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

MUSCOGEE (CREEK) NATION, a federally recognized Indian tribe, *Plaintiff*, v. WADE FREE, in his official capacity as Director, Oklahoma Department of Wildlife Conservation, and RUSSELL COCHRAN, in his official capacity as special prosecutor employed by the Governor, *Defendants*.	)	Case No. 26-cv-00003-CVE-JFJ

DEFENDANTS' JOINT MOTION TO DISMISS PLAINTIFF'S COMPLAINT AND BRIEF IN SUPPORT

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Defendants Wade Free and Russell Cochran, sued in their official capacities as officers of the State of Oklahoma (collectively, "Defendants" or the "State"), file this Joint Motion to Dismiss the Complaint of Plaintiff, the Muscogee (Creek) Nation ("Nation") (Doc. 2), along with the following Brief in Support.

INTRODUCTION

This lawsuit represents the latest effort by Oklahoma's tribes to challenge the State's regulatory, civil, and criminal authority across virtually every aspect of its affairs by seeking to expand the reach of *McGirt v. Oklahoma*, 591 U.S. 894 (2020), well beyond the United States Supreme Court's express holding. Indeed, using only the undefined term "Creek Reservation" throughout their filings,[1] the Nation generally asks the Court to find that the definition of "Indian country," as defined in 18 U.S.C. § 1165 and construed under *McGirt*, is determinative of *any* question regarding the appropriate intersection of State and tribal jurisdiction – with the State's authority to regulate Indians, for *any* purpose – ending at the outer boundary of Indian country *unless Congress has expressly stated otherwise*. Doc. 2 at ¶ 5. But that is simply not the law. "State sovereignty does not end at a reservation's border." *Nevada v. Hicks*, 533 U.S. 353, 361 (2001).

And as the U.S. Supreme Court subsequently held in *Oklahoma v. Castro-Huerta*, 597 U.S. 629 (2022), the presumption is exactly the opposite: "[A]s a matter of state sovereignty, a State has jurisdiction over all of its territory, including Indian country," and "the default is that States have criminal jurisdiction in Indian country unless that jurisdiction is *preempted*." *Id.* at 636, 638, 653 (emphasis in original). Thus, "States do not need a permission slip from Congress to exercise their

[1] By contrast, the State distinguishes between "fee lands" and "trust lands" in its filings in an attempt to provide clarity to the Court's analysis. Even still, courts often use imprecise language. Fee lands are sometimes referred to as "off-reservation," "unrestricted," "fee-patented lands," or "non-Indian lands." Trust lands are sometimes referred to as "on-reservation," "restricted," "tribal lands," or "Indian lands." But regardless of terminology, the specific nature of the land at issue, including ownership and occupancy, is critical to this analysis.

sovereign authority." *Id.* at 653. Accordingly, contrary to the Nation's position that State jurisdiction in Indian country must be expressly authorized by Congress, a State's jurisdiction in Indian country is presumed and may be preempted only: "(i) by federal law under ordinary principles of federal preemption, or (ii) when the exercise of state jurisdiction would unlawfully infringe on tribal self-government." *Id.* at 638.

Founded on this faulty premise, the Nation filed this action seeking broad declaratory and injunctive relief that would categorically prohibit Defendants from enforcing ***any*** state wildlife laws and regulations against both its own tribal members, as well as members of other tribes in eastern Oklahoma (what the Complaint refers to as "Five Tribe citizens") ***anywhere*** within the Nation's Indian country – even on fee lands historically and presently managed by the State. Doc. 2, ¶¶ 1-2. The Nation sued each of the Defendants in his official capacity. *Id.*, ¶¶ 23-24. The Nation seeks a declaratory judgment that its tribal members, as well as all Five Tribe citizens, hold a special right to hunt and fish free of the State's regulations and enforcement authority anywhere within its Indian country. *Id.* at 15, ¶¶ A, C. And further, the Nation seeks an order enjoining Defendants from enforcing the State's "civil regulatory or criminal jurisdiction" over its tribal members, or any Five Tribe citizens," within its Indian country *Id.* at 15-16, ¶¶ B, D.

Multiple independent legal grounds foreclose this suit. ***First***, the Nation's claims are barred by the State's sovereign immunity under the Eleventh Amendment, which has not been waived or abrogated. The claims do not fit within the narrow *Ex parte Young* exception because, as in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 268-69 (1997), the suit "is the functional equivalent of a quiet title action which implicates special sovereignty interests" since, if the declaratory and injunctive relief sought by the Nation were granted, "substantially all benefits of ownership and control would shift from the State to the [Nation]."

Second, the Nation's claims are barred by equitable principles, including the doctrine of laches, as articulated in *City of Sherrill, New York v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005). After acquiescing to the State's uninterrupted and near-exclusive regulation of hunting and fishing within its borders for purposes of wildlife conservation for over a century, during which time the State created "justifiable expectations" as to its jurisdiction and regulatory authority, the Nation should be precluded from now seeking to revive its long-dormant claims to any special right to hunt and fish free from any State regulation.

Third, the Nation lacks Article III standing to assert claims on behalf of non-member Indians, including all "Five Tribe citizens," which includes members of the other non-Plaintiff tribes who are signatories to the Five Tribe Wildlife Management Reciprocity Agreement ("Reciprocity Agreement") (Doc. 2-1). Additionally, the Nation has not established the existence of a case or controversy between the Nation and Mr. Cochran.

