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

UNITED STATES OF AMERICA, Plaintiff, and CHEROKEE NATION, and CHOCTAW NATION OF OKLAHOMA, Intervenor Plaintiffs, and MUSCOGEE (CREEK) NATION, Consolidated Plaintiff, vs. CAROL ISKI, District Attorney for the Twenty-Fifth Prosecutorial District of Oklahoma in her official capacity, Defendant.	)	Case No: 6:24-cv-00493-CVE (BASE FILE) Consolidated with: Case No. 25-CV-0028-CVE

RESPONSE OF CHEROKEE NATION AND CHOCTAW NATION OF OKLAHOMA TO DEFENDANT'S MOTION TO DISMISS

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Order Granting City of Tulsa's Oral Mot. to Dismiss Over Def.'s Objection, *City of Tulsa v. O'Brien*, Nos. 720766, et al. (Municipal Crim. Ct. City of Tulsa Feb. 13, 2025) 6

Plaintiffs Cherokee Nation and Choctaw Nation of Oklahoma ("Nations") respond to Defendant's Mot. to Dismiss and Brief ("Br."), ECF No. 77, to show that abstention is not required in this case under *Younger v. Harris*, 401 U.S. 37 (1971), the Anti-Injunction Act, 28 U.S.C. § 2283 ("AIA"), or *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), and thus Defendant's motion to dismiss should be denied.

STANDARD OF REVIEW

Although Defendant does not cite the Federal Rule under which her motion is brought, in this circuit a motion to dismiss on *Younger* abstention grounds is properly brought under Fed. R. Civ. P. 12(b)(1). *Serna v. City of Colorado Springs*, No. 24-1149, 2025 WL 471224, at *2 (10th Cir. Feb. 12, 2025) (citing *Graff v. Aberdeen Enters., II*, 65 F.4th 500, 507-09 (10th Cir. 2023)). And "[c]ourts have recognized a variety of other defenses that one normally would not think of as raising subject-matter jurisdiction questions when considering a Rule 12(b)(1) motion, such as claims that ... the subject matter is one over which the federal court should abstain from exercising jurisdiction," 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1350 (4th ed. 2008) (footnotes omitted), which supports treatment of Defendant's AIA and *Colorado River* contentions under Rule 12(b)(1). *See Riggi v. Charlie Rose Inc.*, No. 24-CV-8066 (JPO), 2025 WL 1080730, at *2 (S.D.N.Y. Apr. 9, 2025); *OMT Addiction Ctrs., LLC v. Freedom Healthcare Props. of Tex., LLC*, No. 3:24-cv-00356, 2025 WL 762691, at *5 (M.D. Tenn. Mar. 11, 2025). Defendant's challenge is "facial," as she attacks the sufficiency of the complaint, not the underlying facts. *See Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995), *abrogated in part on other grounds, Cent. Green Co. v. United States*, 531 U.S. 425 (2001). "In reviewing a facial attack on the complaint, a district court must accept the allegations in the complaint as true." *Id.*; *see Ware v. Kunzweiler*, No. 22-CV-0076-JFH-CDL, 2022 WL 1037484, *2 (N.D. Okla. Apr.

6, 2022) (accepting allegations as true when evaluating federal jurisdiction and *Younger* abstention). The Court may also take judicial notice in resolving a facial attack. *Thurman v. Steidley*, No. 16-cv-554-TCK, 2017 WL 2435287, at *4 (N.D. Okla. June 5, 2017).

ARGUMENT

McGirt v. Oklahoma, 591 U.S. 894 (2020), "'require[s] a clear expression of the intention of Congress' before the state or federal government may try Indians for conduct on their lands," and holds that "Oklahoma cannot come close to satisfying this standard" because it "doesn't claim to have complied with the requirements to assume jurisdiction voluntarily over [Indian country]. Nor has Congress ever passed a law conferring jurisdiction on Oklahoma." *Id.* at 929, 932 (quoting *Ex parte Crow Dog*, 109 U.S. 556, 572 (1883)). That holding of the Supreme Court is binding on the State, its courts, and Defendant.[1] *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 53 (2015). Abstention is not required under *Younger*, the AIA, or *Colorado River* because enforcing *McGirt* on parties bound by it does not interfere with state courts and the requirements of these doctrines are not satisfied here. "Jurisdiction existing," as it is here, Compl. ¶ 9, ECF No. 67, "a federal court's 'obligation' to hear and decide a case is 'virtually unflagging.'" *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013) (quoting *Colo. River*, 424 U.S. at 817). "Parallel state-court proceedings do not detract from that obligation." *Id.* (citing *Colo. River*, 424 U.S. at 817).

I. *Younger* Has No Application To The Plaintiff's Claims In This Case.

Younger is inapplicable "where federal preemption [is] readily apparent and [the] state tribunal [is] therefore acting beyond its lawful authority." *Seneca-Cayuga Tribe of Okla. v.*

[1] Defendant is bound by *McGirt* because she is a state official. *See Arnold v. McClain*, 926 F.2d 963, 965-66 (10th Cir. 1991); Okla. Stat. tit. 19, § 215.1. State law defines her powers and duties and makes her responsible for appearing in state court to prosecute all violations of state law within the Twelfth District. *Id.* §§ 215.1-215.5, 215.7-215.13, 215.16, 215.20.

Oklahoma ex rel. Thompson, 874 F.2d 709, 716 (10th Cir. 1989) (citing *Baggett v. Dep't of Pro. Regul.*, 717 F.2d 521, 524 (11th Cir. 1983)). *McGirt* makes that rule applicable here, which defeats Defendant's *Younger* claim. Nor are *Younger*'s requirements met here. Defendant asserts *Younger* applies when "(1) [T]here is an ongoing state criminal, civil, or administrative proceeding, (2) [T]he state court provides an adequate forum to hear the claims raised in the federal complaint, and (3) [T]he state proceedings involve important state interests, matters which traditionally look to state law for their resolution or implicate separately articulated state policies." Br. at 9 (quoting *Winn v. Cook*, 945 F.3d 1253, 1258 (10th Cir. 2019) (alterations by Defendant) (indentations removed)).[2] In this case, however, the Nations are not parties to any ongoing "parallel" state court proceeding, and the state court proceedings pending against individual defendants neither provide an adequate forum to hear the claims raised in the Nations' federal complaint, nor do they involve important state interests. Finally, extraordinary circumstances bar *Younger*'s application here.

