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 appointed by the Governor,

Defendants.

Case No. 26-cv-00003-CVE-JFJ

MUSCOGEE (CREEK) NATION'S RESPONSE IN OPPOSITION TO DEFENDANTS' JOINT MOTION TO DISMISS

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INTRODUCTION

Defendants raise an array of arguments in support of their motion to dismiss the Nation's complaint. None has merit. Defendants' Eleventh Amendment, prosecutorial immunity, and standing arguments are foreclosed by controlling Supreme Court and Tenth Circuit precedent. Their affirmative defense of laches fails procedurally because the facts necessary to its establishment appear nowhere on the face of the Nation's complaint, as is mandatory before a court may dismiss a complaint based on an affirmative defense. It likewise fails on the merits because Defendants' perfunctory attempts to analogize this case to *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005)—where the tribe had been absent from the land at issue for 200 years—are unmoored from reality, as evidenced by the Supreme Court's authoritative recognition of "the Creek Nation's nearly 200-year occupancy of these lands," *McGirt v. Oklahoma*, 591 U.S. 894, 927 (2020), and its continuous jurisdiction over them, *id*. at 909–13. And Defendants' contention that *Oklahoma v. Castro-Huerta*, 597 U.S. 629 (2022)—which limits its holding to state jurisdiction over non-Indians—implicitly undermines *McGirt* and other Supreme Court and Circuit precedents involving state jurisdiction over Indians invites this Court to violate the Supreme Court's oft-repeated admonition that lower courts may not deem one of its later precedents to have overruled an earlier precedent by implication, a prohibition the Tenth Circuit applies to its own precedents as well.

ARGUMENT

I. Legal Standard

On a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the Court accepts the well-pleaded facts in the complaint as true and views them in the light most favorable to the non-movant. *Knellinger v. Young*, 134 F.4th 1034, 1042 (10th Cir. 2025). "Dismissal … is

appropriate only if the complaint lacks enough facts to state a claim to relief that is plausible on its face." *Id.* (quotation marks and ellipsis omitted). The same standard applies under Rule 12(b)(1). *See United States v. Iski*, Case No. 24-CV-0493, Case No. 25-CV-0028, 2026 WL 123292, at *2 (E.D. Okla. Jan. 16, 2026) (Eagan, J.).

II. Neither Eleventh Amendment Immunity nor Prosecutorial Immunity Applies.

A. Eleventh Amendment Immunity

The Nation's case—which seeks only prospective declaratory and injunctive relief—is a paradigmatic example of an action under *Ex Parte Young*, 209 U.S. 123 (1908), which provides that state officials may be sued to enjoin ongoing violations of federal law consistent with the Eleventh Amendment. *See Va. Off. for Prot. and Advoc. v. Stewart*, 563 U.S. 247, 255 (2011). In *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), the Supreme Court held that *Ex parte Young* does not apply where a suit "is the functional equivalent of a quiet title action which implicates special [state] sovereignty interests." *Id.* at 281. Defendants spill considerable ink on arguing the applicability of *Couer d'Alene*, *see* Defs. Br. 8–12, but their argument flies in the face of controlling precedent.

In *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 535 U.S. 635 (2002), the Court reaffirmed that in assessing the applicability of *Ex parte Young*, "a court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Id*. at 645 (brackets and quotation marks omitted); *see also Williams v. Utah Dep't of Corr.*, 928 F.3d 1209, 1214 (10th Cir. 2019) (same). Defendants do not dispute that the Nation's complaint meets this standard. They instead contend, relying on an Eleventh Circuit decision, that *Couer d'Alene*'s "special

sovereignty interests" test remains viable. Defs. Br. 9 & n.4 (citing *Muscogee (Creek) Nation v. Rollin*, 119 F.4th 881, 890 (11th Cir. 2024)).

But the Tenth Circuit has repeatedly expressed a contrary understanding, explaining (in cases to which Oklahoma's top officials have been party) "that *Verizon … abrogated*" *Coeur d'Alene*'s special sovereignty interests inquiry, *Hill v. Kemp*, 478 F.3d 1236, 1259 (10th Cir. 2007) (emphasis added); *see also Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1167 n.4 (10th Cir. 2012) ("[I]n *Verizon,* the Supreme Court stated that this inquiry was no longer required under an *Ex parte Young* analysis."); *Tarrant Reg'l Water Dist. v. Sevenoaks*, 545 F.3d 906, 912 (10th Cir. 2008) (stating that in light of *Verizon* and *Hill*, "we reject … that the particular sovereignty issues implicated in this case are relevant to our analysis of Eleventh Amendment immunity").

Defendants ask this Court to disregard these precedents and follow the Eleventh Circuit instead. This argument, self-evidently, is a dead letter. "A district court must follow the precedent of this circuit[.]" *United States v. Spedalieri*, 910 F.2d 707, 709 n.2 (10th Cir. 1990).[1]

B. Prosecutorial Immunity

The Nation has sued Defendant Cochran for prospective declaratory and injunctive relief. Defendants argue that the Nation's claims against him must be dismissed because in *Nielander v. Board of County Commissioners*, 582 F.3d 1155 (10th Cir. 2009), "the Tenth Circuit … made

[1] Even had *Verizon* not abrogated the "special sovereignty interests" inquiry, *Coeur d' Alene* turned on the fact that, under the relief sought by the tribe, "substantially all benefits of ownership and control [of the lands at issue] would shift from the State to the Tribe" and would amount to "a determination that the lands in question are *not even within the regulatory jurisdiction of the State*," *Coeur d'Alene*, 521 U.S. at 282 (emphasis added). Defendants nowhere attempt to explain how the Nation's requested relief, which implicates the decidedly narrow question of state power over Indian hunting and fishing, would amount to a wholesale shift in authority akin to that at issue in *Coeur d'Alene*.