Fourth, the Nation fails to plead a cognizable cause of action entitling the State to dismissal under Rule 12(b)(6). For the same reasons articulated in the State's Response to the Motion for Preliminary Injunction ("Response Brief"), the Nation cannot show that the State's regulatory authority over hunting and fishing in the State has been preempted by federal law or that the enforcement of State wildlife laws or regulations unlawfully infringes on the Nation's right of tribal self-government. No treaty applicable here expressly reserves *any* hunting and fishing rights to the Nation (or its members) as required by *Castro-Huerta*, 597 U.S. at 654. And no decision of the U.S. Supreme Court has ever recognized such implicit rights on fee lands under a theory of inherent tribal sovereignty. *See also N. Arapahoe Tribe v. Hodel*, 808 F.2d 741, 748 (10th Cir. 1987) (tribes' implied rights to hunt and fish are "rights of possession" that are "derived from their status as occupants of the land"). To the contrary, the Supreme Court has expressly rejected the position that tribal members hold "a special right, nonexclusive but free of state regulation" on alienated lands no longer held in

trust for the tribe. *See Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 763-64 (1985). Even if the Nation could establish some implicit treaty-based hunting and fishing rights based on possession or occupancy, those rights vanish when the land is alienated.

The defects in the Complaint, individually and cumulatively, are not curable. The Nation's Complaint should be dismissed in its entirety under Rules 12(b)(1) and 12(b)(6).

FACTUAL BACKGROUND

Since statehood, the State of Oklahoma has exercised undivided criminal and civil jurisdiction in a non-discriminatory manner over all persons within its borders, to include many aspects of the affairs of its citizenry, Indian and non-Indian alike. This includes protecting and conserving the State's wildlife and other natural resources consistent with the inherent authority the Supreme Court has repeatedly affirmed States have to protect and conserve wild animal life within their borders. *See Hughes v. Oklahoma*, 441 U.S. 322, 338–39 (1979). And for over a century, ODWC has maintained a comprehensive regulatory scheme over wildlife conservation, hunting, and fishing activities on all fee lands located within its borders, including those occurring in nearly half the State now known as "Indian country," without regard to tribal citizenship. *See Herrera v. Wyoming*, 587 U.S. 329, 339-40 (2019) (holding that a State may "impose reasonable and nondiscriminatory regulations on an Indian tribe's treaty-based hunting, fishing, and gathering rights on state land when necessary for conservation").[2] This includes fee lands within the "Creek Reservation."

By the turn of the twentieth century, Oklahoma had already experienced dramatic losses in many native wildlife species.[3] In response to these early declines and the need for coordinated

[2] The State does not now seek, nor has it ever sought to Defendants' knowledge, to enforce the Code on lands held in trust by the United States for the benefit of any Indian tribe ("trust lands").

[3] "Oklahoma had already lost several of its wildlife species, including the grizzly bear (*Ursus arctos*), gray wolf (*Canis lupus*), passenger pigeon (*Ectopistes migratorius*), Eskimo curlew (*Numenius borealis*), Carolina parakeet (*Conuropsis carolinensis*), ivory-billed woodpecker (*Campephilus principalis*), elk (*Cervus elaphus*), and American bison (*Bison bison*)." OKLA. HISTORICAL SOCIETY, *The Encyclopedia of Oklahoma History and Culture: Endangered Species*, https://tinyurl.com/ms9dueka (last visited Dec. 9, 2025).

management, just two years after statehood, Oklahoma created what is now the ODWC (then known as the Game and Fish Department). *See* OKLA. DEP'T OF WILDLIFE CONSERVATION, About the ODWC, https://www.wildlifedepartment.com/about (last visited Dec. 18, 2025). Since at least 1909, the State has maintained a comprehensive regulatory system governing hunting, possession, sale, and transportation of wildlife, including restrictions on methods of take, seasons, bag limits, and conduct on public and private lands. *See* S.B. 2, 1909 O.S.L. ch. 44 (Mar. 8, 1909).

The conservation of Oklahoma's wildlife, and the right to responsibly hunt and fish, was so important to the people of Oklahoma that, in 1955, Oklahoma voters made the ODWC and its Commission a *constitutional body*, specifically tasked with "the control, management, restoration, conservation and regulation of the bird, fish, game and wildlife resources of the State, including the purchase or other acquisition of property for said purposes, and for the administration of the laws pertaining thereto …" OKLA. CONST. art. XXVI, §§ 1, 4 (added by Laws 1955, SJR 22, Section 1, State Question 374, Legislative Referendum 115, adopted at election held July 3, 1956). In 1974, the Legislature enacted the "Oklahoma Wildlife Conservation Code," 29 O.S. §§ 1-101 *et seq.* (the "Code"), conferring certain powers and duties on its Director, 29 O.S. § 3-105, including one requiring all hunters to carry State licenses, 29 O.S. § 4-101(D). And in 2008, Oklahoma voters directly added Article II, Section 36 to the Oklahoma Constitution, providing in relevant part:

> *All citizens of this state* shall have a right to hunt, fish, trap, and harvest game and fish, subject only to reasonable regulation as prescribed by the Legislature and the Wildlife Conservation Commission. *The Wildlife Conservation Commission shall have power and authority to approve methods, practices and procedures for hunting, trapping, fishing and the taking of game and fish.*

OKLA. CONST. art. II, § 36 (added by State Question No. 742, Legislative Referendum No. 345, Nov. 4, 2008) (emphasis added). That language unequivocally applies to all citizens, and there is no carveout for Indians and/or "Indian country."

Under the Code, the State requires everyone from the age of 18 to 65 to obtain an annual State license to hunt and/or fish within Oklahoma, subject to certain exemptions. *See* 29 O.S. § 4-112 (hunting); § 4-110 (fishing). One of the exemptions to the licensing requirement is for hunting and fishing by owners or tenants "on land owned or leased by them." 29 O.S. § 4-112(B)(5) (hunting); 29 O.S. § 4-110(B)(4) (fishing). The Code also provides that "no person may hunt or take by any means or method upon the land of another without the consent of the owner, lessee or occupant of such land." 29 O.S. § 5-202(A). The State also regulates methods of take, seasons, and bag limits, for purposes of conservation. For example, ODWC regulations make it "unlawful to place and/or hunt over bait on lands owned or managed" by ODWC. OKLA. ADMIN. CODE § 800:3-1-21.