A. *McGirt* makes federal preemption of state criminal jurisdiction over Indians in Indian country readily apparent.

McGirt makes "federal preemption readily apparent and [the] state tribunal [is] therefore acting beyond its lawful authority," *Seneca-Cayuga*, 874 F.2d at 715, in exercising criminal jurisdiction over Indians in Indian country in Oklahoma. *McGirt* does so by reaffirming that "th[e Supreme] Court has long 'require[d] a clear expression of the intention of Congress' before the

[2] The factors *Winn* recites are the *Middlesex* conditions, *see Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432-33 (1982), which may be considered "*only when* the state proceeding falls into one of the following categories: '(1) state criminal prosecutions, (2) civil enforcement proceedings [that take on a quasi-criminal shape], and (3) civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial function.'" *Travelers Cas. Ins. Co. of Am. v. A-Quality Auto Sales, Inc.*, 98 F.4th 1307, 1317 (10th Cir. 2024) (quoting *Graff*, 65 F.4th at 522; citing *Sprint*, 571 U.S. at 79). Otherwise, "the three *Middlesex* conditions would extend *Younger* to virtually all parallel state and federal proceedings." *Id.* (quoting *Sprint*, 571 U.S. at 81) (citation omitted).

state or federal government may try Indians for conduct on their lands," 591 U.S. at 929 (quoting *Crow Dog*, 109 U.S. at 572) (second alteration in original),[3] and rejecting the State's claim to criminal jurisdiction over Indians in Indian country under that standard.

In *McGirt*, the State asserted jurisdiction over Indians in Indian country by arguing that its "historic practices have *always been correct* and it *remains* free to try individuals like Mr. McGirt in its own courts," 591 U.S. at 928 (emphasis added). The State based that contention on the federal statutes that controlled the assignment of criminal cases during the territorial era, the Oklahoma Enabling Act, ch. 3335, 34 Stat. 267 (1906), and the assertion that there would otherwise have been a jurisdictional void at statehood with respect to minor offenses committed by Indians on Indians. *McGirt*, 591 U.S. at 927-30. The Supreme Court rejected each of these claims. The territorial era statutes "merely discuss[] 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.* at 929. The Oklahoma Enabling Act did not make 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," instead it sent state-law cases to state court and federal-law cases to federal court," and Major Crimes Act cases were federal law cases. *Id.* at 930. Finally, the State argued that "if Oklahoma lacks the 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 931. That argument was not

[3] The Tenth Circuit rule is the same: "unless Congress provides an exception to the rule … states possess 'no authority' to prosecute Indians for offenses in Indian country." *Ute Indian Tribe v. Utah* (*Ute VI*), 790 F.3d 1000, 1004 (10th Cir. 2015) (quoting *Cheyenne-Arapaho Tribes of Okla. v. Oklahoma*, 618 F.2d 665, 668 (10th Cir. 1980), and citing 18 U.S.C. § 1162).

directed solely at crimes subject to the Major Crimes Act, 18 U.S.C. § 1153, which applies only to the crimes it lists. *Id.* The Court rejected that claim, holding that jurisdictional gaps were not "foreign in this area of the law," and that Congress had filled many such gaps by: "reauthorizing tribal courts to hear minor crimes in Indian country," "allow[ing] affected Indian tribes to consent to state criminal jurisdiction[,] 25 U.S.C. §§ 1321(a), 1326," and "expand[ing] state criminal jurisdiction in targeted bills addressing specific States." *Id.* "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.

McGirt's ruling applies equally to the Cherokee Nation Reservation, which has not been disestablished. *Oklahoma v. Castro-Huerta*, 597 U.S. 629, 633-34 (2022) (citing *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, ¶ 15, 497 P.3d 686, 689); *Hogner v. State*, 2021 OK CR 4, ¶¶ 9-11, 17-18, 500 P.3d 629, 631-35; *Oklahoma v. U.S. Dep't of Interior*, 640 F. Supp. 3d 1110, 1119-20 (W.D. Okla. 2022); *United States v. Billey*, No. 17-cr-0108-CVE, 2021 WL 3519279, at *2 n.1 (N.D. Okla. Aug. 10, 2021). And as *McGirt* is a decision of the Supreme Court on a question of federal law, the State and its courts are bound by it. *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 531 (2012) (per curiam) ("When th[e Supreme] Court has fulfilled its duty to interpret federal law, a state court may not contradict or fail to implement the rule so established."). Accordingly, *Younger* does not apply here.

Defendant relies on *Castro-Huerta*, 597 U.S. at 650, and *City of Tulsa v. O'Brien*, 2024 OK CR 31, to contend otherwise, Br. at 1-4, but to no avail. *Castro-Huerta* made clear, expressly and repeatedly, that it was not considering state jurisdiction over Indians in Indian country. *Id.* at 639 n.2 (state prosecutorial authority over Indians who commit crimes in Indian country is "not before us"), 650 n.6 (Court "express[ing] no view" on state authority over Indian criminal defendant); *see*

id. at 648 (contrasting the "narrow jurisdictional issue in this case" with state jurisdiction over Indians). As the Court did not consider state jurisdiction over Indians in Indian country, *a fortiori* it did not decide the issues that such consideration would raise.

Nor can Defendant rely on *O'Brien*, *see* Br. at 2-3,[4] as it is not binding on this Court, and it is inconsistent with, and cannot control over, *McGirt*. This Court is not bound by a state court's interpretation of federal law, *Dutcher v. Matheson*, 840 F.3d 1183, 1195 (10th Cir. 2016), nor should it defer to state courts' rulings on those questions, *see Payne v. WS Servs., LLC*, No. CIV-15-1061, 2016 WL 3926486, at *1 (W.D. Okla. July 18, 2016) (citing *TMJ Implants, Inc. v. Aetna, Inc.*, 498 F.3d 1175, 1181 (10th Cir. 2007)).[5] Furthermore "the 'Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content *or a refusal to recognize the superior authority of its source*.'" *DIRECTV*, 577 U.S. at 53 (quotation omitted) (emphasis added); *accord James v. City of Boise*, 577 U.S. 306, 307 (2016) (per curiam). In addition, while *O'Brien* asserted, 2024 OK CR 31, ¶ 26 n.4, that *McGirt* was "undermined" by

[4] Defendant asserts *O'Brien* addressed "whether the State has subject matter jurisdiction over nonmember Indians who commit non-major crimes within Oklahoma," Br. at 2. *O'Brien* instead expressly states that "Indian country jurisdictional claims do not implicate Oklahoma district courts' subject matter jurisdiction, but rather personal and territorial jurisdiction." *O'Brien*, 2024 OK CR 31, ¶ 12 (citing *Deo v. Parish*, 2023 OK CR 20, ¶ 15, 541 P.3d 833, 838). That holding does not alter the federal law that controls that issue, *see supra* at 3-5; *infra* 7-8.

