S. at 381-82), and "their internal right of self-government includes the right to prescribe laws applicable to tribe members and to enforce those laws by criminal sanctions." *Wheeler*, 435 U.S. at 322 (citing *United States v. Antelope*, 430 U.S. 641, 643 n.2 (1977); *Talton*, 163 U.S. at 380; *Crow Dog*, 109 U.S. at 571-72)); *see also* 25 U.S.C. § 1301(2)

("recogniz[ing] and affirm[ing]" "the inherent power of Indian tribes … to exercise criminal jurisdiction over all Indians"). It is also settled that "to allow the exercise of state jurisdiction [over Indians] would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves." *Williams*, 358 U.S. at 223; *Fisher*, 424 U.S. at 387-88 (1976) ("State-court jurisdiction plainly would interfere with the [tribal] powers of self-government" by subjecting Indians in Indian country "to a forum other than the one they have established for themselves.") In sum, the right of Tribal self-government includes a "concomitant jurisdictional limit on the reach of state law," *McClanahan*, 411 U.S. at 171, which applies to the state courts. *See, e.g.*, *Williams v. Lee*, 358 U.S. at 220; *Kennerly v. Dist. Ct.*, 400 U.S. 423, 426-27 (1971) (per curiam); *Fisher*, 424 U.S. at 386. And "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in this Nation's history," *McGirt*, 591 U.S. at 928 (quoting *Rice v. Olson*, 324 U.S. 786, 789 (1945)); *Warren Trading Post Co. v. Ariz. State Tax Comm'n,* 380 U. S. 685, 686-87 (1965) ("[F]rom the very first days of our Government, the Federal Government had been permitting the Indians largely to govern themselves, free from state interference."); *see Kagama*, 118 U.S. at 384. In addition, "both the tribes and the Federal Government are firmly committed to the goal of promoting tribal self-government, a goal embodied in numerous federal statutes." *Mescalero Apache*, 462 U.S. at 334-35; *accord LaPlante*, 480 U.S. at 14 & n.5 (collecting cases and statutes showing Supreme Court has "repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government" and "[n]umerous federal statutes designed to promote tribal government embody this policy").

44. The exercise of state criminal jurisdiction over Indians on the Cherokee Nation Reservation would "infringe[] on the right of reservation Indians to make their own laws and be

ruled by them." *McClanahan*, 411 U.S. at 171-72. A sovereign has no greater power over individuals than the power to establish rules that are punished by imprisonment if violated. Were the State to have such power over Indians in Indian country, it would render tribal legislatures powerless to make laws for Indians that were contrary to the State's criminal laws and would subordinate the tribal courts' role in the administration of criminal justice over Indians in Indian country to that of the State's courts. That state jurisdiction would be concurrent would make no difference, as state law would control the conduct of Indians in Indian country regardless of what the Nations' laws might provide. The State would also have the power to supplant tribal law with which it disagreed by amending state law, requiring Indian people to comply with those amended requirements or else face criminal punishment. In addition, state courts would displace the power of the Cherokee Nation to dispense justice in its own courts because they would determine Indian people's guilt and innocence of state criminal charges and mete out punishments for violations. Furthermore, the tribal court's determination of the appropriate sentence for a person convicted of a tribal crime could be effectively voided by the State meting out a sentence of its own for the same conduct. "There can be no doubt that to allow the exercise of state jurisdiction [over Indians] would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves." *Williams*, 358 U.S. at 223. To allow state jurisdiction here would virtually extinguish "the right of reservation Indians to make their own laws and be ruled by them," *McClanahan*, 411 U.S. at 171-72 (quoting *Williams*, 358 U.S. at 219-20).

45. That the State has no criminal jurisdiction over Indians in Indian country is also apparent when the "relevant treaty and statutes are read with th[e] tradition of sovereignty in mind," *McClanahan*, 411 U.S. at 173. In *McClanahan*, state jurisdiction on the Navajo

Reservation was held preempted by the Treaty of Bosque Redondo, June 1, 1868, 15 Stat. 667, in which the United States promised the Reservation would be "'set apart' for 'the [Navajo's] permanent home.'" 411 U.S. at 174. The Court had earlier explained in *Williams* that this treaty "provided that no one, except United States Government personnel, was to enter the reserved area." 358 U.S. at 221. *McClanahan* concluded

> the reservation of certain lands for the exclusive use and occupancy of the Navajos and the exclusion of non-Navajos from the prescribed area was meant to establish the lands as within the exclusive sovereignty of the Navajos under general federal supervision. It is thus unsurprising that this Court has interpreted the Navajo treaty to preclude extension of state law—including state tax law—to Indians on the Navajo Reservation.