It was not until 2022 that the Nation enacted its comprehensive Wildlife Conservation Code, MCNCA tit. 23, ch. 2 (the "Conservation Code"), which repealed and replaced its Hunting and Fishing Code that had been in place since approximately 2005. The Conservation Code, and its associated regulations, "substantially mirrors that of the ODWC on a provision-by-provision basis." Doc. 2 at ¶ 21. And the Nation's laws today recognize, as they have since 2005, that its jurisdiction is limited to "hunting, fishing, trapping, [and] gathering … on ***lands of the Muscogee (Creek) Nation***, whether held in fee simple title or in trust, and on lands, the alienation of which is restricted by Tribal or federal law, of citizens of the Muscogee (Creek) Nation" (*i.e.*, ***trust lands***). 23 MCNCA § 2-104(A) (emphasis added); *see also* 23 MCNCA § 2-103(A) (tribal laws apply only "on certain lands" within its boundaries). The Nation contends that the State is violating its sovereignty and rights of self-government by enforcing State hunting and fishing regulations against tribal members and Five Tribe citizens. Doc. 2 at ¶¶ 25-27. But there is no assertation by the Nation that any of the conduct at issue is occurring on the Nation's trust lands where the Nation claims jurisdiction, as opposed to fee lands, including wildlife management areas owned or managed by the State.

ARGUMENT AND AUTHORITIES

The Nation's claims are subject to dismissal under FED.R.CIV.P. 12(b)(1) and 12(b)(6). To survive a motion to dismiss under FED.R.CIV.P. 12(b)(1), "a plaintiff must plausibly allege all jurisdictional elements." *Brownback v. King*, 592 U.S. 209, 217 (2021). In addition, a plaintiff bears the burden of overcoming any threshold jurisdictional requirements, including Article III standing. *See Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 98 (1984) ("the principle of sovereign immunity is a constitutional limitation on the federal judicial power established in Art. III"); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) ("The party invoking federal jurisdiction bears the burden of establishing these [standing] elements."). After all, "a court cannot issue a ruling on the merits 'when it has no jurisdiction' because 'to do so is, by very definition, for a court to act ultra vires.'" *Brownback*, 592 U.S. at 218 (citation omitted).

To survive dismissal under Rule 12(b)(6), a plaintiff must allege "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also* FED.R CIV.P. 12(b)(6). While courts must view a complaint in a light most favorable to the nonmoving party, drawing all reasonable inferences therefrom, courts need not accept as true "labels and conclusions," legal characterizations, unwarranted deductions of fact, or "naked assertions devoid of further factual enhancement." *Iqbal*, 556 U.S. at 678-679 (citation omitted). In other words, a court need not "swallow the plaintiff's invective hook, line and sinker; bald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like need not be credited." *Aulson v. Blanchard*, 83 F.3d 1, 3 (1st Cir. 1996).

When a complaint presents a question of law and "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations," the complaint "must be dismissed, without regard to whether it is based on an outlandish legal theory or on a close but ultimately unavailing one." *Neitzke v. Williams*, 490 U.S. 319, 327 (1989) (citation omitted). Rule

12(b)(6) "authorizes a court to dismiss a claim on the basis of a dispositive issue of law . . . ." *Id.* at 326; *see also Wyoming v. United States*, 279 F.3d 1214, 1222 (10th Cir. 2002). Here, dismissal is required under Rule 12(b)(1) because this Court lacks subject matter jurisdiction to decide the merits of the Nation's suit and/or under Rule 12(b)(6) because the Nation cannot assert a set of facts that would entitle it to plausible relief.

I. THIS SUIT IS BARRED BY SOVEREIGN IMMUNITY.

It is so well-established to be beyond dispute that "the States, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power," including "the authority to provide for the public health, safety, and morals." *Dodger's Bar & Grill, Inc. v. Johnson Cnty. Bd. of Cnty. Comm'rs*, 32 F.3d 1436, 1441 (10th Cir. 1994) (citations omitted); *see also Torres v. Lynch*, 578 U.S. 452, 457-58 (2016) ("State legislatures, exercising their plenary police powers, are not limited to Congress's enumerated powers; and so States have no reason to tie their substantive offenses to those grants of authority."). The Supreme Court has likewise "long recognized the States' interests in conservation and protection of wild animals as legitimate local purposes similar to the States' interests in protecting the health and safety of their citizens." *Hughes*, 441 U.S. at 337 (citing *Firemen v. Chicago*, R. I. & P. R. Co., 393 U.S. 129 (1968)); *see also Kleppe v. New Mexico*, 426 U.S. 529, 545 (1976) ("Unquestionably the States have broad trustee and police powers over wild animals within their jurisdiction.").

Consistent with the Eleventh Amendment, "each State is a sovereign entity in our federal system" and "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996). Indian tribes and their members are bound by the Eleventh Amendment to the same degree as individuals. *See Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779-782 (1991); *Coeur d'Alene*, 521 U.S. at 268-69. Indeed, whereas here the plaintiff is a federally recognized tribe, the suit is "especially troubling" in its impact

on state sovereignty. *Lacano Investments, LLC v. Balash*, 765 F.3d 1068, 1075 (9th Cir. 2014) (quoting *Coeur d'Alene*, 521 U.S. at 282). Sovereign immunity "is a threshold jurisdictional issue," limiting the Court's authority under Article III to hear a claim. *Brockman v. Wyoming Dep't of Family Services*, 342 F.3d 1159, 1163 (10th Cir. 2003); *see also Pennhurst State Sch. & Hosp.,* 465 U.S. at 98 ("In short, the principle of sovereign immunity is a constitutional limitation on the federal judicial power established in Art. III.").