[5] Defendant incorrectly asserts that *O'Brien* is "ripe for appeal to the United States Supreme Court," Br. at 3; *see id.* at 21. The deadline for filing a certiorari petition in *O'Brien* passed on May 6. No petition was filed. *O'Brien* is also moot because the City dismissed the underlying prosecution on February 13, 2025. *See* Ex. 1, Order Granting City of Tulsa's Oral Mot. to Dismiss Over Def.'s Objection, *City of Tulsa v. O'Brien*, Nos. 720766, et al. (Municipal Crim. Ct. City of Tulsa Feb. 13, 2025). This Court may take judicial notice of the Municipal Court's order, as it is directly relevant to Defendant's representations to this Court in this case. Opinion and Order at 3 n.1, ECF No. 61 ("Interv. Order") (citations omitted). As *O'Brien* is no longer an "ongoing" proceeding, it is not relevant to Defendant's abstention claim, *Graff*, 65 F.4th at 523. For the first *Younger* condition to be satisfied "the relevant state court proceeding must be 'ongoing.'" (quoting *Middlesex*, 457 U.S. at 432)), and Defendant's reliance on *O'Brien* to provide an "adequate state-court forum," Br. at 14 (quoting *Winn*, 945 F.3d at 1258), is misplaced.

Castro-Huerta, only the Supreme Court has authority to "undermine" its precedents. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.") (cleaned up). Defendant's reliance on *Stitt v. City of Tulsa*, 2025 OK CR 5, *as corrected* 2025 OK CR 6, 565 P.3d 857, fails for the same reasons.

With respect, *O'Brien* was also wrongly decided. Its assertion that the "discussion in *Castro-Huerta* about the ways in which a state's criminal jurisdiction over Indians may be preempted was not limited to criminal cases involving non-Indian defendants and Indian victims," 2024 OK CR 31, ¶ 19, and its reliance on quotations from *Castro-Huerta*, *see e.g., O'Brien*, 2024 OK CR 31, ¶¶ 13, 14, 17-20, 23, 28, 30-31,[6] are incorrect because they are contrary to *Castro-Huerta*'s express and repeated disclaimers of consideration of state criminal jurisdiction over Indians in Indian country, *see supra* at 5-6, *infra* at 19. And while *O'Brien* describes *McGirt*'s rejection of the State's claim to jurisdiction over Indians in Indian country as "focused on territorial criminal jurisdiction in Oklahoma prior to statehood," 2024 OK CR 31, ¶ 26 n.4 (quoting *McGirt*, 591 U.S. at 929), it fails to recognize that the State argued in *McGirt* that its "historic practices have *always been correct* and it *remains* free to try individuals like Mr. McGirt in its own courts," 591 U.S. at 928 (emphasis added), and that *McGirt* rejected that contention. In addition, *O'Brien* relied on *Castro-Huerta* to assert that neither Public Law 280, nor the Enabling Act preempt state

[6] At the same time, the *O'Brien* Court overlooks the *Castro-Huerta* Court's recognition that state criminal jurisdiction may be preempted "by federal law or by principles of tribal self-government," *O'Brien*, 2024 OK CR 31, ¶ 13 (quoting *Castro-Huerta*, 597 U.S. at 652-53); *see Castro-Huerta*, 597 U.S. at 636, 637, 638, 649, 652-53, 655, as is the Nations' complaint shows is the case here. Compl. ¶¶ 15-28 (Nations' federal right to exercise criminal jurisdiction over all Indians on their Reservations, exclusive of state jurisdiction); 29-48 (federal law preempts state jurisdiction over Indians in Indian country).

criminal jurisdiction over Indians in Indian country, *O'Brien*, 2024 OK CR 31, ¶¶ 20, 23, 30, notwithstanding that *Castro-Huerta* states that "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," 597 U.S. at 648, and only considered Public Law 280 and the Enabling Act "[w]ith respect to crimes committed by non-Indians against Indians in Indian country," *id.* at 655.

Finally, the *Castro-Huerta* Court's express disclaimer of consideration of state criminal jurisdiction over Indians in Indian country, *see supra* at 5-6, *infra* at 19, negates the *O'Brien* Court's reliance on *Castro-Huerta* to authorize its application of the balancing test set forth in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), to determine the narrow question of state and municipal jurisdiction posed there. *O'Brien*, 2024 OK CR 31, ¶¶ 31, 32-34.[7] Indeed, *Castro-Huerta* explicitly recited that disclaimer in indicating that preemption of state jurisdiction over crimes by Indians in Indian country would not result from the General Crimes Act, but from "a separate principle of federal law that … precludes state interfere with tribal self-government." *Castro-Huerta*, 597 U.S. at 639 n.2 (citing part III.B of the Court's opinion, *Bracker*, 448 U.S. at 142-43, 145 and *McClanahan v. State Tax Comm'n*, 411 U.S. 164, 171-72 (1973)).[8]

[7] We reserve any further argument regarding *Bracker* in the event the issue later arises.

[8] The holding of *McGirt* 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," *id.* at 929 (quoting *Crow Dog*, 109 U.S. at 572), falls squarely within the "principle of federal law that … precludes state interference with tribal self-government," *Castro-Huerta*, 592 U.S. at 639 n.2, as does preemption under the principles of *McClanahan*. As *McGirt* explained, "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in this Nation's history," *id.* at 928 (quoting *Rice v. Olson*, 324 U.S. 786, 789 (1945)), and Indian tribes' sovereign authority is "dependent on and subject to no state authority," *id.* at 928-29 (citing *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832), and *McClanahan*, 411 U.S. at 168-169).

B. The Nations are not parties to, nor will the future relief they seek interfere with, any state proceedings.

Younger does not apply to the Nations' claims in this case because "[n]o state proceedings [a]re pending" against them and their claims "satisf[y] the requirements for federal jurisdiction," *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 930 (1975), as "a suit to enjoin a State from exercising jurisdiction contrary to federal law" "is an action 'arising under' federal law," *Ute Indian Tribe v. Lawrence* (*Lawrence I*), 875 F.3d 539, 544 (10th Cir. 2017).

Application of *Younger* in this case is governed by *Doran*. *Doran* concerned three corporate bar owners who challenged a town ordinance that impacted all of their operations, allegedly in violation of their constitutional rights. *See* 422 U.S. at 924-25. State criminal proceedings were pending against one owner, but not the two others. *Id.* at 925. The Court found *Younger* applied to the owner facing prosecution, but not the two others. *Id.* at 928-30. The Court explained that distinction as follows:

> While there plainly may be some circumstances in which legally distinct parties are so closely related that they should all be subject to the Younger considerations which govern any one of them, this is not such a case;—while respondents are represented by common counsel, and have similar business activities and problems, they are apparently unrelated in terms of ownership, control, and management. We thus think that each of the respondents should be placed in the position required by our cases as if that respondent stood alone.

Id. at 928–29. Similarly, in *Steffel v. Thompson*, 415 U.S. 452 (1974), two protesters were told by police that they would be arrested for violation of state trespass law if they did not stop handbilling. One stopped doing so and filed suit in federal court to obtain a declaration that the threat of arrest violated his constitutional rights; the other did not and was arrested and charged. *Id.* at 455-56. The Court rejected application of *Younger* to a request for declaratory relief when no state prosecution was pending, *id.* at 460-62, ruling that "[t]he pending prosecution of petitioner's handbilling companion does not affect petitioner's action for declaratory relief," *id.* at 471 n.19.