411 U.S. at 174-75. This conclusion applies with equal, if not greater, strength to the Cherokee Nation's treaties, under which it was "[i]n many respects … promised virtually complete sovereignty over their new lands" in what is now Oklahoma. *Choctaw Nation*, 397 U.S. at 635 (citing *Atl. & Pac. R.R. v. Mingus*, 165 U.S. 413, 435-36 (1897)) (discussing Choctaw and Cherokee treaties). The Nation's exclusive authority on its Reservation in what is now Oklahoma was confirmed by the 1835 Treaty, which

> Secure[d] to the Cherokee nation the right by their national councils to make and carry into effect all such laws as they may deem necessary *for the government and protection of the persons and property within their own country belonging to their people or such persons as have connected themselves with them*: provided always that they shall not be inconsistent with the constitution of the United States and such acts of Congress as have been or may be passed regulating trade and intercourse with the Indians.

Id. art. 5 (emphasis added). This established the Nation's power to make laws to govern all Indians, including those "connected" with the Nation through their on-Reservation activities.

46. This conclusion is reaffirmed by the 1846 Treaty, which established that those living within the Cherokee Nation Reservation would only be subject to criminal prosecution on the following terms: "No one shall be punished for any crime or misdemeanor except on conviction

by a jury of his country, and the sentence of *a court duly authorized by law to take cognizance of the offense*." *Id.* art. 2 (emphasis added). The "country" referred to was that held by the Cherokee Nation, *see id.* arts. 1, 4 (referring to the Cherokee Nation Reservation as "the country west of the Mississippi"). The 1866 Treaty then confirmed that "[a]ll provisions of treaties, heretofore ratified and in force, and not inconsistent with the provisions of this treaty, are hereby reaffirmed and declared to be in full force." *Id.* art. 31. Nothing in the 1866 Treaty limited the Nation's authority over Indians within its boundaries.

47. These treaty guarantees remain in effect. Under settled law, "Congress 'must clearly express' any intent to abrogate Indian treaty rights." *Herrera v. Wyoming*, 587 U.S. 329, 340 (2019) (quoting *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999)). Congress has taken no action that does so. Furthermore, "there is nothing inherent in the nature of reserved treaty rights to suggest that they can be extinguished by implication at statehood." *Id.* at 341-42 (quoting *Mille Lacs*, 526 U.S. at 207) (alteration omitted). Apart from their weight in the *McClanahan* analysis, the Cherokee Nation's treaties provide an independent basis for their right to exercise criminal jurisdiction over all Indians on the Cherokee Nation Reservation free from interference by the State.[10]

48. In *McClanahan*, the Court also found that the Arizona Enabling Act supported its holding that the State lacked jurisdiction by providing that the State would disclaim "right and title" to Indian lands and that those lands "shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States.'" 411 U.S. at 175

[10] *Castro-Huerta* is not to the contrary as the Court's brief discussion of "treaties from the 1800s" only considered those treaties "[w]ith respect to crimes committed by non-Indians against Indians in Indian country," *id.* at 655, and because the Court limited its opinion to that issue. *See supra* at ¶ 39.

(quoting Arizona Enabling Act, 36 Stat. 569) (footnote omitted)). Section 3 of the Oklahoma Enabling Act, ch. 3335, 34 Stat. 267, 270, protects Indian rights in virtually identical terms. In addition, Section 1 of the Enabling Act provides that:

> nothing contained in the [Oklahoma] constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this Act had never been passed.