clear [that] '[p]rosecutors are entitled to absolute immunity'" for carrying out their prosecutorial duties, Defs. Br. 13 (brackets in original) (quoting *Nielander*, 582 F.3d at 1164). But *Nielander* involved a claim for monetary damages under 42 U.S.C. § 1983. *See* 582 F.3d at 1163. The Tenth Circuit has been clear that prosecutorial immunity "extends only to liability for damages. Prosecutors may still be liable for declaratory and injunctive relief," *Martinez v. Winner*, 771 F.2d 424, 438 (10th Cir. 1985). Moreover, prosecutorial immunity is limited to individual capacity suits, and the Nation has named Mr. Cochran in his official capacity. *See Kentucky v. Graham*, 473 U.S. 159, 167 (1985) ("In an official-capacity action, [absolute immunity] defenses are unavailable."); *Chilcoat v. San Juan Cnty.*, 41 F.4th 1196, 1214 (10th Cir. 2022) ("[T]he law … permits [plaintiff] to sue [the prosecutor] for injunctive and declaratory relief in his official capacity."). As the Circuit has explained, prosecutors remain subject to official capacity suits for declaratory and injunctive relief because "[a] prosecutor may not simply raise the shield of official immunity and continue to act in an unconstitutional manner without fear of judicial orders to the contrary." *Lemmons v. L. Firm of Morris and Morris*, 39 F.3d 264, 267 (10th Cir. 1994). That teaching applies here and forecloses Defendants' prosecutorial immunity claims.

III. Defendants' Laches Argument Fails Both Procedurally and on the Merits.

Defendants next argue that the Nation's action is barred by "the doctrine of laches" under *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005). Defs. Br. 13–17. This argument fails both procedurally and on the merits.

As to procedure, laches is an affirmative defense. *See* Fed. R. Civ. P. 8(c)(1). A court may dismiss a complaint "based on an affirmative defense …. *only* when the complaint itself admits all the elements of the affirmative defense by alleging the factual basis for those elements." *Fernandez v. Clean House, LLC*, 883 F.3d 1296, 1299 (10th Cir. 2018) (emphasis

added). While Defendants have set forth varying iterations of the elements of laches, *see* Defs. Br. 14–16 & n.5, and factual averments that purport to meet them, *id*. at 15–17, they make no claim that any of those facts is alleged in the Nation's complaint. And no such allegations exist. For this reason alone, Defendants' motion to dismiss based on laches should be denied.

Defendants' argument likewise fails on the merits. In *Sherrill*, the Oneida Nation asserted that parcels of land it had purchased in fee within an area it had not occupied or governed "[f]or two centuries" were immune from local taxation. 544 U.S. at 202. The Oneida claimed that through the purchases it had "unified fee and aboriginal title and may now assert sovereign dominion over the parcels." *Id.* at 213. The Court rejected this theory because a tribe "cannot unilaterally revive its ancient sovereignty …. The Oneidas long ago relinquished the reins of government and cannot regain them through open-market purchases," *id.* at 202–03.

Sherrill exists a world apart from this case, and Defendants' attempts to analogize the Nation's claims to those of the Oneida fail at every turn.

First, in *Sherrill* "[t]he wrongs of which OIN complains … occurred during the early years of the Republic." *Id.* at 216. By contrast, the wrongs of which the Nation complains began in October 2025, *see* Compl. (Dkt. 2) ¶¶ 8–15, 39–47, and it filed suit within a matter of months. Any suggestion that the Nation has engaged in "unreasonable delay" in bringing suit, Defs. Br. 15 (citation omitted), accordingly falls flat on its face.

Second, the Nation is not, like the Oneida, seeking to "revive its ancient sovereignty," Defs. Br. 14 (quoting *Sherrill*, 544 U.S. at 203), because it never relinquished that sovereignty in the first place. Whereas the Oneida had largely abandoned the area at issue, 544 U.S. at 203–07, and had asserted no regulatory authority over it for "two centuries," *id*. at 218, in *McGirt*, the Supreme Court confirmed "the Creek Nation's nearly 200-year occupancy of [its Reservation]

lands," 591 U.S. at 927, as well as its oft-threatened yet continuous exercise of sovereignty over that Reservation, *id*. at 909–13. Thus, while Congress passed laws at the turn of the twentieth century that "represented serious blows to the Creek," those laws still "left the Tribe with significant sovereign functions over the lands in question." *Id*. at 909. In the 1930s, Congress "enabl[ed] the Creek government to resume many of its previously suspended functions," and "[t]he Creek Nation has done exactly that." *Id.* at 911–12. Since then, the Nation

> has ratified a new constitution and established three separate branches of government. Today the Nation is led by a democratically elected Principal Chief, Second Chief, and National Council; operates a police force and three hospitals; commands an annual budget of more than $350 million; and employs over 2,000 people. In 1982, the Nation passed an ordinance reestablishing the criminal and civil jurisdiction of its courts. The territorial jurisdiction of these courts extends to any Indian country within the Tribe's territory as defined by the Treaty of 1866. And the State of Oklahoma has afforded full faith and credit to its judgments since at least 1994.

Id. at 912 (citations omitted). Defendants' conclusory efforts to equate this history with one in which the Oneida returned after a 200-year absence and sought to "rekindl[e] embers of sovereignty that long ago grew cold," *Sherrill*, 544 U.S. at 214, simply cannot be reconciled with *McGirt*'s binding conclusions regarding the Nation's continued presence on and exercise of sovereignty over the Reservation since that Reservation was established by treaty in the 1830s.

Third, Defendants acknowledge that *Sherrill* involved the Oneidas' attempt to establish sovereignty over fee lands "within the boundaries of a former reservation," Defs. Br. 14. And *Sherrill* repeatedly emphasizes the "unilateral" nature of that effort. *See, e.g.*, 544 U.S. at 203 (holding that Oneida "cannot unilaterally revive its ancient sovereignty"); *id.* at 219 (rejecting "unilateral reestablishment of … Indian sovereign control"). The Oneida claim, after all, was that it could establish sovereignty simply by purchasing parcels of land on the open market. *See id.* at 213. *Sherrill*'s rejection of that unilateral action theory reflects a fundamental guidepost in

modern Indian law—i.e., that "some explicit action *by Congress* … must be taken to create or to recognize Indian country," *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 531 n.6 (1998) (emphasis added); *see also Hydro Res., Inc. v. U.S. EPA*, 608 F.3d 1131, 1151 (10th Cir. 2010) (en banc) (Gorsuch, J.) ("Congress—not the courts, not the states, not the Indian tribes—gets to say what land is Indian country[.]"); *Buzzard v. Okla. Tax Comm'n*, 992 F.2d 1073, 1076–77 (10th Cir. 1993) (holding that while tribe had "the right to acquire land unilaterally," it lacked the "unilateral power to create Indian country").