Cf. Compl. ¶ 64 (seeking declaratory relief against Defendant's exercise of jurisdiction contrary to federal law). The holdings of these cases direct the same result with respect to the Nations, who are not subject to any pending state court proceedings. It makes no difference that the Nations and the individual Indian defendants both oppose state jurisdiction, just as it made no difference in *Doran* that the bar owner who was prosecuted and those who were not prosecuted had "similar business activities and problems," *see* 422 U.S. at 928-29, and the protesters in *Steffel* were both handbilling to "protest[] American involvement in Vietnam," 415 U.S. at 455.

As the Tenth Circuit explained in *D.L. v. Unified School District No. 497*, 392 F.3d 1223 (10th Cir. 2004), "*Doran* illustrates that it is proper for a federal court to exercise jurisdiction over the claim of a genuine stranger to an ongoing state proceeding even though a federal decision clearly could influence the state proceeding by resolving legal issues identical to those raised in state court." *Id.* at 1230 (citations omitted). Defendant argues that "the Nations are not 'genuine strangers'" because they "hold interests that are closely aligned with their individual members." Br. at 10 (citing *D.L.*, 392 F.3d at 1230-31). But *D.L.* uses that term in referring to the federal court plaintiff's relationship *to the state court proceeding*, not to the state court defendants. *See* 392 F.3d at 1230. The Nations are strangers to the state court proceedings because they are not parties to those proceedings, *see Castro-Huerta*, 597 U.S. at 650 ("The only parties to the criminal case are the State and the non-Indian defendant."), and because they have no right to intervene in those proceedings, *see Ellis v. State*, 2003 OK CR 18, ¶ 41 n.12, 76 P.3d 1131, 1138 n.12. And "[s]o long as the stranger has its own distinct claim to pursue, *it may even be aligned with the state-court litigant in a common enterprise* of vindicating the policy that gives rise to their individual claims." *D.L.*, 392 F.3d at 1230 (emphasis added).

The Nations are pursuing "[their] own distinct claim" in this action. *See id*. As "'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))," and "holding rights of self-government recognized by federal law," Compl. ¶ 15, the Nations have "the 'power to punish tribal offenders,'" *id.* (quoting *United States v. Wheeler*, 435 U.S. 313, 328-29 (1978)) (citing *Talton v. Mayes*, 163 U.S. 376 (1896)) and "the inherent power … to exercise criminal jurisdiction over all Indians." *id.* (quoting 25 U.S.C. § 1301(2)). "'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.'" *Id.* (quoting *Fisher v. Dist. Ct.*, 424 U.S. 382, 387-88 (1976) (per curiam) and *Williams v. Lee*, 358 U.S. 217, 223 (1959) ("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")). "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,'" *Id.* ¶ 16 (quoting *McGirt*, 591 U.S. at 929) (some internal quotation marks omitted).

The Cherokee Nation also holds the right to exercise criminal jurisdiction over crimes by Indians on the Cherokee Nation Reservation free from state interference under its treaties with the United States. Compl. ¶¶ 19-25 (citing Treaty of New Echota, Dec. 29, 1835, 7 Stat. 478; 1846 Treaty with the Cherokee, Aug. 6, 1846, 9 Stat. 87; 1866 Treaty of Washington with the Cherokee, July 19, 1866, 14 Stat. 799). "[T]he 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." *Id.* ¶ 46.

"[A]s the [Nations] ha[ve their] own distinct claim to pursue, [they] may even be aligned with the state-court litigant in a common enterprise of vindicating the policy that gives rise to their individual claims." *D.L.*, 392 F.3d at 1230. While the Nations and the individual Indian defendants both oppose state criminal jurisdiction over Indians in Indian country, that does not make the Nations the "alter ego" of the individual defendants, as Defendant contends. Br. at 10. The individual Indian state-court litigants are not sovereigns, nor do they hold the right to prosecute Indian offenders by federal statute and treaty, as do the Nations. And the Nations' sovereign activities are unrelated to individual state court defendants' activities unless they violate tribal law, in which case their relationship to the Nations would be that of defendant to prosecutor.[9]

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[9] Defendant sows confusion by misstating the facts of the seven prosecutions—not four, *see* Br. at 4—that show that Defendant is currently infringing on tribal sovereignty and threatens to continue to do so, *see* Compl. ¶¶ 50-58. (The facts of these prosecutions discussed below are all judicially noticeable, *see supra* at 6 n.5.) Of course, because the Nations are strangers to state court criminal proceedings and are pursuing a different claim from criminal defendants, based on their own interests that the criminal defendants do not hold, *see supra* at 10-12, they are not seeking "intervention," to "pursue a jurisdictional challenge" on behalf of a criminal defendant, or "to act on [a criminal defendant's] behalf." Br. at 5-6. And although Defendant refers to four of these cases as the "Ongoing Prosecutions," Defendant dismissed one of them: her prosecution of Joey Wiedel, Br. at 5-6; *see* Minute, *State v. Wiedel*, No. CF-2024-00105 (Okla. Dist. Ct. Apr. 15, 2025), https://tinyurl.com/WiedelApr15. Dismissed prosecutions are not relevant to Defendant's abstention claim, *Graff*, 65 F.4th at 523 (For first *Younger* condition to be satisfied "the relevant state court proceeding must be 'ongoing.'" (quoting *Middlesex*, 457 U.S. at 432)), and cannot "trend on the same course as *McGirt* and *Castro-Huerta*," Br. at 6.

Defendant misstates both the facts and outcome of the prosecutions of Joseph Long. Defendant has prosecuted Mr. Long for conduct *outside* the County jail. *See* Nations' Reply in Supp. of Mot. to Intervene at 15 n.11, ECF No. 55 ("Reply Br."). And the Oklahoma Court of Criminal Appeal's ("OCCA's") decision in Long's appeal in case No. CF-2023-00086, *see Long v. State*, No. F-2023-884 (Okla. Crim. App. Apr. 24, 2025) https://tinyurl.com/LongvState, concerned only the acceleration of Mr. Long's deferred sentence, not the state court's jurisdiction. *See* U.S.'s Reply in Supp. of Its Mot. to Amend. Br'g Sch., at 2 n.1, ECF No. 18. Indeed, the OCCA expressly did not consider the jurisdictional question, citing state law procedural grounds. *See Long*, No. F-2023-884, slip op. at 3.