34 Stat. at 267-68. "Section one is a general reservation of federal and tribal jurisdiction over 'Indians, their lands, [and] property,' except as extinguished by the tribes or the federal—not state—government." *Indian Country, U.S.A.*, 829 F.2d at 979 (alteration in opinion). Section 1 bars state jurisdiction over Indians in Indian country.[11] *See Tiger v. W. Inv. Co.*, 221 U.S. 286, 309 (1911); *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 756 (1866); *see also Bd. of Comm'rs v. Seber*, 130 F.2d 663, 668 (10th Cir. 1942), *aff'd* 318 U.S. 705 (1943) ("Aside from the historically paramount power of Congress … the State of Oklahoma, has by acceptance of statehood under Section one of the Enabling Act, conceded the power and authority of the United States government to make any law or regulation respecting Indians, their lands, property, or other rights by treaties, agreement, law or otherwise." (citations omitted)). Apart from its weight in the *McClanahan* analysis, Section 1 of the Oklahoma Enabling Act provides an independent basis for

[11] Section 1 "derive[s] its force not from any agreement or compact with the proposed new state, nor by reason of its acceptance of such enactment as a term of admission, but solely because the power of Congress extended to the subject…." *Coyle v. Smith*, 221 U.S. 559, 574 (1911); *see also State ex rel. Williamson v. Comm'rs of Land Off.*, 301 P.2d 655, 659 (Okla. 1956) ("It has been held by the highest authority that congressional regulations in an enabling act remain in force after admission of the State into the Union if the subject is one within the regulating power of Congress." (citing *United States v. Sandoval*, 231 U.S. 28 (1913)).

establishing the Cherokee Nation's right to exercise criminal jurisdiction over all Indians on the Cherokee Nation Reservation exclusive of the State.

49. The *McClanahan* Court also made clear that "Congress has [] provided a method whereby States may assume jurisdiction over reservation Indians," set forth in P.L. 280, under which "the State must act 'with the consent of the tribe occupying the particular Indian country,' 25 U.S.C. s 1322(a), and must 'appropriately (amend its) constitution or statutes.' 25 U.S.C. s 1324." *McClanahan*, 411 U.S. at 177-78 (footnote omitted). Arizona had not done so, and the Supreme Court readily acknowledged that under its general rule a state has "no choice but to" concede that it "can exercise neither civil nor criminal jurisdiction over reservation Indians" absent compliance with P.L. 280. *Id.* at 178 & n.19 (citing *Kennerly*; *Kagama*). As Oklahoma has not implemented P.L. 280 either, *see supra* ¶¶ 36, 38, it remains subject to the same rule, which also provides an independent barrier to state jurisdiction over Indians in Indian country.[12]

C. Defendants' Interference With The Federal Rights Of The Nations And Indians On Their Reservation.

50. Defendant asserts that the State has the right to exercise criminal jurisdiction over and apply state law to the conduct of Indians in Indian country, including within the boundaries of the Cherokee Nation Reservation, which is Indian country under federal law, 18 U.S.C. § 1151(a). He has taken action in furtherance of this purported authority and directed others under his

[12] While the *Castro-Huerta* Court considered whether P.L. 280 preempted state criminal jurisdiction over non-Indians, the Court expressly limited its consideration of P.L. 280 to that issue. *Castro-Huerta*, 597 U.S. at 648 ("our resolution of the narrow jurisdictional issue in this case does not negate the significance of Public Law 280 in affording States broad criminal jurisdiction over other crimes committed in Indian country, such as crimes committed by Indians."); *id.* at 655 (the Court only considered P.L. 280 "[w]ith respect to crimes committed by non-Indians against Indians in Indian country.").

supervision and direction to do so, and he intends to continue to exercise state criminal jurisdiction over and apply state law to the conduct of Indians within the Cherokee Nation Reservation.

51. Defendant and those under his supervision and direction have arrested, charged, detained, and sought to prosecute and punish Indians for alleged violations of state law on the Cherokee Nation Reservation, and assert the right to continue to do so. These actions violate the holdings of the Supreme Court in *McGirt*, which are binding on Defendant, *see supra* ¶¶ 30-34, the law of the Tenth Circuit, *see supra* ¶ 30 n.3, as well as the Cherokee Nation's rights of self-government, inherent sovereign power to exercise criminal jurisdiction over all Indians on the Cherokee Nation Reservation, and its Treaty and statutory rights, under which the Cherokee Nation has jurisdiction exclusive of the State over crimes by Indians in Indian country. Defendant's actions therefore constitute a continuing violation of federal law.