Seeking to take advantage of that principle, Defendants describe the Nation's suit as an effort "to 'unilaterally revive' territorial sovereignty," Defs. Br. 17 (quoting *Sherrill*, 544 U.S. at 202–03), within what they refer to as the Nation's "former reservation," *id.* at 15. But this case involves no unilateral action by the Nation, nothing of the sort, and *McGirt* leaves no room to conclude otherwise: "Start with what should be obvious: *Congress established* a reservation for the Creeks …. [i]n a series of treaties," 591 U.S. at 899 (emphasis added); *see also id*. at 902 ("Congress established a reservation for the Creek Nation[.]"). Moreover, "only Congress may disestablish a reservation," and between the 1830s and the present "there simply arrived no moment when any Act of Congress … disestablished [the Creek] reservation." *Id.* at 913, 924. Thus, Defendants' characterization of the Nation's suit as an attempt to unilaterally reestablish a "former reservation," Defs. Br. 15, is at best wishful thinking and, perhaps more accurately, a gross distortion of the Nation's history as authoritatively distilled in recent Supreme Court precedent.

Fourth, Defendants assert that, as in *Sherrill*, "[t]he longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian" creates "justifiable expectations" that warrant dismissal of this case. Defs. Br. 13–14 (brackets in original) (quoting

Sherrill, 544 U.S. at 215 & n.9). However, the *McGirt* dissent pressed this argument strenuously as a basis to deny the Indian country status of the Creek Reservation and the applicability of the settled jurisdictional rules that accompany that status, *see* 591 U.S. at 968–71, as did Oklahoma.[2] And the *McGirt* majority forcefully rejected the argument, holding that neither "Oklahoma's long historical prosecutorial practice of asserting jurisdiction over Indians," nor the fact "that Tribe members today constitute a small fraction of those now residing on the land," *id.* at 917, is a viable basis to hold that the jurisdictional rules of Indian country do not apply in the Creek Reservation, *see id*. at 917–24. The Court instead found both circumstances to provide

> little help in discerning the law's meaning …. If anything, the persistent if unspoken message here seems to be that we should be taken by the "practical advantages" of ignoring the written law. How much easier it would be, after all, to let the State proceed as it has always assumed it might …. That would be the rule of the strong, not the rule of law.

Id. at 923–24.

Fifth, *McGirt*'s recognition that legal doctrines exist "to protect those who have reasonably labored under a mistaken understanding of the law," including laches and statutes of repose, *id*. at 936, hurts rather than helps Defendants' cause. That such doctrines might come into play in individual cases where persons or businesses have organized their affairs in reliance on the pre-*McGirt* status quo—*see Nat'l City Bank of N.Y. v. Cont'l Nat'l Bank & Tr. Co. of Salt Lake City*, 83 F.2d 134, 138 (10th Cir. 1936) (stating that laches "depends upon the facts and circumstances of each individual case")—in no way suggests that such reliance allows a court, as an equitable matter, to cement in place that unlawful status quo going *forward*, something

[2] *See* Brief for Respondent at 7–8, 40, *McGirt* (No. 18-9526), 2020 WL 1478582, at *7–8, *40 (stating that "subsequent … demographics" give rise to "justifiable expectations" and that "Oklahoma's civil and criminal jurisdiction over Indians has gone unquestioned for a century." (citation omitted)).

McGirt is clear that courts "may never do," 591 U.S. at 930; *see also id*. at 937–38 ("Unlawful acts, performed long enough …, are never enough to amend the law.").

Applying *Sherrill* to accomplish that outcome would be an act of judicial disestablishment. As the Second Circuit has explained, "the Court's forceful reaffirmation in *McGirt* of Congress's singular power to disestablish a reservation further underscores the infirmity of" interpreting *Sherrill* to allow courts to equitably deny Indian country status established by Congress. *Cayuga Nation v. Tanner*, 6 F.4th 361, 379 (2d Cir. 2021). "To the extent that were ever a plausible interpretation of *Sherrill*, *McGirt* forecloses it." *Id*. at 379–80; *see also Oklahoma v. U.S. Dep't of Interior*, 577 F. Supp. 3d 1266, 1275–76 (W.D. Okla. 2021) (stating that "[h]ere, like in *Tanner*, Oklahoma cannot rely on *Sherrill* … to avoid the consequences" of federal law, and that "*McGirt* itself teaches as much").

IV. The Nation Has Standing.

Defendants next contend that the Nation lacks standing to assert its claims to jurisdiction over non-member Indians hunting and fishing under the Five Tribes Reciprocity Agreement and its claims against Mr. Cochran. *See* Defs. Br. 17–21. Neither contention has merit.

A. The Nation Has Standing To Vindicate Its Jurisdiction over Non-Member Indians.

Defendants assert that "[t]he Nation seeks sweeping equitable relief not only for itself, but also *on behalf of* … Five Tribe citizens (*i.e.*, non-members)." Defs. Br. 17 (emphasis added); *see also id*. at 18 (stating that "[t]he Nation cannot assert claims on behalf of non-member Indians" because legal rights "cannot be asserted vicariously"). But no portion of the Nation's Complaint even arguably seeks to vindicate the rights of individual non-member Indians. The Nation's claims are instead framed explicitly in terms of the Nation's *own* rights to exercise its jurisdiction free from state interference, including in the paragraphs cited by Defendants. *See*

Dkt. 2 ¶ 2 ("The second claim seeks declaratory and injunctive relief *to vindicate the Nation's authority* to regulate, free of interference by Defendants, the citizens of the" Five Tribes hunting and fishing within the Nation's Reservation (emphasis added)); *id.* ¶ 6 ("*[T]he interests of the Nation … in the Nation's exclusive regulation* of those Indians are compelling[.]" (emphasis added)); *id.* ¶ 36 ("*The Nation's interests in exercising exclusive jurisdiction* over Five Tribe citizens hunting and fishing within its treaty-guaranteed Reservation … are substantial." (emphasis added)).