The Nation is likely to contend this suit is permissible under the *Ex parte Young* exception. While the "Eleventh Amendment generally bars suits against a state in federal court commenced by citizens of that state or citizens of another state," a party may file "suit against a state official in federal court seeking only prospective, equitable relief for violations of federal law." *Timpanogos Tribe v. Conway*, 286 F.3d 1195, 1205 (10th Cir. 2002). The Tenth Circuit has held that the district court must conduct "the 'straightforward [or so one might hope] inquiry' whether the relief requested is 'properly' characterized as prospective or is indeed the functional equivalent of impermissible retrospective relief." *Hill v. Kemp*, 478 F.3d 1236, 1259 (10th Cir. 2007) (quoting *Verizon Maryland v. Public Service Commission of Maryland*, 535 U.S. 635 (2002)). This test was described in the Supreme Court's decision in *Coeur d'Alene*, was clarified in *Verizon Maryland*, and currently requires the court to determine "whether the relief sought by [plaintiff] is prospective, not just in how it is captioned but also in its substance." *Id.*[4] In sum, the *Ex parte Young* exception does not apply to suits that are the equivalent of actions to quiet title and implicate special sovereignty interests. *Coeur d'Alene*, 521 U.S. at 281-88.

[4] The decision in *Coeur d'Alene* involved a splintered opinion. Justice Kennedy announced the judgment of the Court and delivered the opinion with respect to Parts I, II-A, and III, joined by Justice O'Connor's partial concurrence. Soon after it was issued, the Tenth Circuit adopted a "four-part framework" for applying the *Ex parte Young* doctrine, consistent with *Coeur d'Alene*, which as the fourth and final step considered "whether the suit rises to the level of implicating 'special sovereignty interests.'" *Timpanogos Tribe*, 286 F.3d at 1205 (citing *Elephant Butte Irr. Dist. of New Mexico v. Dep't of Interior*, 160 F.3d 602, 609 (10th Cir. 1998)). And the Tenth Circuit applied the *Coeur d'Alene* "special sovereignty interest" test in *ANR Pipeline Co. v. Lafaver*, 150 F.3d 1178, 1193 (10th Cir. 1998), finding

In *Coeur d'Alene*, the tribe alleged an ongoing violation of its property rights in contravention of federal law, originally seeking to quiet title and for broad declaratory and injunctive relief very similar to that which is sought by the Nation here:

> The suit named the State of Idaho, various state agencies, and numerous state officials in their individual capacities. In addition to its title claims, the Tribe further sought a declaratory judgment to establish its entitlement to the exclusive use and occupancy and the right to quiet enjoyment of the submerged lands as well as a declaration of the invalidity of all Idaho statutes, ordinances, regulations, customs, or usages which purport to regulate, authorize, use, or affect in any way the submerged lands. Finally, it sought a preliminary and permanent injunction prohibiting defendants from regulating, permitting, or taking any action in violation of the Tribe's rights of exclusive use and occupancy, quiet enjoyment, and other ownership interest in the submerged lands ….

521 U.S. at 265. The district court dismissed the claims against the State and its agencies as barred by the Eleventh Amendment, as well as the claims to quiet title and for declaratory judgment against State officials, but permitted the claim for injunctive relief against State officials to proceed. *Id.*, at 265-66. The Ninth Circuit reversed, in part, holding that both the declaratory and injunctive relief claims could proceed against State officials to preclude continuing violations of federal law. *Id.* The Supreme Court reversed in part, finding that "this suit … falls on the Eleventh Amendment side of the line, and Idaho's sovereign immunity controls." *Id.*, at 281.

According to the Court, "[t]o interpret *Young* to permit a federal-court action to proceed in every case where prospective declaratory and injunctive relief is sought against an officer, named in his individual capacity, would be to adhere to an empty formalism and to undermine the principle, reaffirmed … in *Seminole Tribe,* that Eleventh Amendment immunity represents a real limitation on a

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that the power to tax of the State of Kansas represented such an interest. After the Supreme Court revisited the issue in *Verizon Maryland*, the Tenth Circuit in *Hill*, 478 F.3d at 1259, recognized that this fourth step had been abrogated, but found that the court must be satisfied that the relief sought is prospective in both name and substance. To be clear, "[t]he Supreme Court did not overrule *Coeur d'Alene* by failing to mention that exception [for suits that are the equivalent of actions to quiet title and implicate special sovereignty interests] in *Verizon Maryland*." *Muscogee (Creek) Nation v. Rollin*, 119 F.4th 881, 890 (11th Cir. 2024).

federal court's federal-question jurisdiction." *Id.* at 270. A majority of the Court found that "this case is unusual in that the Tribe's suit is the functional equivalent of a quiet title action which implicates special sovereignty interests." *Id.* If the declaratory and injunctive relief sought by the tribe were granted, enjoining the State from "regulating, permitting, or taking any action in violation of the Tribe's rights of exclusive use and occupancy," then "substantially all benefits of ownership and control would shift from the State to the Tribe." *Id.*, at 282.

> This is especially troubling when coupled with the far-reaching and invasive relief the Tribe seeks, relief with consequences going well beyond the typical stakes in a real property quiet title action. The suit seeks, in effect, a determination that the lands in question are not even within the regulatory jurisdiction of the State. The requested injunctive relief would bar the State's principal officers from exercising their governmental powers and authority over the disputed lands and waters. The suit would diminish, even extinguish, the State's control over a vast reach of lands and waters long deemed by the State to be an integral part of its territory. To pass this off as a judgment causing little or no offense to Idaho's sovereign authority and its standing in the Union would be to ignore the realities of the relief the Tribe demands.

Id. (emphasis added). Indeed, in her concurrence, which resulted in the Court's opinion and judgment, Justice O'Connor rejected any reformulation of the *Ex parte Young* test, but held that "[w]here a plaintiff seeks to divest the State of all regulatory power over [certain] lands—in effect, to invoke a federal court's jurisdiction to quiet title to sovereign lands—it simply cannot be said that the suit is not a suit against the State." *Coeur d'Alene*, 521 U.S. at 296 (O'Connor, J., concurring). Thus, because the tribe's suit was the functional equivalent of an action to quiet title, it was barred by the Eleventh Amendment and not saved by the *Ex parte Young* exception.