Defendant also flubs the prosecutions against Joshua Medlock. Br. at 5. Defendant asserts that Mr. Medlock's offense in case No. CF-2024-50 occurred in a state jail, *see id.*, but omits the

The cases Defendant cites do not show otherwise.[10] Defendant's reliance on *Doran* is rejected by its terms and by its application in *D.L.*, *see supra* at 10-11, and her reliance on *Hicks v. Miranda*, 422 U.S. 332 (1975), is rejected for like reasons. In *Hicks*, two theater employees were prosecuted for showing an allegedly obscene movie, and several copies of the film were seized, *D.L.*, 392 F.3d at 1230 (describing facts of *Hicks*). The theater owners were not initially charged but were ordered by the state court to show cause why the movie should not be declared obscene; they appeared in state court at the show cause hearing, at which the state court "declared the movie to be obscene" and ordered seized all copies of the movie to be found at the theater. *Hicks*, 422 U.S. at 335-36. "This judgment and order were not appealed by [the theater owners]." *Id.* at 336. The theater owners then filed their federal action, seeking an injunction barring enforcement of the state obscenity statute and ordering the return of all copies of the movie that

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fact that Mr. Medlock was only in that jail because he had been charged with offenses outside of the jail, in case No. CF-2024-17. Compl. ¶¶ 53-54. Her statement that Mr. Medlock "abandoned" his jurisdictional challenge is misleading and her assertion he did so after an untimely "appeal" is incorrect, *see* Reply Br. at 15-16, n.11. Mr. Medlock's plea in cases Nos. CF-2024-17 and CF-2024-50 resulted in referral to drug court and a five-year suspended sentence, which can be accelerated to ten years if he fails to complete drug court. *See* Minute, *State v. Medlock*, Nos. CF-2024-17, CF-2024-50 (Okla. Dist. Ct. July 23, 2024), https://tinyurl.com/MedlockJul23. And Mr. Medlock must pay monthly court fees in the meantime. *See id.* So he remains subject to the state's criminal jurisdiction. And Defendant ignores entirely her prosecution of Mr. Medlock in No. CM-2024-303, Compl. ¶ 56, for conduct outside of jail, *see* Information, *State v. Medlock*, No. CM-2024-303 (Okla. Dist. Ct. Oct. 25, 2024), https://tinyurl.com/MedlockOct25. Defendant dismissed that prosecution before Mr. Medlock raised any jurisdictional challenge, *see* Minute, *State v. Medlock*, No. CM-2024-303 (Okla. Dist. Ct. Apr. 23, 2025), https://tinyurl.com/MedlockApr23.

As to the proceedings involving Ms. Wiedel: the OCCA never considered the State's lack of jurisdiction to prosecute her, *see* Not. Of Recent Auth. at 1-2, ECF No. 63 (discussing *Wiedel v. McLaughlin*, No. MA-2024-780 (Okla. Ct. Crim. App. Mar. 28, 2025)), much less "rejected" in that case any arguments the Nations or Plaintiff raise here. *Cf.* Br. at 6.

[10] Defendant also asserts that "the subject of the lawsuit is actually limited to nonmember Indians accused of non-major crimes in Indian country." Br. at 1-2. That assertion is incorrect, as the complaint in this action plainly shows. Compl. ¶¶ 64-65 (seeking declaratory and injunctive relief to address Defendant's ongoing actual and threatened exercise of state criminal jurisdiction and application of state law to Indians on the Cherokee Nation Reservation in violation of federal law.).

had been seized. *Id.* at 337-38. On these facts, the *Hicks* Court found *Younger* applied because the theatre owners "had a substantial stake in the state proceedings," and "[o]bviously, their interests and those of their employees were intertwined," *D.L.*, 392 F.3d at 1230 (quoting *Hicks*, 422 U.S. at 348-49). The *Hicks* Court then found that the theatre owners had been charged in state court after the federal complaint was served, and held that *Younger* applied, "where state criminal proceedings are begun against the federal plaintiffs after the federal complaint is filed but before any proceedings of substance on the merits have taken place in the federal court." 422 U.S. at 349.

Hicks is inapposite here. No state proceedings of any kind have been initiated against the Nations, and their interest in the pending state proceedings is limited to establishing in this federal action that the conduct of such proceedings violates their sovereign rights under federal law. Moreover, the Nations expressly seek relief to prevent the Defendant from initiating criminal cases *in the future*. *See* Compl. ¶¶ 1, 65, prayer for relief ¶ 2. *Younger* is inapplicable to the Nations' request for such relief, as "*Younger* is only appropriate when failing to abstain would disturb an ongoing state proceeding." *Graff*, 65 F.4th at 524-25 (citing *Steffel*, 415 U.S. at 460-62 ("[I]f state proceedings are not ongoing, abstention is improper because 'the relevant principles of equity, comity, and federalism have little force.'")).

Defendant then turns to a passel of out-of-Circuit cases. Br. at 10-12 (citing *Spargo v. N.Y. State Comm'n on Jud. Conduct*, 351 F.3d 65 (2d Cir. 2003), *Citizens for a Strong Ohio v. Marsh*, 123 F. App'x 630 (6th Cir. 2005), *Tony Alamo Christian Ministries v. Selig*, 664 F.3d 1245 (8th Cir. 2012); *Glob. Impact Ministries v. Mecklenburg County*, No. 3:20-cv-002320-GCM, 2021 WL 982333 (W.D.N.C. Mar. 16, 2021)). These decisions have no application here as *D.L.* establishes that this action may properly proceed under *Doran* as the Nations are strangers to the state court proceeding and are pursuing their "own distinct claim" in this action, based on their own sovereign

rights, held under federal law. *See supra* at 10-11.[11] In contrast, the cases on which Defendant relies concerned instances in which "in essence only one claim is at stake," *D.L.*, 392 U.S. at 1230, as the non-parties to state proceedings were closely related to state court defendants and brought suit in federal court asserted rights derivative of the rights held by the state court defendants.[12] The Nations' relationship to individual Indian state court defendants is not comparable to the federal claimants in those cases.[13]

In *Spargo* and *Citizens*, federal court plaintiffs sued to stop state proceedings arising from allegedly illegal political activities—in *Spargo*, the political actions and statements of a state judge, 351 F.3d at 67-68, 70, and in *Citizens*, the electioneering of a political advocacy group, 123 F. App'x at 631. In both cases, the federal court plaintiffs argued the state actions stopped their political ally from engaging in certain political activities, and that chilled their own free expression by making it more difficult for them to associate with their ally, hear their political speech, or take action to support them. In both cases, the courts held that the federal court plaintiffs' asserted rights were "derivative" of the state court defendants' rights to speech and political activity, and

[11] The Nations contend the Defendant's conduct "interferes with their inherent sovereign power to exercise criminal jurisdiction over all Indians on their reservations," and "the Nations show actual and concrete injuries in fact because they allege that defendant's conduct infringes on their sovereignty," Interv. Order at 5-6 (citations omitted)).

[12] As the Nations are not parties to any state court proceeding, the holdings of these cases with respect to the state court defendants who were plaintiffs in federal court, have no relevance here.

