UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF OKLAHOMA

MATTHEW JOSEPH DOUGLAS, *Petitioner*, v. GERALDINE WISNER, MATTHEW J. HALL, and LISA OTIPOBY-HERBERT, *Respondents*.	Case No. CIV-24-74-JFH-DES

RESPONDENTS MUSCOGEE (CREEK) NATION ATTORNEY GENERAL GERALDINE WISNER AND PROSECUTOR MATTHEW HALL MOTION TO DISMISS AND BRIEF IN SUPPORT

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Pursuant to Federal Rule of Civil Procedure 12(b)(1) and (6), Respondents Geraldine Wisner, Attorney General of the Muscogee (Creek) Nation ("Nation" or "MCN"), and Matthew Hall, the Nation's prosecutor (collectively "Nation Officials"), respectfully move the Court to dismiss this action without prejudice or, at a minimum, to stay these proceedings until Petitioner has satisfied the statutory prerequisites for seeking habeas relief under 25 U.S.C. § 1304(f).[1] Because Petitioner has not "been sentenced by a participating tribe [i.e., the Nation]," *id.* § 1304(f)(1), and has not "exhausted the remedies available in the Tribal court system" to challenge his prosecution by the Nation, *id.* § 1304(f)(2)(A), his habeas petition is premature. In support of this Motion, the Nation Officials state as follows:

LEGAL AND FACTUAL BACKGROUND

I. Congress Has Authorized Indian Nations to Prosecute Non-Indian Defendants for Certain Offenses Under 25 U.S.C. § 1304.

Absent congressional authorization, Indian Tribes ordinarily lack jurisdiction to prosecute non-Indians. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 194, 212 (1978). Congress provided this authorization to prosecute non-Indians with respect to certain "covered crimes" defined under federal law in 25 U.S.C. § 1304. Relevant to the instant matter, covered crimes include "assault of Tribal justice personnel," which is defined, in part, as

> any violation of the criminal law of the Indian tribe that has jurisdiction over the Indian country where the violation occurs that involves the use, attempted use, or threatened use of physical force against an individual authorized to act for, or on behalf of, that Indian tribe or serving that Indian tribe during, or because of, the performance or duties of that individual in … preventing, detecting, investigating,

[1] On April 23, 2024, the parties filed a Stipulation to Dismiss Respondent Muscogee (Creek) Nation District Court Judge Lisa Otipoby-Herbert Without Prejudice. Dkt. 18. No Order has been entered either granting or denying the parties' request. The undersigned counsel respectfully requests that Judge Otipoby-Herbert's obligation to Answer the Complaint or to file a responsive motion be stayed pending the Court's resolution of the pending Stipulation.

> making arrests relating to, making apprehensions for, or prosecuting a covered crime

id. § 1304(a)(1) & (a)(1)(A); and "obstruction of justice," which is defined to encompass

> any violation of the criminal law of the Indian tribe that has jurisdiction over the Indian country where the violation occurs that involves interfering with the administration or due process of the laws of the Indian tribe, including any Tribal criminal proceeding or investigation of a crime.

Id. § 1304(a)(9).

Congress further provided that Indian Tribes exercising this "Special Tribal Criminal Jurisdiction" over non-Indians (hereinafter, "STCJ"), including the Nation, must comply with numerous procedural and substantive requirements. *Id.* §§ 1304(d)–(g), 1302(a), (c). These requirements include providing defendants with legal protections mirroring those afforded to federal and state court defendants under the Bill of Rights of the United States Constitution, including the rights of due process and equal protection, assistance of counsel, and trial by jury before an impartial, law-trained judge. *Id.* §§ 1304(d), 1302 (a), (c).

Regardless of whether Congress has authorized an Indian Tribe to *prosecute* non-Indians, tribal law enforcement officers, including MCN Lighthorse officers, have authority "to search and detain for a reasonable time any person [a tribal officer] believes may commit or has committed a crime." *United States v. Cooley*, 593 U.S. 345, 351 (2021). To advance their common goal "to provide efficient, effective, and thorough law enforcement and crime prevention to all residents" within their respective jurisdictions, the Nation and the vast majority of the county municipal governments within the Muscogee (Creek) Reservation have entered into Intergovernmental Cross-Deputization Agreements. Ex. 6 GRDA and MCN Cross-Deputization (Dkt. 4-6) at ECF p. 2, 15–54. These agreements allow tribal and non-tribal law enforcement personnel to investigate potential crimes under both State and Nation law and to arrest both Indian and non-Indian suspects. *Id.* at 2–3. While Okmulgee County has declined to