The two Tenth Circuit cases cited in the Nation's Complaint confirm that tribes have standing to challenge state jurisdiction over Indians within their Indian country. *See* Dkt. 2 ¶ 25 (citing *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1242 (10th Cir. 2001) (holding that the unauthorized assertion of state jurisdiction over Indians within tribe's Indian country is an "infringement on tribal self-government" and the "[p]rotection of that right is the foundation of federal Indian law; accordingly, … the tribe has standing"); and *Ute Indian Tribe of the Uintah and Ouray Rsrv. v. Utah*, 790 F.3d 1000, 1005 (10th Cir. 2015) (stating that state prosecution of an Indian within a tribe's Indian country absent congressional assent is an "infringement on tribal sovereignty" causing "irreparable injury" to the tribe (citation omitted))). Tellingly, neither case makes even a cameo appearance in Defendants' briefing.

Nor do Defendants contend with the decisions of this Court in which it has cited *Ute Indian Tribe* and *Prairie Band* to reject similar challenges to tribal standing in cases involving state jurisdiction over both member and non-member Indians. This Court has deemed such challenges "meritless, as the Tenth Circuit has repeatedly rejected similar arguments." *Iski*, 2026 WL 123292, at *4 (citing *Ute Indian Tribe* and *Prairie Band*)); *see also United States v. Iski*, Case No. 24-CV-0493, 2025 WL 1088811, at *2 (E.D. Okla. Apr. 9, 2025) (Eagan, J.) ("Indian

tribes, like states and other governmental entities, have standing to sue to protect sovereign interests." (citing *Ute Indian Tribe*, *Prairie Band*, and *Moe v. Confederated Salish and Kootenai Tribes of Flathead Rsrv.*, 425 U.S. 463, 469 n.7 (1976))); *Quapaw Tribe of Okla. v. Blue Tee Corp.*, 653 F. Supp. 2d 1166, 1179–80 (N.D. Okla. 2009) (Eagan, J.) (same).

In sum, the Nation has standing to vindicate its own jurisdiction over Indians (members and non-members alike) within its Reservation free from state interference.[3]

B. The Nation Has Standing To Assert Its Claims Against Defendant Cochran.

Defendants further contend that the Nation lacks standing because "the Nation acknowledges that Mr. Cochran has not initiated any prosecutions for conduct by Indians within the Creek Reservation" and "that its tribal members are 'complying with State regulatory requirements' when hunting and fishing on non-trust fee lands." Defs. Br. 20 (quoting Dkt. 2 ¶¶ 41, 42). Thus, according to Defendants, "there is no imminent and credible threat of prosecution of Creek [N]ation members by Mr. Cochran[.]" *Id*. The argument lacks all merit.

First, as the Nation has plainly alleged, Defendants themselves have made imminent and credible threats of prosecution:

> The ODWC, under the direction of Defendant Free, has declared its open disregard of these bedrock rules of federal law. On October 9, 2025, it announced that "state fish and wildlife laws apply to everyone in Oklahoma" and that "ODWC game wardens will continue to enforce the law and *will issue citations to anyone in violation of the state's fish and game laws, regardless of tribal citizenship*."

[3] Defendants' contention that non-member Indians are the "functional equivalent" of non-Indians, Defs. Br. 19, is not only wrong, *see infra* n.7, it is irrelevant for standing purposes. *See Initiative and Referendum Inst. v. Walker*, 450 F.3d 1082, 1093 (10th Cir. 2006) ("Standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal[.]" (brackets and citation omitted)).

Dkt. 2 ¶ 8 (emphasis added) (quoting Press Release, ODWC, ODWC Reaffirms Enforcement of Oklahoma's Wildlife Laws (Oct. 9, 2025);[4] *see also id*. ¶ 9 ("ODWC officials *have threatened Nation citizens with prosecution* for hunting and fishing within the Creek Reservation pursuant to Nation licensing and regulation[.]" (emphasis added)). These statements, directly attributable to Defendants, undermine their reliance on *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013), *see* Defs. Br. 19–20. *Clapper*'s description of the "highly speculative" and "highly attenuated chain of possibilities" involving five interdependent hypotheticals that would have to occur in sequence before the plaintiffs would be subject to prosecution, *see* 568 U.S. at 410 (enumerating same), bears no plausible resemblance to the immediate, direct, and explicit person-to-person threats of prosecution that the Nation has alleged and substantiated.

Second, and relatedly, Defendants' argument ignores what is obvious on the face of the Nation's Complaint, including the very paragraph selectively quoted by Defendant. The Nation has alleged that its citizens presently "are … complying with State regulatory requirements *in lieu of the Nation's*" because Defendant Free's "officers *are* coercing Nation citizens into" doing so under threat of prosecution by Mr. Cochran. Dkt. 2 ¶¶ 39–41 (emphasis added). These claims unquestionably allege an interference with the Nation's rights of self-government, *see Ute Indian Tribe* and *Prairie Band*—one that is not merely threatened or imminent, but *currently occurring*, and hence readily meets standing requirements. *See also id*. ¶ 9 ("[A] number of those citizens *have acquiesced* to those threats by submitting to state licensing and regulation." (emphasis

[4] https://www.wildlifedepartment.com/outdoor-news/odwc-reaffirms-enforcement-oklahomas-wildlife-laws.

added)); *id.* ¶ 25 (stating that Defendants' actions are "undermining the authority of its own civil regulatory and criminal justice systems).[5]

C. The Nation Does Not Seek a Universal Injunction.

Defendants contend that "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[.]'" Defs. Br. 20 (quoting *Trump v. CASA, Inc.*, 606 U.S. 831, 838 n.1 (2025)). They misunderstand. Universal injunctions "bar the enforcement of a law anywhere in the Nation" and "prohibit[] the Government from enforcing the law against *anyone*, anywhere." *CASA*, 606 U.S. at 837 n.1. By contrast, the Nation asks only that the Court "enjoin Defendants from exercising … jurisdiction *over Five Tribe citizens … within the Creek Reservation*[.]" Dkt. 2, Prayer for Relief ¶ D. *See Shaw v. Smith*, 166 F.4th 61, 79 n.11 (10th Cir. Jan. 29, 2026) (discussing *CASA* and holding that "the injunction here is not a 'universal injunction' that applies throughout the nation; rather, it applies only to one state agency that conducts law enforcement duties within the State of Kansas and protects only out-of-state drivers traveling in Kansas").

