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

THE UNITED STATES OF AMERICA, **Plaintiff,** **and** **CHEROKEE NATION, CHICKASAW NATION, and CHOCTAW NATION OF OKLAHOMA,** **Intervenor Plaintiffs,** **and** **MUSCOGEE (CREEK) NATION,** **Consolidated Plaintiff,** **v.** **MATTHEW J. BALLARD,** **Defendant.**	**Case No. 24-CV-0626-CVE-SH** **(BASE FILE)** **Consolidated with:** **Case No. 25-CV-0050-CVE-SH**

DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DISMISS MUSCOGEE (CREEK) NATION'S COMPLAINT AND BRIEF IN SUPPORT

In a surprising turn, the Muscogee (Creek) Nation ("Plaintiff" or the "Nation") attempts to use this action as a vehicle to reshape the standing doctrine. Yet, the fundamental principle remains: "If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006). Indeed, "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Id*. (internal citations omitted). "Article III standing . . . enforces the Constitution's case-or controversy requirement." *Id.* at 342. To establish standing, a plaintiff must show it

"suffered an invasion of a legally protected interest[.]" *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016).

Throughout its response [Doc. 77], the Nation *concedes* it has suffered no injury in fact, instead urging this Court to rule on a hypothetical. The Nation identifies no instance of an Indian being prosecuted for crimes within its Indian country, nor does it even allege that Matt Ballard ("Defendant" or "Ballard") has prosecuted any of its members outside the territory. Instead, it simply raises a concern for the *prospect* that Defendant might prosecute conduct occurring in the Nation's Indian country in the future [*id*. at 6, 9]. Even under Plaintiff's analysis, its prosecutorial authority and sovereignty remain untouched.

In addition to its failed bid to bypass standing by urging this Court to entertain a hypothetical, the Nation seeks to evade abstention by further conceding a lack of injury. Even if standing were found in the parallel litigation, it assuredly fails here. To hold otherwise would require the Court to disregard the injury-in-fact—and by extension, redressability—requirements of standing.

I. The Nation lacks standing.

"Standing requires that the plaintiff personally has suffered some actual or threatened injury." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). "[T]hreatened injury must be certainly impending to constitute injury in fact." *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990); *see also Clapper v. Amnesty Intern. USA*, 568 U.S. 398 (2013) (refusing to accept that "objectively reasonable likelihood" of injury meets the "threatened injury" threshold). "Allegations of possible future injury" are insufficient. *Whitmore*, 495 U.S. at 158. The injury must be "concrete and particularized and actual or imminent, not conjectural or hypothetical." *Spokeo, Inc.*, 578 U.S. at 339 (2016) (internal

citation omitted). And plaintiff, not defendant, bears the burden to establish that standing exists at the time suit was filed. *DaimlerChrysler Corp.*, 547 U.S. at 342; *see also Carney v. Adams*, 592 U.S. 53, 58-59 (2020).

Plaintiff concedes that no conduct within its Indian country or directed at its members is at issue. *See, e.g.*, Doc. 77, at 11 (admitting, for instance, there are not "any ongoing state proceedings that the Nations seeks to enjoin"). The Nation challenges only the theoretical possibility of prosecutions of non-member Indians for crimes within the Nation's Indian country.[1] *See, e.g., id.* at 9 (acknowledging "[t]he asserted injury here is the *prospect*" or Ballard's prosecutions of non-Indians for non-major crimes committed in the Nation's Indian country) (emphasis added). Although the Complaint relies on prosecutions of non-member Indians for non-major crimes committed outside the Nation's Indian country, Doc. 2, at 5 and 6, the Nation expresses bewilderment that Ballard references those very prosecutions in his Motion. Doc. 77, at 6. ("the District Attorney oddly refers to his three pending prosecutions arising in the Cherokee Reservation[.]"). One could imagine Ballard's confusion about the lawsuit.