[13] Defendant also relies on *Ellis v. Morzelewski*, No. 2:21-cv-639-TC, 2022 WL 3645850 (D. Utah Aug. 24, 2022), and *Herrera v. City of Palmdale*, 918 F.3d 1037 (9th Cir. 2019), Br. at 19-20, but neither case applies here. In *Ellis*, all plaintiffs were members of the same family, present for an allegedly unconstitutional arrest of the father of that family, who all sued for alleged violations of their constitutional rights arising from his arrest. *See* 2022 WL 3645850, at *1-3. *Palmdale* concerned a City investigation of a motel for code violations, and an ensuing nuisance proceeding against the motel, which gave rise to a federal lawsuit by the operators and residents of the motel, whose claims arose because they "were allegedly deprived of their civil rights collectively during the investigation, and the ongoing nuisance proceeding related to the motel which [plaintiffs] operate and at which [other plaintiffs] reside." 918 F.3d at 1047.

therefore they could not avoid *Younger* even though they were not actually parties in the state proceedings. *See Spargo*, 351 F.3d at 83-84 (quoting *In re Dow Jones & Co.*, 842 F.2d 603, 608 (2d Cir. 1988)); *Citizens*, 123 F. App'x at 636; *D.L.*, 392 F.3d at 1231 (distinguishing *Spargo* from cases in which federal jurisdiction is properly exercised under *Doran*).

Tony Alamo and *Global Impact Ministries* both concerned claims brought by religious organizations who alleged that state proceedings against their members injured them, as well. *Tony Alamo* concerned federal court claims brought by individual members of Tony Alamo Christian Ministries ("TACM") and TACM itself, arising from the State's removal of minor children from TACM members' custody. 664 F.3d at 1247. The court in that case held that "insofar as TACM seeks relief based on the injuries of the church's individual members … TACM's claims are plainly barred by *Younger*" and that abstention also applied "to TACM's own rights and alleged injuries," as its "interests [were] generally aligned with those of its members, [with whom] the church share[d] a close relationship," and because it "allege[d] standing based on injuries that are either directly or indirectly derivative of those of the individual [church member] Plaintiffs," *id.* at 1253, for instance because church members had gone into hiding to avoid state action against them and could not provide donations or labor for church operations, and because reputational impacts to the church from its members' actions might reduce donations from others, *id.* at 1253-54.

In *Global Impact Ministries*, the court held *Younger* applicable to a federal action, brought by two Christian pro-life organizations and the president of one of the organizations, arising from the arrest of the president and other organization members by municipal police, for participating in a pro-life event in contravention of a COVID-era ban on public gatherings. 2021 WL 982333, at *1; *see Glob. Impact Ministries v. Mecklenburg County*, No. 3:20-cv-002320-GCM, 2022 WL 610183, at *1 (W.D.N.C. Mar. 1, 2022). The court concluded that *Younger* barred both the

individual's federal claims and those of the two organizations, which "share[d] a close relationship and alignment of interests with [the individual plaintiff] and the state court proceedings," and that the "[c]ourt cannot practically consider Plaintiffs' right to compensatory or nominal damages without undoubtedly interfering with the criminal proceedings now pending before the state court regarding enforcement of the rescinded [ban on public gatherings]." 2021 WL 982333, at *4.

As this analysis shows, the Nations are not asserting claims that are derivative of the individual Indian defendants claims in state court, as was the case for plaintiffs in *Spargo* and *Citizens*, and they lack the close organizational ties present in *Tony Alamo* and *Global Impact Ministries*. The Nations' interest in their own sovereignty, and the harm which Defendant imposes on that sovereignty, simply is not borne by individual criminal defendants. Therefore, Defendant's assertion that the Nations should be treated as intertwined with those defendants fails.

C. The state proceedings do not implicate an important state interest.

Abstention also requires "the presence of an important state interest." *Ute VI*, 790 F.3d at 1008 (quoting *Seneca-Cayuga*, 874 F.2d at 711). There is none here, as the State has no legitimate interest in defying the Supreme Court's ruling in *McGirt*, which is binding on the State, its courts, and Defendant, *supra* at 2-5. Furthermore, requiring compliance with *McGirt* would not interfere with state court proceedings because state courts are themselves bound by *McGirt*. "[W]here, 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 VI*, 790 F.3d at 1008-09 (quoting *Seneca-Cayuga*, 874 F.2d at 713-14) (alterations in original).[14] For that reason, "abstention is

[14] "Nor would resolution of these issues in state court prevent conflict between the interests of the Tribes, protected by federal law, and the interests of the State. That conflict is inevitable. Because

inappropriate when, as here, the United States is seeking to assert a federal interest against a state interest." *United States v. Composite State Bd. of Medical Exam'rs*, 656 F.2d 131, 134 (5th Cir. Unit B Sept. 1981). As the Nations assert the same claims as the United States, they may rely on the inapplicability of *Younger* to it, just as a tribe may rely on the unavailability of state sovereign immunity against the United States when it joins a claim the United States has brought against a state. *Arizona v. California*, 460 U.S. 605, 614 (1983) (When a Tribe's claim is the same as that of the United States, the court's "judicial power over the controversy is not enlarged … and the States' sovereign immunity protected by the Eleventh Amendment is not compromised"); *see Mille Lacs Band of Chippewa Indians v. Minnesota*, 853 F. Supp. 1118, 1128 (D. Minn. 1994).

While Defendant points to cases that, in other contexts, recognize the importance of the enforcement of state criminal law, Br. at 16-17, none concerns the exercise of state criminal jurisdiction over Indians in Indian country, much less in defiance of a ruling of the Supreme Court holding that the State lacks such jurisdiction, and therefore none establishes that the Defendant has an important state interest in this case. "[S]tate courts' 'adjudicative authority over Indians for on-reservation conduct is greatly limited by federal law,'" *Ute Indian Tribe v. Lawrence* (*Lawrence II*), 22 F.4th 892, 899 (10th Cir. 2022) (quoting *Lawrence I*, 875 F.3d at 542), which "reflect[s] 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,'" *id.* at 899-900 (quoting *Lawrence I*, 875 F2d at 541-42 (quoting *United States v. Lara*, 541 U.S. 193, 200 (2004), and *McClanahan*, 411 U.S. at 168)). As relevant here, those limitations are set forth in *McGirt*, which requires express congressional

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abstention would not mitigate this conflict, the proper forum to resolve it is federal court." *Seneca-Cayuga*, 874 F.2d at 714.

authorization for states to exercise criminal jurisdiction over Indians in Indian country, which Oklahoma lacks. 591 U.S. at 929. Congress's authority over Indian tribes is exclusive, *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985), and is not negated by the invocation of state police power over criminal conduct. *See United States v. Sutton*, 215 U.S. 291, 295 (1909) (rejecting a challenge to Congress's right to forbid the introduction of liquor into an Indian reservation based on the assertion "that the full police power is lodged in the state, and by it alone can such offenses be punished"); *cf. Puyallup Tribe v. Dep't of Game*, 391 U.S. 392, 393-397 (1968) (state power to regulate off-reservation treaty fishing is determined by examining the treaty language, not by the scope of state police power). And while Defendant relies on *Castro-Huerta* for this purpose, that effort fails as *Castro-Huerta* expressly does *not* address state jurisdiction over Indians in Indian country, 597 U.S. at 639 n.2, 650 n.6, 655 n.9. And as *Castro-Huerta* did not consider state jurisdiction over Indians, Defendant's assertion that "[t]he Court in *Castro-Huerta* made no distinction between Indian and nonmember Indian offenders," Br. at 17, is irrelevant.