V. The Non-Indian Fee Status of the Land Is No Basis for Dismissal.

Defendants urge dismissal because "there is no assertion 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," Defs. Br. 6, while Defendants limit their enforcement of state laws to non-Indian fee land, *id*. at 4 & n.2. This proposition has no factual or legal merit.

[5] *See also* Decl. of Sec'y of Interior Affs. Trenton Kissee (Dkt. 10) ¶¶ 41–50; Decl. of Jordan Pettigrew (Dkt. 11) ¶¶ 13–19; Decl. of Trey Downum (Dkt. 12) ¶¶ 12–15.

A. The Nation's Claims Encompass All Lands Within Its Reservation.

Defendants' contention that the Nation claims jurisdiction over Indian hunting and fishing free from interference by Defendants only with respect to "the Nation's trust lands," *id*. at 6, is wrong. "[T]he plaintiff is the master of the complaint," *Caterpillar Inc. v. Williams*, 482 U.S. 386, 398–99 (1987), and the Nation's complaint and supporting documents unambiguously frame its claims in terms of the entirety of the Reservation, because all of it is Indian country:

> The Nation enjoys the authority to regulate hunting and fishing by Indians *within its Reservation* as an aspect of tribal sovereignty.
>
> … Accordingly, with respect to the Nation's own citizens, *where the land remains in Indian Country status*, tribal members are not subject to state regulation of hunting and fishing absent congressional assent.
>
> The Nation likewise enjoys exclusive authority, absent contrary indication by Congress, to regulate hunting and fishing *within its Reservation* by Five Tribe citizens engaged in such activity pursuant to the Five Tribe Reciprocity Agreement.

Dkt. 2 ¶¶ 4–6 (quotation marks, brackets, and citations omitted); *see also id.* Count 1 ¶¶ 2–6; *id.* Count 2 ¶¶ 9–11; Decl. of Sec'y of Interior Affs. Trenton Kissee (Dkt. 10) ¶ 4 (stating that the Nation's wildlife laws "apply to hunting and fishing *on all lands within the Creek Reservation*. 23 MCNCA § 2-104(A)" (emphasis added)).[6]

The Nation's claims plainly encompass Indian hunting and fishing on all lands within the Reservation. As explained next, that those lands include non-Indian fee lands—where owner

[6] The Nation's Conservation Code extends to the "lands of the Muscogee (Creek) Nation, whether held in fee simple title or in trust," 23 MCNCA § 2-104(A), which is coterminous with 18 U.S.C. § 1151(a), and further confirms that "[n]othing in this Code *shall be construed to limit or waive any aspect of the Muscogee (Creek) Nation's sovereign authority to regulate activities conducted in whole or in part within the exterior boundaries of the Muscogee (Creek) Nation*," 23 MCNCA § 2-104(C) (emphasis added). No warrant exists for Defendants to ascribe alternative interpretations to the Nation's Code. *See Quapaw Tribe*, 653 F. Supp. 2d at 1191("Jurisdiction to … interpret tribal constitutions and laws lies with Indian tribes[.]" (quotation marks and ellipsis omitted)).

consent to hunt and fish is required, *see* 23 MCNCA § 3-303; MCN Conservation Regs. § 3-41—in no way undermines the viability of the Nation's claims.

B. Non-Indian Fee Land Within a Reservation Is On-Reservation "Indian Country" as Defined in 18 U.S.C. § 1151(a).

Defendants distinguish between trust and fee land "to provide clarity to the Court's analysis," and state that "[f]ee lands are sometimes referred to as 'off-reservation'" land and "[t]rust lands are sometimes referred to as 'on-reservation'" land, Defs. Br. 1 n.1. Defendants cite no case for that proposition, *see id.*, and accepting it would inject not clarity but legal error into the Court's analysis.

It has been more than a century since the Supreme Court explained that "when Congress has once established a reservation, *all tracts* included within it remain a part of the reservation until separated therefrom by Congress." *United States v. Celestine*, 215 U.S. 278, 285 (1909) (emphasis added). Congress codified that principle in 1948, defining "Indian country" to include "all land within the limits of any [federal] Indian reservation … *notwithstanding the issuance of any patent*," 18 U.S.C. § 1151(a) (emphasis added), a statute nowhere mentioned in Defendants' motion; and in 1962, the Supreme Court squarely rejected the notion that land within a reservation loses its reservation status under § 1151(a) when it is "owned in fee by non-Indians," *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 357 (1962). The Court has since forcefully reiterated the point: "Once a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem v. Bartlett*, 465 U.S. 463, 470 (1984) (citing *Celestine*, 215 U.S. at 285).

McGirt—citing each of those precedents—holds that the Creek Reservation is a federally protected Indian reservation and that all lands within it are reservation lands and "Indian

country" within the meaning of 18 U.S.C. § 1151(a), specifically including non-Indian fee lands. *See* 591 U.S. at 906 ("[Section 1151(a)] expressly contemplates private land ownership within reservation boundaries. Nor under the statute's terms does it matter whether these individual parcels have passed hands to non-Indians."). And contrary to Defendants' position, *McGirt* affirms that tribes "*continue to exercise governmental functions over [such] land even if they no longer own it*," *id.* at 907 (emphasis added) (citing *Seymour*, 368 U.S. at 357–58). The Court underscored this principle by noting that patents in fee were issued for lands throughout the United States "[b]ut no one thinks any of this diminished the United States's claim to sovereignty over any land." *Id*. at 907. The principle, moreover, applies squarely both to criminal and civil jurisdiction. *See, e.g.*, *DeCoteau v. Dist. Cnty. Ct. for Tenth Jud. Dist.*, 420 U.S. 425, 427 n.2 (1975) (stating that § 1151 applies to "questions of civil jurisdiction" and that "[i]f the lands in question are within a continuing 'reservation,'" federal and tribal jurisdiction exists "'notwithstanding the issuance of any patent …. 18 U.S.C. s 1151(a)"); *Shawnee Tribe v. United States*, 423 F.3d 1204, 1220 n.17 (10th Cir. 2005) (citing § 1151(a) and *DeCoteau* for the proposition that "[g]enerally, tribes have jurisdiction within a reservation's boundaries regardless of land ownership patterns within that territory").