Aware it "nowhere makes," Doc. 77, at 6, any claim that the ongoing prosecutions involve conduct within its Indian country or target its members outside it, Plaintiff instead urges the Court to overlook the lack of injury and focus solely on its prayer for relief. *See* Doc. 77, at 6. But Plaintiff misses the core requirement of standing: without harm, there is no case or controversy—and no relief to be granted.

[1] Ironically, while sovereignty is central to its Complaint, the Nation effectively asks the Court to treat conduct occurring in another Tribe's Indian country as if it occurred within its own. It even argues that "[n]o material distinction exists between the Cherokee and Creek Reservations" for purposes of this suit. Doc. 77, at 6.

Plaintiff's reliance on *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289 (1979), and *Winsness v. Yocom*, 433 F.3d 727 (10th Cir. 2006), is misplaced. These cases do not support the notion that a well-written prayer for relief can substitute for injury. In *Winsness*, the Tenth Circuit held the opposite: "[a] plaintiff who himself is not injured cannot sue to enjoin enforcement of a statute on the ground that it violates someone else's rights." *Id.* at 734. And *Babbitt* involved a facial challenge by a plaintiff at genuine risk of prosecution—circumstances far removed from this case, where the Nation points only to prosecutions of non-members for conduct in another Tribe's Indian country.

The Nation's reliance on *Ute Indian Tribe of the Uintah & Ouray Rsrv. v. Utah*, 790 F.3d 1000 (10th Cir. 2015), and *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234 (10th Cir. 2001), also fails.[2] Even setting aside Ballard's argument that those cases are distinguishable because they involved member Indians, neither supports a finding of injury—let alone irreparable harm—where there are no allegations of conduct within the plaintiff Tribe's Indian country or involving its members.

[2] The court, in a parallel case, recently distinguished *Prairie Band, Ute,* and *Fisher*, unequivocally finding, "the Nation has not yet identified certain, great, *actual*, and *non-theoretical* harm." *Creek v. Kunzweiler, et al.*, No. 25-CV-75-GKF-JFJ (N.D. Okla. April 23, 2025) (Doc. 54, Opinion and Order). The court added:

> [The Nation] does not contend that defendants have denied the Nation of its jurisdiction to enforce its own criminal and traffic laws against non-member Indians. The defendants are not attempting to prosecute members of the Nation. And the Nation has not yet explained how state-court jurisdiction over non-member Indians plainly interferes with it powers of tribal self-government.

Id. These findings apply with even more force here, where the Nation concedes that is hasn't alleged the existence of a single prosecution of criminal conduct within its Indian country or even involving its members.

Plaintiff rounds out its novel non-injury theory by attempting to shift the burden to Ballard. Doc. 77, at 7. It suggests that standing could be salvaged by a "disavowal" from Ballard regarding speculative prosecutions of non-member Indians for non-major crimes within the Nation's territory. But standing does not exist to extract assurances from a defendant. "The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing" standing. *Spokeo, Inc.*, 578 U.S. at 338. Where, as here, there is no alleged harm, that burden is unmet—and redressability fails along with it.

Plaintiff's lawsuit must be dismissed for lack of standing—and its abstention arguments only underscore that point.

II. Even if Plaintiff could establish standing, the case is barred by abstention.

"The rule in *Younger v. Harris* is designed 'to permit state courts to try state cases free from interference by federal courts[.]' . . . Plainly, the same comity considerations apply where the interference is sought by some . . . not parties to the state case." *Hicks v. Miranda*, 422 U.S. 332, 349 (1975).

I. *Younger* mandates dismissal.

That abstention is generally the exception that proves the rule is insignificant here because abstention *is mandatory* (*i.e.*, non-discretionary) when: "(1) there is an ongoing state criminal, civil, or administrative proceeding; (2) the state court provides an adequate forum to hear the claims raised in the federal complaint; and (3) the state proceedings involve important state interests, matters which traditionally look to state law for their resolution or implicate separately articulated state policies." *Travelers Cas. Ins. Co. of Am. v. A-Quality Auto Sales, Inc.*, 98 F.4th 1307, 1317 (10th Cir. 2024) (cleaned up); *see also Winn v. Cook*, 945 F.3d 1253, 1258 (10th Cir. 2019) ("When *Younger*'s three requirements are met, abstention is mandatory.").