Finally, Defendant relies on *Muscogee (Creek) Nation v. Kunzweiler*, No. 25-cv-75-GKF-JFJ, 2025 WL 1392057 (N.D. Okla. Apr. 23, 2025), to support the assertion that the State has an "interest[] in enforcing laws with respect to non-member Indians[]," Br. at 17 (quoting *Kunzweiler*, 2025 WL 1392057, at *3). That effort fails because that statement was not made with reference to *Younger* abstention; it was made with reference to the third and fourth factors of the temporary restraining order inquiry, which makes its consideration irrelevant here.[15]

[15] Defendant dramatically alters Judge Frizzell's ruling on the Muscogee (Creek) Nation's motion for temporary restraining order ("TRO") to suggest that Judge Frizzell concluded the arguments in that case, and its current posture, are the same as in this case. *See* Br. at 7. That is not so. *Compare, e.g.*, *Kunzweiler*, 2025 WL 1392057, at *2 ("the [Muscogee (Creek)] Nation has *not yet* explained how state-court jurisdiction over non-member Indian plainly interferes with its powers of tribal self-government") (emphasis added), *with* Br. of Cherokee Nation & Choctaw Nation of Okla. in Supp. of U.S.'s Mot. for Prelim. Inj. at 20-22, ECF No. 68-1; *see also Kunzweiler*, 2025

D. The state proceedings do not provide an adequate opportunity for the Nations to raise their claims.

"[F]or *Younger* abstention to apply, there must be … 'an adequate opportunity to raise federal claims in the state proceedings.'" *Ute VI*, 790 F.3d at 1008 (quoting *Seneca-Cayuga*, 874 F.2d at 711)); *Moore v. Sims*, 442 U.S. 415, 425-26 (1979). Defendant reframes that inquiry in far broader terms, arguing that "unless state law clearly bars the interposition of the federal statutory and constitutional claims,' a plaintiff typically has 'an adequate opportunity to raise federal claims in state court," Br. at 13 (quoting *Winn*, 945 F.3d at 1258), and that "*Younger* abstention does not require that the Nations themselves be actual parties to the prosecutions but, rather, that the ongoing state judicial proceedings afford an adequate opportunity to hear the claims raised in the federal complaint." Br. at 12. Defendant cites no authority for that broad claim, under which *Younger* would require abstention in any federal case presenting an issue also pending in state court, a result that the Court rejected in *Sprint*, 571 U.S. at 81.

Federal law instead requires that "the federal plaintiff must have an opportunity to press his claims in the state courts." *Moore*, 442 U.S. at 432[16]; *D.L.*, 392 F.3d at 1229 ("*Younger* abstention is inappropriate when a federal plaintiff cannot pursue its federal contentions in the ongoing state proceeding.") (citing *Middlesex*, 457 U.S. at 435-37)); *see Robinson v. Stovall*, 646 F.2d 1087, 1092 (5th Cir. Unit A June 1981) ("When this crucial element—availability of intervention in the state proceedings—is absent, the courts have not hesitated to reject an 'intertwining' theory….'). The Nations have no such opportunity because they are not parties to

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WL 1392057, at *1 n.1 (expressly refraining from treating the TRO motion as one for a preliminary injunction).

[16] Defendant's reliance on *Moore*'s discussion of the "extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of the usual prerequisites of bad faith and harassment," *id.* at 432-33, *see* Br. at 13, has no relevance here.

the state criminal proceedings, *see Castro-Huerta*, 597 U.S. at 650 ("The only parties to the criminal case are the State and the non-Indian defendant."), and as they have no right to intervene in the state criminal proceedings, *see Ellis*, 2003 OK CR 18, ¶ 41 n.12, 76 P.3d at 1138 n.12, they have no opportunity to raise their federal claims in the state criminal proceedings. "[A] pending prosecution against someone else affords no opportunity for non-parties to assert their own first amendment rights, because the state will not permit them to participate in the defense of penal charges against others," and that makes *Younger* inapplicable. *N.J.–Phila. Presbytery of Bible Presbyterian Church v. N.J. State Bd. of Higher Educ*., 654 F.2d 868, 882 (3d Cir. 1981). *Younger* is inapplicable here for the same reason.

In its effort to show otherwise, Defendant also asserts "the Tenth Circuit's full confidence in state courts' ability to address federal issues given 'the constitutional obligation of the state courts to uphold federal law[.]'" Br. at 13 (quoting *Weitzel v. Div. of Occupational & Pro. Licensing*, 240 F.3d 871, 876 (10th Cir. 2001) and citing *Pennzoil Co. v. Texaco, Inc.,* 481 U.S. 1, 12 (1987)). That contention misses the mark because the federal law bar against the application of state law to Indians in Indian country applies to the state courts whether or not those courts are bound to apply federal substantive law. *Williams*, 358 U.S. at 223 ("[T]o 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."); *Kennerly v. Dist. Ct.*, 400 U.S. 423, 426-27 (1971) (per curiam) (reaffirming "that '(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.'" (quoting *Williams*, 358 U.S., at 220)); *Fisher*, 424 U.S. at 387-88 ("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.").

Defendant also reviews various state court proceedings, some pending, some not, that she says have addressed or continue to address the issues the Nations raise in this case and are adequate forums for that purpose. *See* Br. at 13-16. Reliance on these cases fails for the reasons just shown—the Nations were not and could not be parties to these cases; nor does Defendant attempt to show that in those proceedings the Nations could have pursued the claims they allege or the relief they seek in their Complaint in this case. *See supra* at 20-21. Defendant refers to two of the Nations' participation as *amici curiae* in one state court case, *see* Br. at 14, but such participation affords no opportunity to litigate their claims because *amici curiae* are not parties to the proceedings and cannot present their own claims to the state court nor can they seek relief from that court. *Coal. of Ariz./N.M. Cntys. for Stable Econ. Growth v. Dep't of Interior*, 100 F.3d 837, 844 (10th Cir. 1996); *see Kane County v. United States*, 928 F.3d 877, 896 (10th Cir. 2019).