The purpose of a "quiet title action is to determine the actual owner of a property and put any adverse claims to rest." *Amoorpour Tr. of Amoorpour Family Tr. v. Kirkham*, 2023 OK 120, ¶ 38, 543 P.3d 677, 685. Although the Nation does not expressly seek to "quiet title" to the alienated fee lands found in "Indian country," which now represent 43% of Oklahoma and most of the eastern half of the State, the requested declaratory and injunctive relief certainly implicates "actual ownership" and is nearly identical to that ultimately sought by the tribe in *Coeur d'Alene*, which the Court found effectively

sought to divest the State of all regulatory power over sovereign fee lands and, therefore, is the "functional equivalent" of an action to determine rights of ownership and possession (*i.e.*, hunting and fishing rights). Specifically, the Nation seeks to enjoin the State from "exercising or directing others to exercise civil regulatory or criminal jurisdiction over Nation citizens hunting and fishing within the Creek Reservation." Doc. 2 at 15, ¶¶ B, D (regarding Five Tribe citizens); *cf. Coeur d'Alene*, 521 U.S. at 265. In that regard, this case is distinguishable from *Timpanogos Tribe*, where the Tenth Circuit found that the tribe was not barred from suing the State of Utah under the Eleventh Amendment, since unlike the plaintiff in *Coeur d'Alene*, the tribe there sought "nothing more than prospective, non-monetary, injunctive relief as to its hunting, fishing, and gathering rights within the ***Indian-controlled lands*** of the Uintah Valley Reservation." 286 F.3d at 1199, 1205-06 (emphasis added).

The Nation's suit here clearly implicates the State's special sovereignty interests. Regardless of how it is styled, the lawsuit—*in substance*—seeks to reclaim exclusive wildlife jurisdiction over fee lands that have been within State control for more than a century. It is not limited to hunting, fishing, and gathering rights within "*Indian-controlled lands*." Instead, the Nation seeks to enjoin the State from enforcing its regulations throughout the Creek Reservation, the vast majority of which are fee lands. The effect of this lawsuit would burden the State's police power and shift that power away from the State. Just as in *Coeur d'Alene*, this "troubling" relief would "diminish, even extinguish, the State's control over a vast reach of lands and waters long deemed by the State to be an integral part of its territory" since statehood and "substantially all benefits of ownership and control would shift from the State to the [Nations]." 521 U.S. at 282. Under these circumstances, "it simply cannot be said that the suit is not a suit against the State." *Id.*, at 296 (O'Connor, J., concurring). Like *Coeur d'Alene,* "this suit … falls on the Eleventh Amendment side of the line, and [Oklahoma's] sovereign immunity controls." *Id.*, at 281. Accordingly, this suit must be dismissed in its entirety because it is barred by the State's sovereign immunity.

Additionally, this suit challenges the very act of prosecution, which is squarely foreclosed by absolute prosecutorial immunity. *Compare* Doc. 2 at ¶ 24 (alleging that Mr. Cochran is without authority to "pursue state-issued citations and criminal misdemeanor charges" against Indians or to "prosecute offenses against the law of the state"), *with Nielander v. Bd. of Cnty. Comm'rs of Cnty. of Republic, Kan.*, 582 F.3d 1155, 1164 (10th Cir. 2009). As the Tenth Circuit has made clear: "[p]rosecutors are entitled to absolute immunity for their decisions to prosecute, their investigatory or evidence-gathering actions, their evaluation of evidence, their determination of whether probable cause exists, and their determination of what information to show the court." *Nielander*, 582 F.3d at 1164; *see also Younger v. Harris*, 401 U.S. 37, 46 (1971) ("No citizen or member of the community is immune from prosecution, in good faith, for his alleged criminal acts. The imminence of such a prosecution even though alleged to be unauthorized and hence unlawful is not alone ground for relief in equity . . . ." (citation omitted)). That absolute prosecutorial immunity does not allow courts or litigants to second-guess prosecutorial decisions—even if those decisions are ultimately dismissed for jurisdictional reasons. Thus, all claims against the Special Prosecutor must be dismissed for this independent reason.

II. THE NATION'S CENTURY-LONG ACQUIESCENCE TO STATE AUTHORITY BARS THE RELIEF THEY NOW SEEK UNDER EQUITABLE PRINCIPLES SUCH AS LACHES PURSUANT TO *SHERRILL*.

Even assuming *arguendo* that tribal sovereignty might once have been asserted to contest the State's jurisdiction in the field of wildlife conservation, that authority has long since gone unclaimed in this field and is now barred by equitable principles as articulated in *Sherrill,* 544 U.S. at 197. According to the Supreme Court, "long acquiescence may have controlling effect on the exercise of dominion and sovereignty over territory," and "[w]hen a party belatedly asserts a right to present and future sovereign control over territory, longstanding observances and settled expectations are prime considerations." *Id.* at 218. Indeed, "[t]he longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and in land use" creates "justifiable

expectations." *Id.* at 215 & n.9. Equitable constraints on asserting stale claims, such as the doctrine of laches, "have deep roots in our law, and [the U.S. Supreme] Court has recognized this prescription [i.e., that the passage of time can preclude relief] in various guises." *Id.* at 217 (citation omitted). Indeed, in downplaying the serious concerns raised by the State about the potential unintended consequences of its decision on civil and regulatory law, the majority in *McGirt* made clear that nothing in that decision precluded the State from asserting equitable defenses and procedural bars against future suits by Indian tribes such as this one. *See* 591 U.S. at 935-36 (2020) ("Many other legal doctrines—procedural bars, res judicata, statutes of repose, and laches, to name a few—are designed to protect those who have reasonably labored under a mistaken understanding of the law.").

In *Sherrill*, the Oneida Indian Nation purchased parcels on the open market in 1997 and 1998 within the boundaries of a former reservation and asserted that those parcels were exempt from local property taxation because the tribe's purchases had "reunited" fee title and aboriginal title. 544 U.S. at 202. The Supreme Court rejected that attempt to revive dormant territorial sovereignty, holding that equitable considerations, including laches, foreclosed the tribe's claim that its late-20th-century purchases restored sovereign dominion:

> Given the longstanding, distinctly non-Indian character of the area and its inhabitants, the regulatory authority constantly exercised by New York State and its counties and towns, and the Oneidas' long delay in seeking judicial relief against parties other than the United States, we hold that the Tribe cannot unilaterally revive its ancient sovereignty, in whole or in part, over the parcels at issue. The Oneidas long ago relinquished the reins of government and cannot regain them through open-market purchases from current titleholders.