C. The Nation's Jurisdiction over Hunting and Fishing by Nation Citizens on Fee Lands Within the Creek Reservation Is Exclusive.

The Nation's governing authority over Indians within its Indian country is subject to different rules with respect to Nation citizens and non-member Indians. With respect to its citizens, the Nation's regulatory jurisdiction is exclusive of state jurisdiction throughout the Nation's Indian country "except where Congress has expressly provided that State laws shall apply," *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 170–71 (1973). As the Supreme Court has explained, when it comes to tribal citizens, "we ask only whether the land is

Indian country," which "Congress has defined … broadly …. See 18 U.S.C. § 1151." *Okla. Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 123, 125 (1993). Accordingly, the Tenth Circuit has explained that where land is "Indian Country within the meaning of s 1151(a)," "state hunting and fishing laws do not apply, directly or indirectly, to hunting and fishing by members" of the tribe. *Cheyenne-Arapaho Tribes of Okla. v. Oklahoma*, 618 F.2d 665, 668, 669 (10th Cir. 1980); *see also United States v. Felter*, 752 F.2d 1505, 1510 (10th Cir. 1985) (describing *Cheyenne-Arapaho* as holding that "because the land remains in Indian Country status, [tribal members] are not subject to state regulation").

Cheyenne-Arapaho is fatal to Defendants' position that they have jurisdiction over Nation citizens hunting and fishing on fee lands within the Reservation. Hence, Defendants invite this Court to limit it to its facts, which involved tribal members hunting and fishing on Indian-held allotments and trust lands. *See* Defs. Br. 21 (citing *Cheyenne-Arapaho*, 618 F.2d at 669). But the controlling force of *Cheyenne-Arapaho* is not so easily constrained. The issue there was not whether the State could regulate tribal member hunting and fishing on those specific types of land, but rather within Indian country more generally. The Circuit thus asked whether "the pertinent land *is within Indian Country as that term is defined in 18 U.S.C. s 1151*," 618 F.2d at 666 (emphasis added), and concluded that the lands fit within that definition. *See id*. at 667 ("Section 1151(c) explicitly includes Indian allotments within Indian Country."); *id*. at 668 ("[L]ands held in trust by the United States for the Tribes are Indian Country within the meaning of s 1151(a)."). And because "[s]tates have no authority over Indians in Indian Country unless it is expressly conferred by Congress," *id*. (citing *McClanahan*, 411 U.S. at 170–172), the Circuit held that "state hunting and fishing laws do not apply … to hunting and fishing by [tribal] members" on those lands, *id.* at 669. Since *McGirt* holds that all land within the Creek

Reservation is likewise "Indian country" under § 1151(a), including "individual parcels [that] have passed hands to non-Indians," 591 U.S. at 906, *Cheyenne-Arapaho* controls here and forecloses State regulation of hunting and fishing by Creek citizens within the Reservation.

Defendants' caselaw is not to the contrary. They contend that "the Supreme Court has expressly rejected the position that tribal members hold 'a special right, nonexclusive but free of state regulation' on alienated lands[.]" Defs. Br. 3–4 (quoting *Or. Dep't of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 763–64 (1985)). But *Klamath* is inapposite, as it involved a tribe's claim to *off-reservation* hunting and fishing rights, namely on lands the Tribe had ceded to the United States when its reservation was diminished in 1901. *See* 473 U.S. at 764 ("At issue in this case is an asserted right of tribal members to hunt and fish *outside the reservation boundaries* established in 1901, free of state regulation." (emphasis added)).

Defendants' reliance on *Northern Arapahoe Tribe v. Hodel*, 808 F.2d 741, 748 (10th Cir. 1987), Defs. Br. 3, is likewise baffling. *Northern Arapahoe* holds that two tribes sharing possession of a reservation both enjoy rights to hunt and fish on the reservation by virtue of that possession even in the absence of an express treaty or statutory provision granting them the same. "The very principles of Indian law which dictate that the Shoshone have hunting and fishing rights notwithstanding the lack of an express treaty provision dictate that the Arapahoe have equivalent rights." 808 F.2d at 748. The decision nowhere suggests that those rights to hunt and fish, and to regulate such activity, are delimited to the lands physically owned or occupied by the tribes. To the contrary, the Circuit recognized that two tribes had "equal rights to hunt on the reservation," *id.*, and that over time the tribes "have managed reservation wildlife both jointly and separately," *id.* at 744, despite the fact that one tribe occupied "the eastern section of the

reservation," and the other occupied lands "farther to the west," *Shoshone Tribe of Indians of Wind River Rsrv. in Wyo. v. United States*, 299 U.S. 476, 490 (1937).

D. The Nation Has Jurisdiction over Non-Member Indians Hunting and Fishing Under the Five Tribe Reciprocity Agreement, and Whether the State Has Concurrent Jurisdiction Cannot Be Resolved on a Motion to Dismiss.

In the civil context, the Nation's claim that non-member Indians fishing and hunting on non-Indian fee lands within the Creek Reservation under the Five Tribe Reciprocity Agreement are subject to the Nation's exclusive regulation is based on a different jurisdictional rule than the one governing the Nation's own citizens.[7]

Under the Agreement, each individual tribal member who hunts or fishes within the reservation of another tribe voluntarily consents in advance to that tribe's jurisdiction. *See* Five Tribe Wildlife Management Reciprocity Agreement (Dkt. 2-1) art. 2(F) (providing, as an express condition of hunting and fishing under the Agreement, that "each member or citizen is responsible for knowing and adhering to the laws of the other Nation when they seek to hunt, fish, trap, and/or gather on that other Nation's reservation" and is subject to that tribe's enforcement of its laws). That such consent establishes civil jurisdiction in the host tribe is well-settled. In *Strate v. A-1 Contractors*, 520 U.S. 438, 446 (1997), the Court acknowledged the "general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation"); *see also Montana v.*

[7] In the criminal context, by contrast, the same rule has long been understood to apply with respect to both member and non-member Indians. *See, e.g.*, *McGirt*, 591 U.S. at 898, 929, 932 (stating, in case involving non-member Indian defendant, that states "generally have no jurisdiction to try Indians for conduct committed in 'Indian country'"); *Hagen v. Utah*, 510 U.S. 399, 421 (1994) (holding that state had jurisdiction to prosecute non-member Indian for non-Major-Crimes-Act crime absent congress's assent because land was not Indian country). That long-held understanding notwithstanding, the question whether the State can claim concurrent jurisdiction over non-member Indian defendants is, as this Court well knows, currently the subject of active litigation. *See, e.g.*, *Iski*, 2026 WL 123292.