52. On June 29, 2023, Defendant filed state criminal charges against Brayden Kent Bull in the District Court for Rogers County for alleged conduct within the Cherokee Nation Reservation. *Oklahoma v. Bull*, No. CF-2023-226 (Dist. Ct. Rogers Cnty.). The Honorable Judge Terrell S. Crosson, District Court Judge for Rogers County, declined to issue an arrest warrant for Mr. Bull after finding that he is an enrolled member of the Navajo Nation and that the offenses he is charged with were allegedly committed within the boundaries of the Cherokee Nation Reservation. Court Minute, *Oklahoma v. Bull*, No. CF-2023-226 (June 29, 2023). Defendant subsequently applied for a writ of mandamus in the Oklahoma Court of Criminal Appeals, seeking to direct Judge Crosson to issue an arrest warrant for Mr. Bull. Pet. for Writ of Mandamus and Br. in Supp., *State ex rel. Ballard v. Crosson*, 2023 OK CR 18, 540 P.3d 16 (filed July 27, 2023) (No. MA-2023-623). On November 16, 2023, the OCCA granted the writ and remanded the

proceedings to the Rogers County District Court for further consideration of the jurisdictional issues. *State ex rel. Ballard v. Crosson*, 2023 OK CR 18, 540 P.3d 16.

53. Well before then, in November of 2021, the Cherokee Nation charged Mr. Bull in Cherokee Nation District Court with violations of the Cherokee Nation Tribal Code for the same conduct that was later made the subject of the State charges. Mr. Bull was taken into custody by the Cherokee Nation, Br. of the Cherokee Nation in Supp. of Mot. for Leave to File *Amicus* Br. 2, *State ex rel. Ballard v. Crosson*, 2023 OK CR 18, 540 P.3d 16 (filed Sept. 1, 2023) (No. MA-2023-623) ("*Crosson* Amicus Br."), and later transferred to federal custody so that the federal government could prosecute him in federal court. Mr. Bull pled guilty to federal charges in the United States District Court for the Northern District of Oklahoma. J. in a Crim. Case at 1, *United States v. Bull*, No. 4:23-CR-00283-1 (N.D. Okla. filed Oct. 2, 2024), ECF No. 60, and is currently being held in federal custody on a fifty-year prison sentence. *See id.* at 2. In light of his fifty-year sentence, the Cherokee Nation dismissed pending criminal charges against him without prejudice. *See* Information, *Cherokee Nation v. Bull*, No. CF-21-2764 (Cherokee Nation Dist. Ct. filed Dec. 10, 2021); Mot. to Dismiss, *Cherokee Nation v. Bull*, No. CF-21-2764 (Cherokee Nation Dist. Ct. filed Oct. 3, 2024); Order of Dismissal, *Cherokee Nation v. Bull*, CF-21-2764 (Cherokee Nation Dist. Ct. Oct. 3, 2024). However, the State continues to seek custody of Mr. Bull and has continued its state prosecution in state district court. *See* App. For Writ of Habeas Corpus Ad Prosequendum, *State v. Bull*, No. CF-2023-226 (Okla. Dist. Ct. filed July 15, 2024); Request for Temporary Custody, *State v. Bull*, No. CF-2023-226 (Okla. Dist. Ct. filed Nov. 20, 2024); Prosecutor's Acceptance of Temporary Custody, *State v. Bull*, No. CF-2023-226 (Okla. Dist. Ct. filed Jan. 14, 2025).

54. On September 15, 2023, Defendant filed state criminal charges against Tony Demond Williams in the Rogers County District Court. *State v. Williams*, No. CF-2023-311 (Okla. Dist. Ct.). The Honorable Laura Russell, District Court Judge for Rogers County, declined to issue an arrest warrant for Mr. Williams after determining that he is a member of the Chickasaw Nation and that the alleged crime occurred within the boundaries of the Cherokee Nation Reservation. *See* Minute Order, *State v. Williams*, No. CF-2023-311 (Okla. Dist. Ct. Sept. 8, 2023).

55. On October 9, 2023, Defendant filed a petition for writ of mandamus and/or prohibition in the OCCA, seeking *inter alia* an order directing Judge Russell to issue an arrest warrant for Mr. Williams. *See* Pet. For Writ of Mandamus &/or Writ of Prohib. & Br. in Supp., *State ex rel. Ballard v. Russell*, 2023 WL 11915588 (Okla. Crim. App. filed Oct. 9, 2023) (No. MA-2023-826). The OCCA granted Defendant Ballard's petition on December 1, 2023, and remanded the proceedings to the District Court for prosecution under state law, *see State ex rel. Ballard v. Russell*, No. MA-2023-826 (Okla. Crim. App. Dec. 1, 2023), where Defendant retains custody of Mr. Williams pursuant to a state court bond order and continues to prosecute him in a court other than Cherokee Nation District Court.