Id. at 202–03. Or, as the Court later summarized in even sharper terms: "We now reject the unification theory of [the Oneida] and the United States and hold that 'standards of federal Indian law and federal equity practice' preclude the Tribe from rekindling embers of sovereignty that long ago grew cold." *Id.* at 214.

Under *Sherrill*, "'disruptive,' forward-looking claims, a category exemplified by possessory land claims, are subject to equitable defenses, including laches." *Quapaw Tribe of Oklahoma v. Blue Tee Corp.*, 653 F. Supp. 2d 1166, 1192 (N.D. Okla. 2009) (quoting *Sherrill*, 544 U.S. at 217).[5] Laches is applicable where the court finds, in its discretion: "(a) unreasonable delay in bringing suit by the party against whom the defense is asserted and (b) prejudice to the party asserting the defense as a result of this delay." *Jicarilla Apache*, 687 F.2d at 1337-38 (applying the doctrine of laches to bar claims brought by Indian tribe after a delay of four to six years). Specifically, laches and related equitable principles bar a tribe's claims where there exists:

> (1) "longstanding, distinctly non-Indian character of the [disputed land] and its inhabitants"; (2) "regulatory authority constantly exercised by [the] State and its counties and towns"; and (3) a "long delay," usually of decades or more, in seeking relief.

United States v. Osage Wind, LLC, No. 14-CV-704-GKF-JFJ, 2021 WL 3774685, at *12 (N.D. Okla. Aug. 25, 2021).

Each of those three elements is present here. First, as in *Sherrill*, the vast majority of the lands within the former reservation boundaries (95% or more) are fee lands alienated many years ago that are not owned by, or held in trust for, the Nation. *See McGirt*, 591 U.S. at 938 (C.J. Roberts, dissenting) ("fee lands … make up more than 95% of the Creek Nation's former territory"); *Matter of Stroble*, 2025 OK 48, ¶ 1, __ P.3d __ (recognizing that "[a]lmost all (around 95%) of this property is fee land, meaning it is not restricted or held in trust").

[5] Laches is an equitable doctrine that bars untimely claims. The Tenth Circuit has found that Congress made the Oklahoma state statutes of limitations, as well as the parallel doctrine of laches, applicable to Indians of the Five Civilized Tribes by the Act of April 12, 1926, 44 Stat. 240. *See Armstrong v. Maple Leaf Apartments, Ltd.*, 622 F.2d 466, 472 (10th Cir. 1979) (affirming dismissal of Indian's claims on grounds of laches). "Laches may be found … where a party, having knowledge of the relevant facts, acquiesces for an unreasonable length of time in the assertion of a right adverse to his own. A party must exercise reasonable diligence in protecting his rights." *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1337-38 (10th Cir. 1982) (citations omitted).

Second, as demonstrated above, the State has constantly regulated hunting and fishing by all citizens, uniformly applying its wildlife laws and regulations under its Constitution and implementing statutes on all non-trust fee lands for more than a century. The State passed its first wildlife conservation laws regulating hunting and fishing in 1909. *See* S.B. 2, 1909 O.S.L. ch. 44 (Mar. 8, 1909). The Oklahoma Legislature enacted the Code in 1974. The Code requires everyone from the age of 18 to 65 to obtain an annual State license to hunt and/or fish within Oklahoma, subject to certain exemptions. *See* 29 O.S. § 4-112 (hunting); § 4-110 (fishing). The State also regulates methods of take, seasons, and bag limits, for purposes of conservation. For example, ODWC regulations make it "unlawful to place and/or hunt over bait on lands owned or managed" by ODWC. OKLA. ADMIN. CODE § 800:3-1-21. Violations of the Code and ODWC regulations can be punished by fines and/or prosecuted as misdemeanor offenses.

Third, until 2022 or later, the Nation freely acquiesced in the State's longstanding exercise of regulatory authority over hunting and fishing on all non-trust fee lands. For more than 50 years, the State's regulatory framework has included a requirement that all persons not subject to an exemption have a State license. It is only since *McGirt* that the Nation began to interfere with the State's enforcement of the Code and its wildlife regulations on fee lands within Indian country. The Nation first adopted its comprehensive Conservation Code, which supplanted its prior Hunting and Fishing Code, in 2022 in light of *McGirt*. Doc. 2 at ¶ 19; *see also* NCA 22-014, § 1 "Findings" ("The increased jurisdictional authority following the decision of the United States Supreme Court in *McGirt v. Oklahoma* requires the Nation to review its laws," indicating "the need to adopt a more comprehensive wildlife code for enforcement with the Muscogee (Creek) Nation Reservation.") (available at https://static1.squarespace.com/static/681cdef655f05d76e9fd3e36/t/682e36b3a4f7d6700ab64e02/1747859123547/NCA-22-014.pdf). But the Conservation Code contains the same limits to the Nation's jurisdiction as the prior law has since at least 2005—it applies only to hunting and fishing on

trust lands. And the Nation first entered into the Reciprocity Agreement, along with the remaining of the Five Tribes, in July 2024. Doc. 2-1. The Nation delayed **another <u>five</u> years** after *McGirt* was issued to bring the current lawsuit.