enter into such an agreement with the Nation, MCN Lighthorse officers exercise delegated State law enforcement authority within the County through a cross-deputization agreement with the State's Grand River Dam Authority ("GRDA"). Ex. 3 Decl. of Shannon Clark (Dkt. 4-3) ECF ¶¶ 3, 6; Ex. 5 Keith Bell GRDA Commission (Dkt. 4-5) ECF p. 2–3.

II. The Events of December 18, 2023.

While this motion does not ask or require the Court to resolve any issues of fact, the Nation Officials provide this brief summary for context. On December 18, 2023, MCN Lighthorse officers observed an individual driving on the wrong side of the road in a school zone, in the city of Okmulgee, Oklahoma. Ex. 4 (REDACTED) Arrest and Booking Data Sheet (Dkt. 4-4); Pet. (Dkt. 4) at 4; Muscogee (Creek) Nation, *Muscogee Nation Attorney General Issues Remarks Regarding Incident with Okmulgee County Jail Officials* (Dec. 21, 2023) (hereinafter, "MCN Press Release").[2] The officers effected a traffic stop. When they observed drug paraphernalia on the front seat of the suspect's vehicle, they searched the suspect and discovered a substance that the suspect identified as fentanyl. Dkt. 4-4. Because the Lighthorse officers believed the suspect to be non-Indian, they brought him to the Okmulgee County jail facility to remand him to County law enforcement authorities. Dkt. 4-3 ¶2.

Lighthorse officers informed County jail officials that the suspect had been detained pursuant to the Nation's Intergovernmental Cross-Deputization Agreement with the GRDA, and that the County officials were obligated to take the suspect into custody under state law. Dkt. 4-3 ¶ 3; MCN Press Release. *See also* Okla. Stat. tit. 21, § 533(A). County officials, however, refused to accept custody of the suspect. Dkt. 4-3; MCN Press Release. Petitioner informed

[2] Cited in Petition at 4, https://www.muscogeenation.com/2023/12/21/muscogee-nation-attorney-general-issues-remarks-regarding-incident-with-okmulgee-county-jail-officials/ (including linked body cam footage).

Lighthorse Deputy Chief Dennis Northcross that the County had a policy not to accept suspects from the Lighthorse and that they could be charged with an offense for bringing weapons into the County jail facility. *See* MCN Press Release. Petitioner threatened to lock the Lighthorse officers in the jail's receiving area if they did not take the suspect with them. *Id*.

As the County jail officials were attempting to close the door of the receiving area, which would have resulted in the Lighthorse officers being confined in a secured area of the jail facility, Lighthorse Deputy Chief Dennis Northcross attempted to follow the County officers out of the secured area. *Id*. It was at this point that the Nation alleges that Petitioner forcefully placed his hands on the Deputy Chief. *See id.*

III. The Nation's Prosecution of Petitioner Under 25 U.S.C. § 1304 and the Right to Petition for a Writ of Habeas Corpus.

On December 20, 2023, Respondent Hall, as Prosecutor for the Nation, charged Petitioner under the Nation's STCJ with protected status battery against a tribal law enforcement official in violation of Muscogee (Creek) Nation Code, tit.14, § 2-303(B)(1) (hereinafter, "MCN Code").[3] Those charges are presently pending in MCN District Court before MCN District Court Judge Lisa Otipoby-Herbert. *See* Decl. of Matthew Joseph Douglas (Dkt. 4-1). After securing private counsel to represent him in the MCN District Court proceedings, Petitioner appeared at a virtual hearing on December 21, 2023, at which time Judge Otipoby-Herbert ordered him released on his own recognizance. Dkt. 4-1 ¶¶ 5, 8. On February 28, 2024, the Attorney General of the State of Oklahoma on behalf of the Petitioner filed for a writ of habeas corpus in this Court, disputing the Nation's jurisdiction to prosecute him under its STCJ authority. At his arraignment hearing on March 27, 2024, Judge Otipoby-Herbert granted Petitioner's request to temporarily stay the proceedings against him in light of the pending proceedings in this Court.