The Nation leans on its failure to show injury—*i.e.*, its inability to identify any prosecution that even arguably affects the Nation—to evade *Younger* abstention. But the Complaint could only arguably satisfy standing if such conduct existed, in which case the first *Younger* element would be satisfied. As to the second element, the Nation argues that it is neither a party to state proceedings nor in privity with one. But the standard is whether the state forum provides an adequate opportunity to raise the federal claims—not whether the plaintiff is a named party or even in direct privity. Finally, the Nation contends, with immaterial nuance, that prosecutions for violations of Oklahoma law do not implicate important state interests. Respectfully, that's untenable. If enforcing state criminal law within state borders isn't an important state interest, nothing is. Neither law nor logic supports the Nation's position.

A. The state courts provide an adequate forum to hear the claims raised in the Complaint.

In urging this Court to retain jurisdiction and block theoretical state criminal prosecutions, Plaintiff argues it is not—and cannot become—a party to such proceedings. Doc. 77, at 12. Ballard readily agrees: Plaintiff cannot become a party to prosecutions that do not exist. But even if Plaintiff had alleged ongoing criminal proceedings, *Younger* abstention does not require it to be a party, only that the state forum provides an adequate opportunity to raise the federal claims.

Federal courts routinely apply *Younger* abstention to non-parties when their interests are closely tied to those of individuals involved in ongoing state proceedings. As the Supreme Court stated in *Doran v. Salem Inn, Inc.*, *Younger* considerations may extend to "legally distinct parties" where their interests are "so closely related" that interference with one would disrupt the others. 422 U.S. 922, 928 (1975). Likewise, in *Hicks v. Miranda*, the Court confirmed that abstention is proper where interests are "intertwined" and where the federal action seeks to disrupt a state prosecution. 422 U.S. at 348–49. These comity principles apply even when the federal plaintiff is

not a party to the state proceeding but asserts rights derived from those who are. *See D.L. v. Unified Sch. Dist. No. 497*, 392 F.3d 1223, 1231 (10th Cir. 2004)[3]; *Spargo v. N.Y. State Comm'n on Judicial Conduct*, 351 F.3d 65, 83–84 (2d Cir. 2003); *Citizens for a Strong Ohio v. Marsh*, 123 F. App'x 630, 635–36 (6th Cir. 2005).

The analysis and decision in *Tony Alamo Christian Ministries v. Selig*, 664 F.3d 1245 (8th Cir. 2012), are enlightening. There, the Arkansas Department of Human Services took custody of numerous children living on the property of a religious organization ("TACM") following findings of abuse. Although TACM itself was not a party to the state dependency and parental rights proceedings, it filed a federal lawsuit alleging violations of its and its members' constitutional rights. TACM argued that it had no way to participate in state court and no access to federal court if *Younger* applied—claiming it was in a "no man's land." *Id.* at 1251. The appellate court rejected that argument, emphasizing that *Younger* abstention applied because TACM's injuries were "sufficiently related to, or inextricably intertwined with," those of its members, who were parties to the state cases. *Id.* at 1253 (holding that relief based on the injuries of individual members were "plainly barred by Younger"). As to TACM's claims of independent injury, the court found those injuries were "generally aligned with those of its members" and, therefore, "in one degree or another, derivative of the injuries of its members." *Id.* Accordingly, the court held that *Younger* barred the federal action, even though TACM could not become a party to the state court proceedings and had asserted facial constitutional claims.