The logic applied in *Sherrill* applies with no less force here. Under *Sherrill*, "standards of federal Indian law and federal equity practice" preclude the Nation from suddenly "rekindling embers of sovereignty that long ago grew cold" in order to invalidate long-settled state regulatory authority over its own lands. 544 U.S. at 214. Here, the Nation seeks to upend a century of undisputed State regulation by asking this Court to strip Oklahoma of its authority to apply its neutral wildlife laws to tribal members and other non-member Indians on fee lands long ago alienated. It does so only after statehood, after generations of non-tribal settlement and infrastructure development, and after decades in which Oklahoma alone has borne the legal and fiscal responsibility of wildlife conservation over these areas. That type of belated effort to "unilaterally revive" territorial sovereignty over non-tribal lands is exactly what *Sherrill* forbids. 544 U.S. at 202-03, 214.

The Court should find that the Nation is barred from now claiming, after decades of acquiescence, that Oklahoma's conservation laws do not apply to tribal members on fee lands by equitable principles, such as laches, as articulated by the U.S. Supreme Court in *Sherrill*.

III. THE NATION LACKS STANDING TO ASSERT CLAIMS ON BEHALF OF NON-MEMBER INDIANS AND/OR AGAINST MR. COCHRAN.

The Nation seeks sweeping equitable relief not only for itself, but also on behalf of tribal members and Five Tribe citizens (*i.e.*, non-members). *See* Doc. 2 at ¶¶ 2, 6, 35-36, p. 15-16, ¶¶ B, D. They also seek an injunction against Mr. Cochran, in his capacity as Special Prosecutor, although they do not allege that he is pursuing any claims against tribal members (or non-members) hunting or fishing on the Creek Reservation. *See id.* at ¶¶ 42 (alleging only that Cochran is prosecuting claims "within areas of Oklahoma Indian country covered by" the Reciprocity Agreement, *i.e.*, within the Indian country of non-Plaintiff tribes). The Nation lacks standing to pursue any such claims here.

"Article III of the U.S. Constitution limits the jurisdiction of federal courts to 'Cases' and 'Controversies.'" *Shields Law Grp., LLC v. Stueve Siegel Hanson LLP*, 95 F.4th 1251, 1279 (10th Cir. 2024). Article III standing is a jurisdictional threshold requirement that must be satisfied at the outset of a case. *Id.* "To establish the 'irreducible constitutional minimum' of standing," a party must make three showings: "'(1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'" *Id.*, at 1280. Importantly, it is the plaintiff's burden to establish standing as to each claim asserted. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) ("We have insisted, for instance, that 'a plaintiff must demonstrate standing separately for each form of relief sought.'") (citation omitted). And because "standing is not dispensed in gross," "a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 581 U.S. 433, 439 (2017) (holding that this same principle applies where there are multiple plaintiffs); *see also Thiebaut v. Colorado Springs Utilities*, 455 Fed. Appx. 795, 802 (10th Cir. 2011) (unpublished) (rejecting a plaintiff's invitation to adopt a "standing for one is standing for all" theory).

An injury alleged must be "concrete and particularized," and the threat of that injury must be "actual and imminent, not conjectural or hypothetical." *Petrella v. Brownback*, 697 F.3d 1285, 1293 (10th Cir. 2012) (quoting *Summers v. Earth Island Institute,* 555 U.S. 488, 493 (2009). To be concrete, an injury must be real harm to a legally protected interest, not abstract. *N. Mill St., LLC v. City of Aspen*, 6 F.4th 1216, 1229 (10th Cir. 2021). An injury is particularized only if it affects a party in a personal and individual way. *Id.*

The Nation cannot assert claims on behalf of non-member Indians. As a general matter, legal rights and interests cannot be asserted vicariously. The Supreme Court explained decades ago that a

"plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975).[6] And "Five Tribe citizens," who are not members of the Creek Nation, are the functional equivalent of private individuals for the standing analysis. Indeed, as the Supreme Court has held on multiple occasions, "[f]or most practical purposes," non-member Indians "stand on the same footing as non-Indians resident on the reservation." *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 161 (1980); *see also Thlopthlocco Tribal Town v. Stidham*, 762 F.3d 1226, 1234 (10th Cir. 2014) (emphasis added) (holding that when a Supreme Court decision "refers to 'non-Indians,' the logic of the opinion applies to non-members of a tribe, including other independent Indian tribes"). Indeed, the Nation cannot plausibly argue it is entitled to assert the interests of the Choctaw Nation (or its members) against the State, for example, simply because the Choctaw Nation is a party to the Reciprocity Agreement. Such a notion would no doubt be offensive to the very concept of tribal sovereignty upon which the Nation relies so heavily. Indians are not a monolithic group upon as to whom any tribal entity can assert a concrete legal interest. Accordingly, dismissal of the Nation's claims seeking relief on behalf of "Five Tribe citizens" (*i.e.*, non-member Indians) is not only warranted but required.

Additionally, the Nation has failed to identify a case or controversy that is actual or imminent involving Mr. Cochran. "Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409

[6] The Nation cannot invoke a *parens patriae* exception to standing to overcome this jurisdictional defect. According to the Tenth Circuit, "*parens patriae* standing has been explained on the ground that the plaintiff state is not merely advancing the rights of individual injured citizens, but has an additional sovereign or quasi-sovereign interest . . . ." *Satsky v. Paramount Commc'ns, Inc.*, 7 F.3d 1464, 1469 (10th Cir. 1993) (citation and internal marks omitted). And the *parens patriae* standing exception established "has been narrowly construed." *Quapaw Tribe of Okla. v. Blue Tee Corp.*, 653 F. Supp. 2d 1166, 1178 (N.D. Okla. 2009).

(2013) (holding that whether the government would later target and prosecute plaintiffs for potentially illegal conduct was insufficient to establish standing) (emphasis in original). Standing requires a "credible threat of prosecution." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014). And plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Clapper*, 568 U.S. at 416. Here, the Nation acknowledges that Mr. Cochran has not initiated any prosecutions for conduct by Indians within the Creek Reservation. Doc. 2, at ¶ 42; *see also* Doc. 8 at 2 (refencing only his conduct on "adjacent reservations"). And the Nation alleges that its tribal members are "complying with State regulatory requirements" when hunting and fishing on non-trust fee lands. Doc. 2 at ¶ 41. The Nation cannot manufacture standing by instructing tribal members to inflict harm on themselves by violating State laws—laws they have been complying with for decades. Accordingly, there is no imminent and credible threat of prosecution of Creek nation members by Mr. Cochran, and the Nation lacks standing to assert any claims against him in this action.