[3] https://www.creeksupremecourt.com/wp-content/uploads/title14.pdf.

Ex. 1 (Order to Stay (Mar. 15, 2024), *Muscogee Creek Nation v. Douglas* (No. CF-2023-1937)). Petitioner has not filed a motion to dismiss for lack of jurisdiction in the MCN District Court, or otherwise sought to raise his jurisdictional arguments in those proceedings.

In investigating and bringing the charged offense, the Nation's Attorney General and Prosecutor came to the firm conclusion that Petitioner committed that offense and that it falls within the Nation's STCJ authority under the assault of Tribal justice personnel and obstruction of justice provisions. However, if the MCN District Court, upon the presentation of those arguments and evidence, disagrees, it possesses full authority to dismiss the charges.

If, however, the Nation's courts determine there is jurisdiction over Petitioner under 25 U.S.C. § 1304, and if Petitioner is convicted, then Congress has provided that he can challenge his conviction in federal court by filing for a writ of habeas corpus. 25 U.S.C. § 1304(f)(1) ("After a defendant has been sentenced by a participating tribe, the defendant may file a petition for a writ of habeas corpus in a court of the United States under section 1303 of this title."). Prior to filing a habeas petition, Petitioner must exhaust his MCN District Court remedies. *Id*. § 1304(f)(2) ("An application for a writ of habeas corpus on behalf of a person in custody pursuant to an order of a Tribal court shall not be granted unless … the applicant has exhausted the remedies available in the Tribal court system[.]"). Petitioner can forego the exhaustion requirement only if "there is an absence of an available Tribal corrective process" or "circumstances exist that render the Tribal corrective process ineffective to protect the rights of the applicant." *Id*.

ARGUMENT

I. Petitioner's Petition for a Writ of Habeas Corpus is Premature Under 25 U.S.C. § 1304.

As a federally recognized Indian Tribe, 89 Fed. Reg. 944, 946 (Jan. 8, 2024), the Nation enjoys sovereign immunity from suits in federal court. *See*, *e.g.*, *Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1013 (10th Cir. 2007) (dismissing suit against MCN on sovereign immunity grounds). Unless abrogated by Congress or waived by the Tribe, "a tribe's immunity generally immunizes tribal officials from claims made against them in their official capacities." *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1296 (10th Cir. 2008). *See also Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1154 (10th Cir. 2011) (Tribal sovereign "immunity extends to tribal officials, so long as they are acting within the scope of their official capacities."). Because the Nation has not consented to this suit, this Court may only exercise jurisdiction to the extent that Congress has authorized it to do so.

In authorizing Indian tribes to exercise STCJ over non-Indian defendants, Congress also authorized those defendants to file for writs of habeas corpus in federal courts. But it did so only under specific conditions. 25 U.S.C. § 1304(f)(1), (2). Congress clearly set forth the procedures that a tribal court defendant must follow before they may challenge a tribal court's exercise of STCJ authority, including that they must first be convicted by the tribe and exhaust all available tribal court remedies. Because Petitioner has not satisfied these jurisdictional prerequisites, he may not seek relief in the federal courts against Nation officials pursuant to the narrow abrogation of tribal sovereign immunity provided by Congress. This Court accordingly should dismiss the petition without prejudice or, at a minimum, stay the petition until it is ripe for review.

A. The Petition is Premature Because Petitioner Has Not Been Convicted or Sentenced by the MCN District Court.

25 U.S.C. 1304(f)(1) provides that "*[a]fter a defendant has been sentenced by a participating tribe*, the defendant may file a petition for a writ of habeas corpus in a court of the United States under section 1303 of this title." (emphasis added). The statute contains no other provision authorizing a tribal court defendant to challenge their prosecution under Section 1304. Petitioner has not been convicted, let alone sentenced, and accordingly may not seek habeas relief in this Court at this time.

Petitioner does not address Section 1304's requirement that he must be sentenced prior to filing a habeas petition. Overlooking this express statutory requirement, he instead contends that he has satisfied the statutory pre-requisites because he is "in detention" for purposes of federal habeas law. Pet. at 6–8 (citing *Dry v. CFR Ct. of Indian Offenses for Choctaw Nation*, 168 F.3d 1207, 1208 & n.1 (10th Cir. 1999) and *Fife v. Moore,* 808 F. Supp. 2d 1310, 1312–13 (E.D. Okla. 2011)). But those cases did not arise under Section 1304(f), which was not enacted until 2022. Thus, they have nothing to say about Petitioner's eligibility to bring a pre-conviction challenge to his prosecution. Because there is no tribal court sentence from which to seek habeas relief, Congress—as a matter of plain statutory text that Petitioner is not free to wish away—has not authorized this Court to consider his request for relief at this time.