Similar to the slew of lawsuits the Nation has recently filed, in *Glob. Impact Ministries v. Mecklenburg Cnty.*, 2021 WL 982333 (W.D.N.C. Mar. 16, 2021), several organizations filed an

[3] Plaintiff's reliance on dicta in *D.L.* is surprising, considering the court found that *Younger* barred federal claims of non-parties to state litigation. *See* Doc. 77, at 12; *see also D.L.*, 392 F.3d at 1230-1231. If "controlling precedent[,]" Doc. 77, at 12, it cuts against the Nation's position.

action against a city and county in North Carolina seeking, among other things, an injunction against the enforcement of a local ordinance banning certain protest gatherings as unconstitutional after several of its members had been cited and arrested pursuant to it. According to the court, these "ongoing state criminal proceedings relating to the arrests or citations of" members of the organization plainly implicated *Younger*. *Id*. at *3. The organizations "share a close relationship and alignment with the" individual members and the state court proceedings. *Id*. at *4. And those "proceedings implicate important state interests and provide an adequate opportunity for the parties in the state proceeding to raise constitutional challenges." *Id*. at *3

Even if the Nation could identify relevant state prosecutions arising from conduct in its Indian country—and it cannot—its position would mirror that of the organizations in *TACM* and *Glob. Impact Ministries*. In that scenario—theoretical though it may be—the Nation would be closely aligned with the criminal defendants and asserting rights entirely dependent on their circumstances. The Nation speculates it might suffer future harm if non-member Indians are prosecuted within its territory—describing a prospective impact on its "sovereignty and the authority of its own criminal justice system." Doc. 77, at 4. But any such theoretical injury hinges on prosecutions that have not occurred. Without them, this case would have no possible foundation—and it doesn't. Like those organizations, the Nation is not a party to any state court proceedings, but its claims are so intertwined with those of the defendants that any relief would directly interfere with those hypothetical proceedings. The relevant question is whether a non-party's identity and claims are closely intertwined with a party to the state proceeding. *D.L.*, 392 F.3d at 1231. Here, the arguments and requested relief would not just be closely intertwined; they would be indistinguishable.

Finally, the Nation's own conduct undercuts its position. In extensive amicus briefing before the OCCA, the Nation raised all the arguments presented here without ever suggesting that the state courts were an improper venue or incapable of deciding the issues. Those courts ruled, and the Nation now turns to federal court in hopes of a different result. Litigation initiated for the express purpose of undermining—much less interfering with—ongoing state proceedings is the exact type of interference *Younger* forbids. *See Younger*, 401 U.S. at 44.

In sum, the theoretical state prosecutions the Nation urges this Court to imagine would provide an adequate forum to address the claims raised in the Complaint. As in *TACM*, "but for" the ongoing prosecution of individual Indians and their purported jurisdictional defenses, the Nation's claims do not exist.

B. The state court prosecutions implicate important state interests.

With immaterial nuance, the Nation contends that no important state interests are implicated. After conceding the state has a general interest in enforcing its laws, the Nation posits that the "dispositive question in cases such as this one turns on the state's interest in enforcing its criminal laws against Indians in Indian country[.]" Doc. 77, at 15 (cleaned up).

The actual question under *Younger* is simply whether "the proceedings implicate important state interests." *Middlesex Cnty. Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982). Here then we must ask whether the theoretical state prosecutions of non-member Indians accused of violating Oklahoma's criminal laws within its borders—and in some cases, against its citizens—implicate important state interests. Plaintiff skips to a merits argument (something it shuns elsewhere in its brief) to conclude that the state cannot have an interest because it has "no legal entitlement . . . in the first place." Doc. 77, at 15 (citation omitted). Clear law and basic logic belie the Nation's analysis.

There is "no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *Id.* Indeed, in our federal system, "[t]he States possess primary authority for defining and enforcing the criminal law." *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993). Each state has a "sovereign interest in being in control of, and able to apply, its laws throughout its territory." *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457, 476 (2d Cir. 2013). Simply put, States have "a strong sovereign interest" in "protecting *all* crime victims," and punishing *all* criminal offenders within their borders. *Castro-Huerta*, 597 U.S. at 651 (emphasis added); *see also Creek v. Kunzweiler, et al.*, Opinion and Order, No. 25-CV-75-GKF-JFJ (N.D. Okla. April 23, 2025) (finding the State has an "interest[] in enforcing laws with respect to non-member Indians[]"). Of course, it would be a logical impossibility to have an interest in protecting crime victims while lacking the power to prosecute offenders.