E. The state proceedings present extraordinary circumstances that threaten irreparable harm.

Even when *Younger*'s requirements are met, abstention is barred by "irreparable injury 'both great and immediate.'" 401 U.S. at 45 (quoting *Fenner v. Boykin*, 271 U.S. 240, 243 (1926); *Moore*, 442 U.S. at 433 ("'extraordinary circumstances' that … constitute great, immediate, and irreparable harm" render *Younger* inapplicable) (citing *Kugler v. Helfant*, 421 U.S. 117 (1975)); *Phelps v. Hamilton*, 59 F.3d 1058, 1064 (10th Cir. 1995) (abstention barred where "extraordinary circumstance[s] creating a threat of 'irreparable injury' both great and immediate" are shown). Indeed, Defendant admits injunctive relief is permissible where "irreparable harm [i]s 'both great and immediate.'" Br. at 17 (quoting *Mitchum v. Foster*, 407 U.S. 225, 230-31 (1972)).

And while "the 'threat to the plaintiff's federally protected rights' is only irreparable if it 'cannot be eliminated by ... defense against a single prosecution,'" *Phelps v. Hamilton*, 122 F.3d 885, 889 (10th Cir. 1997) (quoting *Younger*, 401 U.S. at 46), that is exactly the case here. Defendant's ongoing prosecutions of Indians in state court for crimes allegedly committed in Indian country in defiance of *McGirt* cannot be eliminated by defending against a single prosecution because unless enjoined Defendant can continue her actual and threatened prosecution of Indians for crimes allegedly committed in Indian country indefinitely, as shown by the string of cases that Defendant is now prosecuting and by her threatened prosecutions. Compl. ¶¶ 49-59. Defendant's actions invade tribal sovereignty and constitute irreparable harm to the Nations, *id.* ¶ 14 (quoting *Ute VI*, 790 F.3d at 1005), by "interfere[ing] with their inherent sovereign power to exercise criminal jurisdiction over all Indians on their reservations" and "[t]herefore, regardless of the Nations's ability to exercise their own jurisdiction or their nonparty status in the state criminal prosecutions, the Nations show actual and concrete injuries in fact because they allege that defendant's conduct infringes on their sovereignty." Interv. Order at 5-6 (citing *Williams*, 358 U.S. at 223 and *Ute VI*, 790 F.3d at 1005) (parentheticals omitted). The Nations cannot protect the Cherokee Nation's federal right to be free from state interference with its exercise of criminal jurisdiction over all Indians on its Reservation in the state court proceedings because the State and the criminal defendant are the only parties to state court criminal cases, *see Castro-Huerta*, 597 U.S. at 650, and the Nations could not pursue injunctive relief against the Defendant in a case to which they were not parties—even assuming, *arguendo*, that such relief were available in a state court criminal case, which it is not, *see Ellis*, 2003 OK CR 18, ¶ 41 n.12, 76 P.3d at 1138 n.12.

II. The AIA Has No Application to This Case.

The Court should reject Defendant's underdeveloped and cursory argument that the AIA[17] applies here, *Cf.* Br. at 8, 9, because it is inadequately briefed, *see United States v. McBride*, 94 F.4th 1036, 1045 (10th Cir. 2024), and because the AIA has no application here in any event.

First, the AIA does not apply where, as here, the United States seeks injunctive relief. *Arkansas v. Farm Credit Servs. of Cent. Ark.*, 520 U.S. 821, 829 (1997) ("Just as the Tax Injunction Act is inapplicable where the United States is a party, a parallel rule prevails under § 2283.") (citing *Leiter Mins., Inc. v. United States*, 352 U.S. 220, 225-26 (1957)). And, as with the inapplicability of *Younger* to the United States, this emption from the AIA properly extends to the Nations. *See supra* at 17-18. Second, the AIA is inapplicable to strangers to the state court proceeding sought to be enjoined, *Imperial County v. Munoz*, 449 U.S. 54, 59 (1980); *SEC v. Marquis Props., LLC*, No. 2:16-cv-0040-JNP, 2016 WL 6839513, at *1 (D. Utah July 21, 2016), and is therefore inapplicable here for the reasons shown *supra* at 10-12. Third, the AIA is inapplicable where, as here, an Indian tribe brings an action under 28 U.S.C. § 1362, *see* Compl. ¶ 9, seeking to enjoin state court proceedings, and the action is one that the United States could have brought as the tribe's trustee. *Cayuga Indian Nation of N.Y. v. Fox*, 544 F. Supp. 542, 551 n.5 (N.D.N.Y. 1982) (citing *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976) (cleaned up)); *see Farm Credit*, 520 U.S. at 829 (*Moe* held Indian tribes exempt from the Tax Injunction Act by relying on 28 U.S.C. § § 1362, which "granted sweeping federal-court jurisdiction where an Indian tribe is a party.")[18]

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[17] The AIA provides that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283.

[18] Defendant cites the alternative holding in *Pueblo of Pojoaque v. Biedscheid*, 689 F. Supp. 3d 1033, 1129-33 (D.N.M. 2023), *appeal dismissed* No. 23-2149, 2024 WL 4256791 (10th Cir. May

Finally, even assuming *arguendo* that the AIA were applicable here, its effect would be limited as "[t]he Anti–Injunction Act … does 'not preclude injunctions against the institution of state court proceedings, *but only bar[s] stays of suits already instituted*.'" *SEC v. DeYoung*, 850 F.3d 1172, 1180 (10th Cir. 2017) (quotation omitted) (emphasis added). *See* Compl. ¶¶ 64-65 (seeking relief against Defendant's current and threatened exercise of jurisdiction).

III. The *Colorado River* Abstention Doctrine Does Not Apply Here.

The *Colorado River* abstention doctrine has no application to this case for the reasons set forth by the Nations in Section III of their Response to Defendant's Motion to Dismiss Plaintiff's Complaint and Brief in Support, at 19-25, ECF No. 59, which the Nations incorporate herein. Defendant only adds two points to which the Nations did not already respond in that brief. First, Defendant argues that "[t]here are clearly parallel state and federal proceedings involving substantially the same parties and interests," citing Section II.A of her brief. Br. at 20. The Nations rebutted that argument in I.B of this Response, so that contention fails. Second, Defendant asserts that the pending litigation in *Kunzweiler* means that this case will not provide a uniform resolution of the questions the Nations and United States seek to litigate in this case. Br. at 21. But this—and the suit in *United States v. Ballard* pending before this Court sitting in the Northern District of Oklahoma, *see* No. 4:24-cv-00626-CVE-SH—are the only cases in which the United States, the Nations, and a representative of the State are present and will be bound.

CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss should be denied.

13, 2024). *Biedscheid* concerned the Pueblo's federal court suit to enjoin a state court suit *brought directly against it*. *See id.* at 1049, 1052. The United States was not a federal court plaintiff, and there was no consideration of whether the United States could have brought the suit as the Pueblo's trustee. So *Biedscheid* is irrelevant, while the exceptions discussed *supra* at 24, apply here.

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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 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

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

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

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

CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2025, I electronically filed the above and foregoing document with the Clerk of Court via the ECF System for filing.

/s/ Frank S. Holleman
Frank S. Holleman