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Plaintiffs Cherokee Nation, Chickasaw Nation, and Choctaw Nation of Oklahoma (“Nations”) respond to Defendants’ Joint Motion to Dismiss (“Mot.”) and reply to the Defendants’ Response to Plaintiffs’ Motion for Preliminary Injunction (“Resp.”), ECF Nos. 46, 47 to show the former should be denied and the latter granted.

STANDARD OF REVIEW

Motions to dismiss on grounds of sovereign immunity, standing, abstention, or the AIA are properly brought under Rule 12(b)(1). *See, e.g., Ruiz v. McDonnell*, 299 F.3d 1173, 1180 (10th Cir. 2002); *Colo. Env’t Coal. v. Wenker*, 353 F.3d 1221, 1227 (10th Cir. 2004); *Egbune v. Baum*, No. 23-cv-02830-PAB, 2024 WL 1374905, at *3 (D. Colo. Apr. 1, 2024); *N. Arapaho Tribe v. Burwell*, 118 F. Supp. 3d 1264, 1272 (D. Wyo. 2015). Defendants’ Rule 12(b)(1) arguments attack the legal sufficiency of the complaint, not its allegations, so their challenges are “facial.” *See Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995), *abrogated in part on other grounds, Cent. Green Co. v. United States*, 531 U.S. 425 (2001). The plaintiff bears the burden of proof to show the court has subject matter jurisdiction. *Montoya v. Chao*, 296 F.3d 952, 955 (10th Cir. 2002), *see Ute Indian Tribe v. Lawrence (Lawrence I)*, 875 F.3d 539, 544 (10th Cir. 2017).

Motions to dismiss asserting the Court may not grant relief on a claim, or raising the affirmative defenses of prosecutorial immunity or equitable defenses like laches, are brought under Rule 12(b)(6). *See Warnick v. Cooley*, 895 F.3d 746, 749-51 (10th Cir. 2018); *Strauss v. Angie’s List, Inc.*, No. 2:17-cv-02560-HLT-TJJ, 2019 WL 399910, at *3 & n.4 (D. Kan. Jan. 31, 2019). A Rule 12(b)(6) motion “should not be granted ‘unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.’” *Sutton v. Utah State Sch. for Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999).

On both a 12(b)(1) facial challenge and a 12(b)(6) motion, the Court must “accept [Plaintiffs’] allegations of material facts as true and construe the complaint in favor of [Plaintiffs].”

United States v. Rodriguez-Aguirre, 264 F.3d 1195, 1203 (10th Cir. 2001), and may consider only extrinsic materials incorporated into the complaint or that are judicially noticeable, *see Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 942 (10th Cir. 2002); *Thurman v. Steidley*, No. 16-cv-554-TCK, 2017 WL 2435287, at *4 (N.D. Okla. June 5, 2017). Dismissal at the Rule 12 stage based on an affirmative defense is only proper “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).

Defendants do not dispute the standards for a preliminary injunction as set forth in our opening brief, ECF No. 3-1 at 8 (“Br.”), except to argue that the Nations’ motion is subject to a heightened standard, which we address *infra* at 18-20.

ARGUMENT

I. Response To Motion to Dismiss.

A. The Nations’ Claims Are Not Barred by State Sovereign Immunity.

The Nations’ suit is brought under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), ECF No. 2 ¶ 3 (“Compl.”),¹ which Defendants argue is not available under *Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261 (1997). Mot. 8-12. This assertion is not colorable.