56. On September 22, 2023, the Nation charged Mr. Williams with violations of the Cherokee Nation Code in Cherokee Nation District Court. Information, *Cherokee Nation v. Williams*, No. CF-23-2876 (Cherokee Nation Dist. Ct. filed Sept. 22, 2023). On November 19, 2024, Mr. Williams pled no contest in Cherokee Nation District Court and the Court sentenced him to a five-year deferred sentence. Plea of Guilty, *Cherokee Nation v. Williams*, No. CF-23-2876 (Cherokee Nation Dist. Ct. filed Nov. 19, 2024); Plea Order, *Cherokee Nation v. Williams*, No. CF-23-2876 (Cherokee Nation Dist. Ct. Nov. 19, 2024).

57. On September 24, 2024, Defendant filed state criminal charges against Eric Ashley in the Rogers County District Court. *State v. Ashley*, No. CF-2024-421 (Okla. Dist. Ct.). Mr. Ashley is a member of the Choctaw Nation of Oklahoma and the crime he is alleged to have committed occurred within the boundaries of the Cherokee Nation Reservation. Defendant continues to prosecute Mr. Ashley in state district court.

58. Mr. Ashley has also been charged with violations of the Cherokee Nation Code and is being prosecuted by the Cherokee Nation in Cherokee Nation District Court for the same conduct on which Defendant's state criminal charges are based. *See* Information, *Cherokee Nation v. Ashley*, CF-2024-03178 (Cherokee Nation Dist. Ct. filed Oct. 15, 2024).

59. Defendant's conduct also threatens Indians anywhere within his prosecutorial district on the Cherokee Nation Reservation with arrest and prosecution in state court for violations of state law occurring on the Cherokee Nation Reservation. That threat has been realized in the specific prosecutions discussed in ¶¶ 52-55, 57, *supra*, and those prosecutions show it will continue to be realized in future cases.

60. Defendant has no right to assert jurisdiction or to threaten to assert jurisdiction over Indians for alleged violations of state law on the Cherokee Nation Reservation, nor do the state courts have jurisdiction to adjudicate such violations, because Congress has not expressly authorized the State to exercise such jurisdiction. Defendant's actual and threatened actions also deprive the Cherokee Nation of its right to exercise criminal jurisdiction over crimes by Indians on the Cherokee Nation Reservation free from state interference, which are secured to the Cherokee Nation by its inherent sovereign authority, under 25 U.S.C. § 1301(2), and by its treaties with the United States, which are binding on Defendant by virtue of the Supremacy Clause of the United States Constitution, art. VI, cl. 2., and by federal common law. These actual and threatened

actions by Defendant constitute a continuing violation of federal law, which is actionable under the doctrine of *Ex parte Young*.

61. Defendant's efforts to interfere with the federal rights alleged in the preceding paragraph invades the Cherokee Nation's sovereignty and "constitute[s] [an] irreparable injury." *See Ute Indian Tribe v. Utah* ("*Ute VI*"), 790 F.3d 1000, 1005-06 (10th Cir. 2015) (Gorsuch, J.) (quoting *Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1255 (10th Cir. 2006); and citing *Pierce*, 253 F.3d at 1250-51).

62. Plaintiff Nations have no adequate remedy at law. Defendant's interference with the federal rights of the Cherokee Nation cannot be vindicated if Defendant continues prosecuting Indians under state law in state court for conduct in Indian country or continues to threaten such prosecutions, as the State and Defendant are the only parties to such prosecutions. In addition, those prosecutions themselves subject the Plaintiff Nations' members to the very processes that violate the Cherokee Nation's and the individual Indian defendants' federal rights. Plaintiff Nations' members have no remedy at all except at the risk of suffering fines, imprisonment, and confiscation of property, involving a multiplicity of legal proceedings. Additionally, Plaintiff Nations have no adequate remedy at law because the rights of the Cherokee Nation under its treaties are unique and should be specifically protected.

CLAIM FOR RELIEF

63. Plaintiff Nations incorporate by reference and restate all allegations of paragraphs 1 through 62 of this complaint as if fully set forth herein.