B. Petitioner's Claims Are Premature Because He Has Failed to Exhaust His MCN District Court Remedies.

1. Petitioner Fails to Address the Express, Statutory Exhaustion Requirement Under STCJ.

Petitioner is also unable to seek relief because he has failed to exhaust his MCN District Court remedies. Section 1304's remedial provision states that

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to an order of a Tribal court shall not be granted unless –

> **(A)** the applicant has exhausted the remedies available in the Tribal court system;
> **(B)** there is an absence of an available Tribal corrective process; or
> **(C)** circumstances exist that render the Tribal corrective process ineffective to protect the rights of the applicant.

25 U.S.C. § 1304(f)(2).

Petitioner concedes that he has not exhausted his MCN District Court remedies as required by subsection (A). *See* Pet. at 6–8. And he does not contend that there is an absence of an available tribal corrective process, under subsection (B), *see id*., nor could he. The Nation's Code guarantees Petitioner's ability to raise his factual, procedural, and other defenses to the charges pending in the MCN District Court, consistent with the requirements imposed by Congress for the Nation's exercise of STCJ. *See* MCN Code, tit.14 § 1-303 ("Rights of Defendant," including the right to representation of counsel, confront witnesses, and appeal a judgment to the Nation's Supreme Court); 25 U.S.C. § 1302(a), (c) (right to due process, equal protection, and trial before a law-trained judge).

With respect to subsection (C), Petitioner suggests that "the Tribal corrective process [would be] ineffective to protect [his] rights" because "the relief he seeks would require the tribal court to acknowledge it lacks jurisdiction, presumably even to decide the very jurisdictional issue it was asked to address." Pet. at 7. But one of the fundamental obligations of any court is to determine the scope of its own jurisdiction. *See*, *e.g.*, *Brownback v. King*, 592 U.S. 209, 218 (2021) ("a federal court always has jurisdiction to determine its own jurisdiction"). The Nation's courts are no exception. Any suggestion that the Nation's courts are incapable of discharging that obligation would reflect nothing other than unfounded bias, and would run counter to the truth. *See*, *e.g.*, *Muscogee (Creek) Nation v. Stith*, SC 14-04 (MCN S. Ct. 2014) (dismissing criminal

prosecution for lack of personal jurisdiction over the defendant)[4]; *Slay v. Muscogee (Creek) Nation Travel Plaza*, SC 14-01 (MCN S. Ct. 2014) (dismissing civil suit for lack of subject-matter jurisdiction).[5]

Petitioner's suggestion that tribal courts, unlike all other courts, cannot be relied upon to impartially determine their own jurisdiction relies on *Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes*, 623 F.2d 682, 685 (10th Cir. 1980). Pet. 7. But *Dry Creek* has no application here. In *Dry Creek*, non-Indian landowners within the reservation sought—but were denied—the opportunity to invoke the tribal court's jurisdiction. 623 F.2d at 684. Reasoning that "[t]here has to be a forum where the dispute can be settled," and finding none available through the tribal or state judicial systems, the Court held that under these narrow and limited circumstances, the federal courts must be available to hear the suit. *Id.* at 685. The Tenth Circuit has subsequently emphasized that this holding "depended … on the finding that no tribal court forum existed for the non-Indian party[,]" and that "speculative futility is not enough to justify federal jurisdiction." *Bank of Oklahoma v. Muscogee (Creek) Nation*, 972 F.2d 1166, 1170 (10th Cir. 1992) (quoting *White v. Pueblo of San Juan*, 728 F.2d 1307, 1313 (10th Cir. 1984)).