In determining if *Young* applies, “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.’” *Va. Off. for Protection & Advocacy v. Stewart* (“VOPA”), 563 U.S. 247, 255 (2011) (quoting *Verizon Md., Inc. v. Pub. Serv. Comm’n*, 535 U.S. at 645). Courts “are to proceed immediately in every case” to determine whether the relief requested is prospective “or is indeed the functional

¹ Contra Defendants’ obfuscations, *see* Mot. 25 n.9, *Young* gives the Nations a cause of action for prospective injunctive and declaratory relief to remedy Defendants’ ongoing violations of federal law. *See Verizon Md., Inc. v. Pub. Serv. Comm’n*, 535 U.S. 635, 645-46 (2002).

equivalent of impermissible retrospective relief.” *Hill v. Kemp*, 478 F.3d 1236, 1259 (10th Cir. 2007).²

The Nations only seek prospective relief: An injunction and declaration that prevents Defendants from continuing to violate federal law by exercising state jurisdiction over on-reservation hunting, fishing, and gathering by Nation members, which is clearly prospective relief. *Sevenoaks*, 545 F.3d at 912-13; accord *Verizon Md.*, 535 U.S. at 645 (“The prayer for injunctive relief—that state officials be restrained from enforcing an order in contravention of controlling federal law—clearly satisfies our ‘straightforward inquiry.’”); *Timpanogos*, 286 F.3d at 1205-06.³

By contrast, in *Coeur d’Alene*,⁴ the Tribe sought to void application of *all* state laws that would “regulate, authorize, use, or affect *in any way*” the lands or interfere with the Tribe’s exclusive “use and occupancy, quiet enjoyment, and other ownership interest” thereof. 521 U.S. at 265 (emphasis added). This relief was therefore the “functional equivalent” of a quiet title action that would not only “block all attempts by [state] officials to exercise jurisdiction over a substantial portion of land” and “divest the State of its sovereign control over submerged lands.” *Id.* at 282,

² Relying on *Hill*, 478 F.3d at 1259, *Tarrant Regional Water District v. Sevenoaks*, 545 F.3d 906, 912 (10th Cir. 2008), explained that *ANR Pipeline Co. v. Lafaver*, 150 F.3d 1178 (10th Cir. 1998), “misconstrued *Coeur d’Alene*.” *Hill* effectively abrogated the fourth step of the “framework” from *Timpanogos Tribe v. Conway*, 286 F.3d 1195, 1205-06 (10th Cir. 2002). *Cf.* Mot. 9 n.3. Even if *Lafaver* were still good law, it is inapposite. Unlike this case, it concerned Kansas’s interest in “its property tax system” and found that a declaration that a state should “recertify” a property tax assessment was equivalent to a retroactive money judgment. 150 F.3d at 1194 & n.17.

³ *Timpanogos* does not suggest the fee status of land matters under *Young*. *Cf.* Mot. 12. While *Timpanogos* concluded that since Utah lacked an interest in tribal lands, the injunction sought there would not affect “special sovereignty interests” under the fourth part of its “four-part framework,” 286 F.3d at 1206, the fourth part has been abrogated, *see supra* at 3 n.2.

⁴ Justice O’Connor’s concurrence—which was not for the Court, *compare* Mot. 11, with 521 U.S. at 263-64—explained that the Tribe’s suit sought to establish “not only that the State has no right to possess the property, but also that the property is not within Idaho’s sovereign jurisdiction at all.” *Id.* at 289. She emphasized, as *VOPA* later did, that *Young* depends on “a straightforward inquiry into whether a complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective,” *id.* at 296.

283, 287; see *Idaho v. United States*, 533 U.S. 262, 271 n.4 (2001) (“[C]laim to the submerged lands” implicated Eleventh Amendment bar).

Defendants argue that the Nations’ suit is “nearly identical” to a functional quiet title action and “implicates the State’s special sovereignty interests.” Mot. 11-12. But *Young* requires only a “straightforward” inquiry into the nature of relief sought. See *VOPA*, 563 U.S. at 255, 256 n.3 (addressing *id.* at 269 (Roberts, C.J., dissenting));⁵ *Sevenoaks*, 545 F.3d at 912 (expressly rejecting argument “that the particular sovereignty issues implicated in [a particular] case are relevant to our analysis of Eleventh Amendment immunity.”). The assertion that the Nations’ claims are “nearly identical” to a functional quiet title action is fanciful. The Nations respect owners’ rights to exclude others. Compl. ¶¶ 61, 80. Neither can Defendants or the State claim to hold an ownership interest in fish or game, as “it is pure fantasy to talk of ‘owning’ wild fish, birds, or animals.” *Hughes v. Oklahoma*, 441 U.S. 322, 334 (1979) (quoting *Geer v. Connecticut*, 161 U.S. 519, 539-40 (1896) (Field, J., dissenting)); see *Sevenoaks*, 545 F.3d at 913 (state lacks ownership interest in water and so a *Young* action forbidding application of state water appropriation law was not effectively against the State). Nor can avoid *Young* by merely asserting a state sovereign interest,