64. Pursuant to and in accord with the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, the Nations seek a declaration that (a) Defendant's ongoing actual and threatened exercise of state criminal jurisdiction and application of state law to Indians on the Cherokee Nation Reservation violates federal law because Congress has not expressly authorized the State to

exercise state criminal jurisdiction and apply state criminal law to Indians in Indian country in Oklahoma, which under federal law includes all land within the Cherokee Nation Reservation, 18 U.S.C. § 1151(a); and (b) Defendant's ongoing actual and threatened exercise of state criminal jurisdiction and application of state law to Indians on the Cherokee Nation Reservation also violates federal law because it interferes with the Cherokee Nation's exercise of its inherent sovereign authority, confirmed by statute, 25 U.S.C. § 1301(2), to exercise criminal jurisdiction over all Indians within Indian country, which includes all land within Indian reservations, 18 U.S.C. § 1151(a), and therefore includes all land within the Cherokee Nation Reservation.

65. In furtherance of Plaintiff Nations' request for declaratory relief, as recited at ¶ 64, *supra*, the Plaintiff Nations seek to have this Court enjoin Defendant in his official capacity from: (a) exercising state criminal jurisdiction over or applying state criminal laws to Indians on the Cherokee Nation Reservation; (b) interfering, through the exercise of state criminal jurisdiction or the application of state criminal law, with the Cherokee Nation's application of its criminal laws to Indians on the Cherokee Nation Reservation, and with the Cherokee Nation's prosecution of violations of such laws by Indians in the Nation's courts.

PRAYER FOR RELIEF

Wherefore the Plaintiff Nations pray for a judgment granting the relief as follows:

1. Declaring, pursuant to 28 U.S.C. § 2201, that the State lacks criminal jurisdiction over Indians in Indian country within the boundaries of the State of Oklahoma, and that Defendant's continued assertion of such jurisdiction violates federal law.

2. Enjoining Defendant from asserting criminal jurisdiction over and prosecuting Indians for conduct occurring in Indian country absent express authorization from Congress, whether by arrest, search and seizure, by initiating or conducting state court proceedings seeking to enforce such laws, or by other means.

4. Awarding the Nations all litigation costs to the maximum extent allowed by law.

5. Granting such other and further relief as the Court deems just and proper.

Dated: April 15, 2025

Respectfully submitted,

By: */s/ Frank S. Holleman*

Frank S. Holleman
Douglas B. L. Endreson
SONOSKY, CHAMBERS, SACHSE,
ENDRESON & PERRY, LLP
1425 K St. NW, Suite 600
Washington, DC 20005
Tel: 202-682-0240
E-mail: fholleman@sonosky.com
dendreso@sonosky.com

Counsel for the Cherokee Nation, Chickasaw Nation, and Choctaw Nation of Oklahoma

Chad Harsha
Attorney General
CHEROKEE NATION
OFFICE OF ATTORNEY GENERAL
P.O. Box 1533
Tahlequah, OK 74465
Tel: 918-453-5369
E-mail: chad-harsha@cherokee.org

R. Trent Shores
GABLEGOTWALS
110 N. Elgin Avenue, Suite 200
Tulsa, OK 74120
Tel: 918-595-4800
E-mail: tshores@gablelaw.com

Counsel for the Cherokee Nation

Stephen Greetham
GREETHAM LAW, PLLC
621 Greenwood Road
Chapel Hill, NC 27514
Tel: 580-399-6989
E-mail: sgreetham@greethamlaw.net

Counsel for the Cherokee Nation and Chickasaw Nation

Michael Burrage
WHITTEN BURRAGE
512 N. Broadway Ave., Suite 300
Oklahoma City, OK 73102
Tel: 405-516-7800
E-mail: mburrage@whittenburragelaw.com

Counsel for the Chickasaw Nation and Choctaw Nation of Oklahoma

Brian Danker
Senior Executive Officer
DIVISION OF LEGAL & COMPLIANCE
CHOCTAW NATION OF OKLAHOMA
1802 Chukka Hina Drive
Durant, OK 74701
Tel: 580-642-7423
E-mail: bdanker@choctawnation.com

Counsel for the Choctaw Nation of Oklahoma

Kaycie Sheppard
Chief Executive Counsel
THE CHICKASAW NATION
OFFICE OF EXECUTIVE COUNSEL
2021 Arlington St.
Ada, OK 74820
Tel: 580-310-7925
E-mail: kaycie.sheppard@chickasaw.net

Counsel for the Chickasaw Nation