Here, Petitioner's invocation of *Dry Creek* to argue that tribal courts cannot adjudicate challenges to their own jurisdiction runs headlong into the express procedural requirements of Section 1304. Setting aside the question of exhaustion, a tribal court defendant may not file a habeas petition until after the defendant has been tried, convicted, and sentenced. *Supra* p. 6–7. In the course of those proceedings, a tribal court will have occasion to review its jurisdiction. And there is no question that the MCN District and Supreme Courts stand ready to hear

[4] http://www.creeksupremecourt.com/wp-content/uploads/SC_14-04.pdf.
[5] http://www.creeksupremecourt.com/wp-content/uploads/SC_14-01_Opinion_and_Order_102314.pdf.

Petitioner's jurisdictional and other arguments. Nothing in *Dry Creek* relieves Petitioner of the obligation to raise those arguments there in the first instance.[6]

In sum, Section 1304(f) sets forth the circumstances under which a non-Indian defendant subject to a tribe's STCJ authority may seek relief in federal court. Congress plainly did not authorize the gaping exception to those requirements that Petitioner invites the Court to find here.

2. Petitioner's Attempts to Evade the Clear Statutory Prerequisites to Federal Court Review Are Without Merit.

Petitioner cannot satisfy Section 1304's explicit and narrow exception to tribal court exhaustion. Instead, he simply attempts to wish it away, positing that exhaustion is not required because 1) it is a matter of comity and not jurisdictional and 2) the exhaustion requirement is inapplicable where a tribal court attempts to assert jurisdiction over a non-Indian. Pet. at 7. Both contentions are wholly without merit.

First, with respect to a tribal court defendant's federal court challenge to a tribal court's exercise of STCJ, exhaustion *is* jurisdictional. Section 1304 sets forth its exhaustion rule in explicit statutory text: "an application for a writ of habeas corpus on behalf of a person in custody pursuant to an order of a Tribal court *shall not be granted unless* … the applicant has exhausted the remedies available in the Tribal court system[.]" 25 U.S.C. § 1304(f)(2)(A) (emphasis added). Thus, the Supreme Court's comment that the *common law* exhaustion doctrine

[6] Contrary to Petitioner's view, Tenth Circuit caselaw fully supports Congress's determination that tribal courts are best suited to the task of determining their own jurisdiction in the first instance. *See*, *e.g.*, *Norton v. Ute Indian Tribe of the Uintah & Ouray Rsrv.*, 862 F.3d 1236, 1250 (10th Cir. 2017) ("nearly five decades of tribal cases applying ICRA show that tribal courts protect the rights of both member and nonmember litigants in much the same way as do federal and state courts…. Moreover, empirical studies demonstrate that tribal courts are even-handed in dispensing justice to nonmembers.").

is "a 'prudential rule,' based on comity" *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997) (quoting *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 20 n.14 (1987)), is irrelevant here.

Petitioner's contention that the exhaustion doctrine simply does not apply when the defendant is a non-Indian is equally flawed. Again, Petitioner ignores the statutory exhaustion requirement applicable in this case. In contrast to its neighboring provisions, which relate to the criminal jurisdiction that Tribes exercise over "all Indians," 25 U.S.C. § 1301(2), Section 1304 pertains to the Tribes' STCJ authority, which is the only form of tribal criminal jurisdiction that Congress has affirmed applies to "all persons." *Id.* § 1304(b)(1). Thus, when Congress adopted Section 1304(f)'s exhaustion requirement as part of its 2022 amendments to Section 1304, it made the exhaustion requirement specifically applicable to the lone category of criminal jurisdiction that Congress has affirmed that Tribes may exercise over non-Indians.

II. Congress Has Not Authorized This Court to Adjudicate Petitioner's STCJ Claims Under the *National Farmers* Common Law Doctrine.

Despite the express statutory remedy provided by Congress barring his present petition, Petitioner contends that he is entitled to relief via an additional, implied cause of action under the doctrine of *National Farmers Union Insurance Companies v. Crow Tribe of Indians*, 471 U.S. 845, 857 (1985). Pet. at 3 n.3. Petitioner is incorrect. Because Congress has provided the express procedures and conditions under which tribal court defendants may challenge their STCJ prosecution, the common law doctrine recognizing that "whether a tribal court has exceeded the lawful limits of its jurisdiction" is a federal question for purposes of 28 U.S.C. § 1331, *Nat'l Farmers*, 471 U.S. at 857, does not apply. *See Am. Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410, 424 (2011) ("The test for whether congressional legislation excludes the declaration of federal common law is simply whether the statute speaks directly to the question at issue.")

(quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978) (quotation marks omitted)).

Here, Congress has spoken directly to the question at issue, and no evidence exists that Congress nevertheless intended that parties subject to a tribe's STCJ authority could also challenge tribal court jurisdiction under the *National Farmers* doctrine. To the contrary, on its face the statute provides the exclusive means by which a tribal court defendant may challenge the Nation's exercise of jurisdiction: "After a defendant has been sentenced by a participating tribe, the defendant may file a petition for a writ of habeas corpus in a court of the United States under [25 U.S.C. §] 1303." 25 U.S.C. § 1304(f)(1). *See also id*. § 1304(f)(2) ("An application for a writ of habeas corpus … shall not be granted unless" the applicant complies with the statutory exhaustion rules).

The history of the Indian Civil Rights Act, *id.* §§ 1301–1303 ("ICRA"), further demonstrates that Congress intended for the habeas corpus remedy to be the exclusive avenue to challenge a Tribe's exercise of STCJ authority. Enacted in 1968, ICRA made applicable to Tribal governments many of the protections of the United States Constitution's Bill of Rights. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 57 (1978). The statute also provided a federal court remedy for individuals claiming violations of that Act: "The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe." 25 U.S.C. § 1303.

The federal courts have long recognized that this statutory habeas corpus remedy constitutes the sole means by which a party may litigate an alleged ICRA violation in federal court. In *Santa Clara Pueblo*, a tribal member sought declaratory and injunctive relief in federal court to challenge her Tribe's enrollment criteria, under which her children were ineligible for

tribal citizenship, under ICRA's equal protection clause. 436 U.S. at 51. After conducting a searching inquiry into ICRA's legislative history and the "Indian sovereignty … backdrop against which the … statut[e] must be read," *id.* at 60 (alteration in original), the Court determined that "the structure of the statutory scheme and the legislative history of Title I suggest that Congress' failure to provide remedies other than habeas corpus was a deliberate one," *id.* at 61. And while the Court acknowledged that it is within Congress's power to provide broader or additional remedies under the Act, it held unequivocally that "unless and until Congress makes clear its intention to permit the additional intrusion on tribal sovereignty that adjudication of such actions in a federal forum would represent, we are constrained to find that § 1302 does not impliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers." *Id*. at 72. *See also*, *e.g.*, *Walton v. Tesuque Pueblo*, 443 F.3d 1274, 1278 (10th Cir. 2006) ("[T]he ICRA does not create a private cause of action against a tribal official. The only exception is that federal courts do have jurisdiction under the ICRA over habeas proceedings." (citations omitted)).

Nothing in the text or history of STCJ indicates that Congress intended for a different result to obtain with respect to challenges to STCJ under Section 1304. To the contrary, "when Congress enacts statutes," courts must presume that Congress was "aware of [the United States Supreme] Court's relevant precedents." *Ysleta Del Sur Pueblo v. Texas*, 596 U.S. 685, 700 (2022). *See also United States v. Garcia*, 74 F.4th 1073, 1125 (10th Cir. 2023) ("[The United States Supreme Court] normally assume[s] that Congress is aware of relevant judicial precedent' when it enacts a new statute." (quoting *Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 233 (2022)). In enacting STCJ, Congress was surely aware that, for more than 40 years, the Supreme Court had found ICRA's habeas corpus provision to be the exclusive means of enforcing the Act's

provisions in federal court. Rather than choosing to depart from ICRA's established framework, Congress explicitly chose to adopt it, providing that tribal court defendants seeking to challenge their Section 1304 convictions, including on jurisdictional grounds, must do so through ICRA's pre-existing habeas corpus mechanism. *See* 25 U.S.C. § 1304(f). There is no warrant for this Court to craft a common law right to challenge STCJ prosecutions. Congress has provided an express mechanism for such challenges.

III. Petitioner's Contention that the Charges Pending Against Him Exceed the Tribe's Jurisdiction Under Section 1304 is Premature Because the Facts and Issues Have Not Been Developed in the MCN District Court.