United States, 450 U.S. 544, 547 (1981) (discussing same). But that general principle is "not an absolute rule," *United States v. Cooley*, 593 U.S. 345, 350 (2021), and is subject to well-settled exceptions, including that tribes have jurisdiction to regulate "the activities of nonmembers [on non-Indian fee lands] who enter consensual relationships with the tribe," *Montana*, 450 U.S. at 565.

The "consensual relationship" exception sweeps in "individuals who [have] voluntarily submitted themselves to tribal regulatory jurisdiction" over the conduct in question, *Nevada v. Hicks*, 533 U.S. 353, 372 (2001) (citation omitted); *see also, e.g.*, *MacArthur v. San Juan Cnty.*, 497 F.3d 1057, 1073 (10th Cir. 2007) (same). Since non-member Five Tribe Indians who hunt and fish on non-Indian fee lands within the Creek Reservation have expressly consented to the Nation's jurisdiction, *see* Dkt. 2-1, art. 2(F), under *Montana*'s "consensual relationship" exception they are subject to that jurisdiction.

Whether Defendants may *also* assert civil jurisdiction over such non-member Indians is a separate question that entails "a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law," *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980). State authority does so if it impairs "federal and tribal interests reflected in federal law, unless the State interests at stake are sufficient to justify the assertion of State authority." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983).

This *Bracker* inquiry is not suitable for a motion to dismiss because it constitutes an "interest-balancing test," *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 99 (2005), and a highly fact-sensitive one at that. *See, e.g.*, *Bracker*, 448 U.S. at 145–52. Here, there has been no discovery or evidentiary hearing, and no facts have been determined; and those facts the

Nation has alleged must be taken as true with all reasonable inferences drawn in the Nation's favor, *see Knellinger*, 134 F.4th at 1042.

Accordingly, Defendants' claim to concurrent jurisdiction over non-member Indians simply is not susceptible to determination on their Rule 12(b)(6) motion. This Court could not conceivably balance the relevant interests on a Rule 12(b)(6) motion. As the Tenth Circuit has explained, a balancing test involving the asserted interests of a government defendant "is inappropriate in evaluating a dismissal under [Rule] 12(b)(6) as no countervailing state interest could have been alleged since the claim is evaluated solely upon the pleadings of the plaintiff." *Brown v. City of Tulsa*, 124 F.4th 1251, 1269 (10th Cir. 2025) (brackets in original) (citation omitted)); *see also id.* (describing interest balancing as "usually inappropriate—if not impossible—at the motion to dismiss stage"); *Trant v. Oklahoma*, 426 F. App'x 653, 661–62 (10th Cir. 2011) (declining to conduct balancing on motion to dismiss and noting that balancing is more appropriate for summary judgment "where an adequate factual record had been developed to actually 'show,' rather than merely speculate about," the competing interests); *Halley v. Oklahoma ex rel. Okla. State Dep't of Hum. Servs.*, 176 F.Supp.3d 1268, 1279 (E.D. Okla. 2016) (describing "a fact-intensive balancing test" as "not ordinarily suitable for the Rule 12(b)(6) stage" (quoting *Thomas v. Kaven*, 765 F.3d 1183, 1196 (10th Cir. 2014))).[8]

VI. *Castro-Huerta* Provides No Basis for Dismissal.

Defendants' reliance on *Oklahoma v. Castro-Huerta*, 597 U.S. 629 (2022), fails both procedurally and on the merits. *See* Defs. Br. 1–3, 22–23. As to procedure, *Castro-Huerta* holds that state jurisdiction in Indian country may be foreclosed by express preemption *or Bracker*

[8] This reasoning applies equally to a motion to dismiss under Rule 12(b)(1), where the standard is the same as under Rule 12(b)(6). *See Iski*, 2026 WL 123292, at *2.

balancing. *See* 597 U.S. at 649–50. Thus, a court may not bless such jurisdiction without engaging in the latter. As noted, fact-intensive interest balancing is inappropriate at the motion to dismiss stage "since the claim is evaluated solely upon the pleadings of the plaintiff." *Brown*, 124 F.4th at 1269. This alone is sufficient to defeat Defendants' reliance on *Castro-Huerta.*

On the merits, when *Castro-Huerta* issued, the prohibition against state jurisdiction over Indians in Indian country absent congressional assent was well-settled. In 2015, the Tenth Circuit affirmed that "unless Congress provides an exception to the rule … states possess 'no authority' to prosecute Indians for offenses in Indian country." *Ute Indian Tribe*, 790 F.3d at 1004. For that principle, the Court relied on *Cheyenne-Arapaho*, where it had rejected Oklahoma's asserted jurisdiction over Indian hunting and fishing on lands that met the § 1151 definition of Indian country because "[s]tates have no authority over Indians in Indian Country unless it is expressly conferred by Congress," 618 F.2d at 668 (citing *McClanahan*, 411 U.S. at 170–72). *McGirt* reaffirmed the continuing validity of that principle in 2020 and accordingly rejected Oklahoma's asserted jurisdiction over a non-member Indian within the Creek Reservation because "Oklahoma cannot come close" to establishing that Congress had assented. 591 U.S. at 929. Defendants urge this Court to hold that *Castro-Huerta* upended this well-established presumption against state jurisdiction over Indians in Indian country, such that today "the presumption is exactly the opposite," and "a State's jurisdiction in Indian country is presumed" unless preempted. Defs. Br. 1–2. This is an invitation to commit reversible error.