Finally, an injunction applied to non-member Indians, as sought by the Nation here, would exceed this Court's authority under the Supreme Court's recent prohibition against the issuance of a "universal injunction" (*i.e.*, one which "prohibits the Government from enforcing the law against *anyone*, anywhere"). *Trump v. CASA, Inc.*, 606 U.S. 831, 838 n.1 (2025) (emphasis in original). According to the Supreme Court, a universal injunction "falls outside the bounds of a federal court's equitable authority under the Judiciary Act." *Id.*, at 847 (2025). Accordingly, the Court found, district courts should properly issue more limited "injunctions prohibiting executive officials from enforcing a challenged law or policy ***only*** *against the plaintiffs in the lawsuit*." *Id.*, at 837 (emphasis added). No Five Tribe citizen is a plaintiff in this lawsuit.

Because both Article III and the traditional equity jurisdiction of district courts properly limit injunctive relief to the parties and injuries actually before the Court, the Nation lacks standing to assert

claims for, or obtain relief on behalf of, other non-Plaintiff tribes (or involving those tribes' Indian country) and/or as *parens patriae* on behalf of any non-member Indians. Any such claims or requests for relief should be dismissed.

IV. THE NATION FAILS TO STATE A PLAUSIBLE CLAIM FOR RELIEF.

Even beyond the numerous issues identified above, the Nation's Complaint is subject to dismissal under Rule 12(B)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief may be granted.[7] In order to analyze the Nation's claims, it is first important to understand what they are not.

- The State does not enforce its wildlife laws or regulations against member Indians hunting and fishing "on land held as Indian allotments [or] on land held in trust by the United States for the" Nation (*i.e.*, trust lands), pursuant to *Cheyenne-Arapaho Tribes of Oklahoma v. State of Okl.*, 618 F.2d 665, 669 (10th Cir. 1980).

- The State does not require owners or tenants to obtain a State license to hunt or fish "on land owned or leased by them." *See* 29 O.S. § 4-112(B)(5) (hunting); 29 O.S. § 4-110(B)(4) (fishing).

- The Nation does not claim jurisdiction to regulate hunting or fishing beyond their tribal trust lands, even by tribal members. 23 MCNCA §§ 2-103(A), 2-104(A). And non-member Indians are the functional equivalent of private individuals "[f]or most practical purposes" and "stand on the same footing as non-Indians resident on the reservation" under *Colville*, 447 U.S. at 161.

- The Nation lacks standing to assert claims on behalf of, non-member Indians (and/or non-Plaintiff tribes). *See supra*, Proposition III.

- The only relief the Nation can properly seek here, if any, under the *Ex parte Young* exception as clarified in *Coeur d'Alene*, is prospective, equitable relief for violations of federal law that is not the "functional equivalent" of a quiet title suit that would shift benefits of ownership and control from the State to the tribe. *See supra*, Proposition I.

[7] Declaratory judgment and injunctive relief are remedies, not causes of action. The Tenth Circuit has made clear that "reliance on the Declaratory Judgment Act" is "misplaced," because "that act involves procedural remedies; it does not confer any 'substantive rights' or create a cause of action." *Cheyenne & Arapaho Tribes v. First Bank & Trust Co.*, 560 F. App'x 699, 708 (10th Cir. 2014) (unpublished). Without a substantive right creating a cause of action, declaratory and injunctive relief cannot issue.

Properly limited and defined, therefore, the Court should consider only whether the Nation is entitled to prospective injunctive relief that would create a system of concurrent, tribal citizenship-based regulation over hunting and fishing on fee lands within the Nation's Indian country.

As to these fee lands, the Nation has not asserted a claim upon which relief can be granted. The history of Oklahoma reflects an appropriate exercise of State jurisdiction over hunting and wildlife on fee lands within its borders. Accordingly, under the framework confirmed in *Castro-Huerta*, the only remaining question for the Court is whether the State's jurisdiction in Indian country is "preempted (i) by federal law under ordinary principles of federal preemption, or (ii) [because] the exercise of state jurisdiction would unlawfully infringe on tribal self-government." 597 U.S. at 638. It is not.

First, State jurisdiction is not preempted by federal law or any express or implied treaty rights. Any implicit treaty-based hunting and fishing is ownership-based and flows with the land. *Second*, the State is expressly authorized under controlling law to regulate hunting and fishing, even on tribal lands, in the interest of conservation. And since the Nation has failed to identify a single State wildlife law or regulation that the tribe itself would not also apply against tribal members in Oklahoma, each of the State's laws is entitled to a presumption of validity under the conservation necessity standard. *Third*, the exercise of State jurisdiction over wildlife conservation on non-trust fee lands would not unlawfully infringe on the Nation's tribal self-government. *Fourth*, the State does not require a permission slip from Congress to exercise jurisdiction over all Oklahoman, including tribal members, who violate the State's wildlife laws or regulations on fee lands. *See* Response Brief, Section II.B.

The binding authorities set forth in the State's Response Brief and briefly summarized above clearly preclude the Nation's claims here. Tribal members do not hold a special right to hunt and fish on fee lands free of State wildlife regulations, such as licensing requirements. And tribal members do not enjoy immunity from citation or prosecution in state courts for violation of the State's wildlife

laws and regulations. Because the relief requested is barred by Supreme Court precedent, the Nation has failed to state a plausible claim for relief, and the Complaint should be dismissed.

CONCLUSION

For these many reasons, Defendants Wade Free, Director of ODWC, and Russell Cochran, Special Counsel for the State of Oklahoma, in their official capacities, respectfully request the Court dismiss the Complaint in its entirety under Rules 12(b)(1) and 12(b)(6).

Dated: February 13, 2026

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CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2026, 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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