Petitioner ultimately contends that this Court must intervene before he has raised his jurisdictional challenge or the MCN District Court has adjudicated the charges against him because "it is clear no covered crime … was committed" and the Nation accordingly "lacks jurisdiction over Petitioner." Pet. at 10. As explained above, Congress did not proscribe an exception to the exhaustion requirement simply because a tribal court defendant contends that the pending prosecution exceeds the scope of tribal jurisdiction. 25 U.S.C. § 1304(f). Instead, before seeking relief in federal court he must submit his jurisdictional challenges to the tribal court in the first instance. *See generally Nat'l Farmers*, 471 U.S. at 856 (Congress's "policy of supporting tribal self-government and self-determination … favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge." (footnote omitted)).

Nor is it even possible for this Court to evaluate at this stage whether the alleged offense falls within the Nation's STCJ authority because the relevant facts have yet to be developed in MCN District Court. As *National Farmers* recognized:

> the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed. The risks of the kind of

> "procedural nightmare" that has allegedly developed in this case will be minimized if the federal court stays its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made. Exhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review.

Id. at 856–57 (footnotes omitted). *See also Norton v. Ute Indian Tribe of the Uintah & Ouray Rsrv.*, 862 F.3d 1236, 1245 n.3 (10th Cir. 2017) ("A key rationale underlying the tribal exhaustion requirement is to provide federal courts with 'the benefit of a full factual record on the relevant issues and the benefit of tribal court expertise.'" (quoting *Thlopthlocco Tribal Town v. Stidham*, 762 F.3d 1226, 1237 (10th Cir. 2014)).

Although the *National Farmers* doctrine does not apply here because Congress has imposed an express statutory exhaustion rule for challenges by tribal court defendants to the exercise of STCJ, *supra* at 11–13, the policies articulated by the *National Farmers* court fully obtain. Pursuant to the MCN criminal procedure code, the Prosecutor initiates a prosecution by filing a criminal Complaint against the Defendant. MCN Code, tit. 14 § 1-401(A). However, in a typical prosecution that Complaint will not contain a detailed statement or assessment of the underlying jurisdictional basis for the prosecution. Rather, it will set forth the names of the Defendant and any victims of or witnesses to the alleged offense, identify the criminal offense that the Defendant is alleged to have committed, and a "written statement describing in ordinary and plain language the facts of the offense alleged to have been committed including a reference to the time, date, and place, as nearly as may be known." *Id.* § 1-401(B)(4). Discovery of relevant materials from the Prosecution and the Defense follows. *Id.* § 1-408(E). In Petitioner's case, at the current stage, there exists only an allegation that he has committed an offense against the laws of the Nation, and that this offense satisfies STCJ's jurisdictional requirements.

The facts needed to sustain that allegation thus are still in development and are not a part of the record in this case. Indeed, Petitioner acknowledges that the lack of a fully developed factual record in the MCN District Court limits his ability to substantiate his claims in this action. *See* Pet. at 2 n.2 ("Petitioner strongly contends that his actions on December 18, 2023 were reasonable and did not violate Tribal (or any) criminal statutes. However, any statements Petitioner makes in support of this petition could be used by MCN in connection with his *ultra vires* prosecution."). But the absence of a tribal court record is no less prejudicial to the Nation Officials' ability to rebut Petitioner's claims. The Nation's court system accordingly must have the opportunity to review those facts and Petitioner's jurisdictional arguments before they can be considered by this Court. This is precisely what Congress mandated when it authorized tribal court defendants to challenge their sentence under STCJ through the writ of habeas corpus.

IV. Until the Petitioner Has Been Convicted by the MCN District Court and Exhausted All Available Remedies in the Tribal Court, Any Amendments to Petitioner's Complaint Would Be Futile.

Pursuant to Local Rule 7.1(o), the Nation Officials respectfully submit that, until the Petitioner has satisfied Section 1304(f)'s requirements, any amendments to Petitioner's complaint would be futile. Congress has spoken, and unless and until Petitioner has been convicted by the Tribal Court and has exhausted all remedies available to him in that forum, this Court has no power to grant him the relief that he seeks.

CONCLUSION

For the foregoing reasons, the Nation Officials respectfully request that the Court dismiss this matter without prejudice, or, at a minimum, stay these proceedings until the statutory prerequisites for seeking habeas relief under 25 U.S.C. § 1304(f) have been satisfied.

Dated: April 30, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on April 30, 2024, I electronically transmitted the above and foregoing document to the Clerk of the United States District Court for the Eastern District of Oklahoma using the ECF System for filing and transmittal of a Notice of Electronic Filing to:

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