Castro-Huerta involved a challenge to Oklahoma's prosecution of a *non*-Indian in Indian country, and it repeatedly disclaimed any intent to reach the issue of state jurisdiction over Indians. *See, e.g.*, 597 U.S. at 639 n.2 (describing state jurisdiction "over crimes committed by Indians in Indian country" as "a question not before us"); *id.* at 650 n.6 ("We express *no view* on

state jurisdiction over a criminal case of that kind." (emphasis added)); *id*. at 655 n.9 ("To reiterate, we do not take a position on that question.").[9]

Castro-Huerta's repeated disclaimers are not idle verbiage. They instead establish clear boundaries for lower courts regarding the reach of its holding. Indeed, just a month before issuing *Castro-Huerta*, every member of the *Castro-Huerta* majority joined an opinion explaining that the Supreme Court's use of language explicitly limiting a holding to a specific issue is "an important part of the Court's holding" and "foreclose[s] any extension of [that] holding" as a basis to depart from earlier precedent. *Shinn v. Ramirez*, 596 U.S. 366, 387 (2022) (quotation marks omitted). The Tenth Circuit has likewise recently admonished that where the Supreme Court has "emphasized what it was and was not holding," lower courts may not apply the holding beyond its stated limits. *United States v. Hopson*, 150 F.4th 1290, 1308 (10th Cir. 2025). And *Hopson* further explains, regarding such stated limits, that "[a] good rule of thumb for reading Supreme Court decisions is that what they say and what they mean are one and the same." *Id*. (brackets and quotation marks omitted). It is no surprise, then, that *Hopson*—which post-dates *Castro-Huerta* and cites it, *see id*. at 1299—readily embraces what Defendants invite this Court to reject—i.e., the continuing, controlling force of *McGirt*'s pronouncement that "a

[9] In line with these unequivocal disclaimers, not one of the cases *Castro-Huerta* cites for the "overarching jurisdictional principle dating back to the 1800s" on which it rests its holding, 597 U.S. at 637, involves state jurisdiction over an Indian in Indian country. *See id.* at 636–38 (citing *New York ex rel. Cutler v. Dibble*, 62 U.S. (1 How.) 366, 370 (1858) (non-Indian conduct); *Cnty. of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 257–58 (1992) (same); *United States v. McBratney*, 104 U.S. 621, 621 (1881) (same); *Draper v. United States*, 164 U.S. 240, 241 (1896) (same); *New York ex rel. Ray v. Martin*, 326 U.S. 496, 498 (1946) (same); *Organized Vill. of Kake v. Egan*, 369 U.S. 60, 62 (1962) (off-reservation Indian conduct); *Hicks*, 533 U.S. at 355 (same); *Surplus Trading Co. v. Cook*, 281 U.S. 647, 649–50 (1930) (non-Indian property in military reserve).

clear expression of the intention of Congress" is required "before the state … may try Indians for conduct on their lands," *id*. (quoting *McGirt*, 591 U.S. at 929).[10]

This Court has also recognized that *Castro-Huerta* does nothing to undermine that controlling principle:

> States have criminal jurisdiction over all of the territory within their state, including Indian reservations, except to the extent that such jurisdiction is preempted by federal law. *Oklahoma v. Castro-Huerta*, 597 U.S. 629, 637 (2022) (explaining that states have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country). ***However***, the Supreme Court requires a "clear expression of the intention of Congress" before the state or federal government may prosecute crimes committed by Indians on tribal lands, as the power to punish tribal members and enforce tribal laws is part of a tribe's retained sovereignty.

Iski, 2026 WL 123292, at *4 (emphasis added) (quoting *Hopson*, 150 F.4th at 1299 (quoting *McGirt*, 591 U.S. at 929)). Magistrate Judge Robertson, designated under 28 U.S.C. § 636(b) to exercise full jurisdiction in the matter before him, has been similarly emphatic:

> A court that "expresses no view" leaves no room for creative expansion. What the Supreme Court declined to decide is just as binding as what it did.…
>
> … [*Castro-Huerta*'s] limits are unmistakable. Jurisdiction over territory is not jurisdiction over persons, and the majority guarded that distinction with deliberate care. The [Court's] territorial observation merely restates an uncontested premise: a State's borders do not evaporate where Indian country begins. The power to prosecute Indians within those borders has never flowed from geography. It flows from Congress alone. On that question, *McGirt* remains untouched. The Supreme Court recognized it, cited it, and did not alter a single syllable of its command that States lack criminal jurisdiction over Indians absent congressional authorization.

Muscogee (Creek) Nation v. City of Henryetta, 25-CV-227, 2025 WL 3215729, at *2 (E.D. Okla. Nov. 18, 2025).

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[10] *McGirt* forcefully underscores that this principle extends to non-Indian fee lands. *See supra* pp. 15–16. And *Hopson* applies it to an assault committed on a public road near the grounds of the federal courthouse in Tulsa—i.e., not trust or restricted land, though squarely "within the boundaries of the Muscogee (Creek) Nation Reservation," 150 F.4th at 1294.

Cases including *Shinn*, *Hopson*, *Iski*, and *Henryetta* embody fidelity to what the Supreme Court has repeatedly instructed: lower courts may not hold that a later Supreme Court decision "implicitly overruled" earlier decisions, which "remain binding precedent until we see fit to reconsider them," *Bosse v. Oklahoma*, 580 U.S. 1, 3 (2016) (citation omitted). "Until that occurs, [prior precedent] is the law[.]" *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983); *see also Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122, 136 (2023) (stating that lower court "clearly erred" in finding that a Supreme Court decision "implicitly overruled" prior one because lower courts must "leav[e] to this Court the prerogative of overruling its own decisions" (citations omitted)); *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (stating that lower courts should not conclude that "our more recent cases have, by implication, overruled an earlier precedent"); *United States v. Maloid*, 71 F.4th 795, 808, 809 (10th Cir. 2023) (same). The force of this prohibition is at its zenith where later precedent disclaims (as *Castro-Huerta* does, repeatedly) any intent to reach the issue addressed by the earlier case law. *See Shinn*, 596 U.S. at 387. And this same prohibition likewise applies to Tenth Circuit precedents such as *Ute Indian Tribe*, *Prairie Band*, and *Cheyenne-Arapaho*, which "remain good law unless the Supreme Court has *indisputably and pellucidly* abrogated them," *Fed. Trade Comm'n v. Elite IT Partners, Inc.*, 91 F.4th 1042, 1051 (10th Cir. 2024) (emphasis added) (quotation marks omitted).

CONCLUSION

The Nation respectfully requests that Defendants' motion be denied.

Dated: March 3, 2026

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 3, 2026, this document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

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