Moreover, considering the reaffirmation of the validity of State prosecutions in *Castro-Huerta*, the "general[] lack" of authority rule set forth in *Ute* cannot be deployed as a justification for categorical exclusivity. *Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah*, 790 F.3d 1000, 1006 (10th Cir. 2015); *see also Arizona v. U.S.*, 567 U.S. 387, 400 (2012) ("[C]ourts should assume that 'the historic police powers of the States' are not superseded 'unless that was the clear and manifest purpose of Congress.'"). Especially in cases like this one which, unlike *Ute*, do not involve member Indians on member land. *Ute Indian Tribe*, 790 F.3d at 1006*; see also*, *Creek v. Kunzweiler, et al.*, Opinion and Order, No. 4:25-cv-00075-GKF-JFJ (N.D. Okla. April 23, 2025) (where the court distinguished a case like this from *Ute*, where "a Utah county prosecuted a Ute tribal member for alleged traffic offenses on tribal lands.").

A simple hypothetical applying Plaintiff's logic illuminates its absurdity. Suppose a member of the Navajo Nation (*i.e.*, a non-Oklahoma tribe) assaults an Oklahoma public official (*e.g.*, the Governor or Attorney General) in Tulsa, Oklahoma. In Plaintiff's world, such an incident would not implicate any "legitimate" or important state interests, and Oklahoma would be unable to prosecute the Navajo Nation member or protect its own officials. Surely not.

C. No exception to *Younger* applies.

Plaintiff argues that even if the *Younger* elements are met, hypothetical prosecutions of non-member Indians would cause it irreparable harm sufficient to override abstention. Doc. 77, at 17-19. The Nation relies heavily on *Ute* and *Prairie Band* for this tenuous position. *Id*. But a court in a parallel case already rejected that argument, finding, "in contrast to *Prairie Band, Ute,* and *Fisher*, the Nation has not yet identified certain, great, actual, and non-theoretical harm." *Creek v. Kunzweiler, et al.*, No. 25-CV-75-GKF-JFJ (Doc No. 54, Opinion and Order, at 4) (N.D. Okla. April 23, 2025).

The irreparable injury exception is meant to protect the rights of criminal defendants when their individual rights cannot be safeguarded during ongoing prosecutions. It does not apply to federal plaintiffs whose *Younger*-barred claims are intertwined with or derivative, directly or indirectly, of the state defendant. The Nation's attempt to stretch the exception beyond its limits fails.

II. The Court should abstain under *Colorado River*.

Plaintiff's opposition to *Colorado River* abstention rests on the claim that no state proceedings exist—further underscoring its lack of injury and failure to establish standing. That aside, the doctrine is rooted in "wise judicial administration," promoting the "conservation of judicial resources and comprehensive disposition of litigation." *Colorado River Water*

Conservation Dist. v. U.S., 424 U.S. 800, 817 (1976). As the Court explained in *Arizona v. San Carlos Apache Tribe of Arizona*, federal adjudication is "neither practical nor wise" when it risks "duplicative litigation," generates "tension and controversy between the federal and state forums," or fosters "confusion" over underlying rights. 463 U.S. at 568.

Here, the core issue—whether the State's jurisdiction over all its territory includes jurisdiction to prosecute non-member Indians who commit non-major crimes in Indian country—is already being addressed in state courts and has been decided at both trial and appellate levels. Plaintiff simply disagrees with the results. But dissatisfaction with the state court outcomes does not justify federal intervention. Judicial economy and respect for parallel proceedings strongly favors abstention.

CONCLUSION

For all these reasons, Defendant's Motion to Dismiss should be granted.

Date: April 29, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2025, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the ECF registrants.

s/Phillip G. Whaley
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