⁵ Defendants assert that *Coeur d’Alene* establishes an “exception” to *Young*, relying on *Muscogee (Creek) Nation v. Rollin*, 119 F.4th 881, 890 (11th Cir. 2024). Mot. 10 n.3. As *Rollin* imposes an exception rejected by *Verizon Maryland* and *VOPA*, the Court should “depart from it in adherence to the Supreme Court’s directed ‘straightforward inquiry.’” *Teva Pharms. USA, Inc. v. Weiser*, No. 24-1035, 2025 WL 2555552, at *3 n.3 (10th Cir. Sept. 5, 2025) (quotation omitted). In any event, *Rollin* does not help Defendants. It (wrongly) described *Coeur d’Alene* as establishing a “narrow exception” to *Young* “dependent on three ‘particular and special circumstances,’” which are: the claim must be “the equivalent to an action to quiet title . . . assert[ing] a claim to property antagonistic” to the State; the claim must seek relief establishing that the “lands in question are not even within the regulatory jurisdiction” of the State; and the land at issue “must be an ‘essential attribute of sovereignty’ and ‘infused with a public trust’ that the sovereign must respect.” 199 F.4th at 890 (quotations omitted). So even if the Court were to follow *Rollin*’s non-precedential test here—and it should not, as it should follow *Hill* and *Sevenoaks*, see *supra* at 3 & n.2—none of the elements of that test are present here, see *infra* at 4-5.

as “the State itself will have a continuing interest in the litigation whenever state policies or procedure are at stake. . . . Indeed, the suit in *Young* . . . implicated substantial state interests.” *Coeur d’Alene*, 521 U.S. at 269-70. Thus, Defendants are not protected by sovereign immunity.

B. The Nations’ Claims Are Not Barred by *Younger* or the AIA.

The *Younger v. Harris*, 401 U.S. 37 (1971), doctrine does not apply here.

1. The Nations Cannot Pursue Their Federal Contentions in the State Proceedings and Federal Preemption is Readily Apparent.

“*Younger* abstention is inappropriate when a federal plaintiff cannot pursue its federal contentions in the ongoing state proceeding,” *D.L. v. Unified Sch. Dist. No. 497*, 392 F.3d 1223, 1229 (10th Cir. 2004). As “[n]o state proceedings [a]re pending” against the Nations, *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 930 (1975), and “it is proper for a federal court to exercise jurisdiction over the claim of a genuine stranger to an ongoing state proceeding even though a federal decision clearly could influence the state proceeding by resolving legal issues identical to those raised in state court,” *D.L.*, 392 F.3d at 1230 (citations omitted), *Younger* is inapplicable.⁶

While Defendants assert that the Nations bring “derivative claims,” Mot. 24 (citing *D.L.*, 392 F.3d at 1230), such which arise where “in essence only one claim is at stake and the legally distinct party to the federal proceeding is merely an alter ego of a party in state court,” *D.L.*, 392 F.3d at 1230, this is not such a case. The Nations’ treaty and inherent rights to self-government are not held by state court defendants, and their claims to vindicate those rights therefore do not derive from arguments that state court defendants can raise in their cases.⁷ “The interests of

⁶ The Nations’ claims also “satisf[y] the requirements for federal jurisdiction,” *Doran*, 422 U.S. at 930, as their suit arises under federal law, *see Lawrence I*, 875 F.3d at 544.

⁷ And even if they did, Defendants only point to state prosecutions of Chickasaw and Choctaw citizens on those Nations’ Reservations, *see Resp. 22-23*, and so claims that defendants might raise in those prosecutions could not be “derivative” of Cherokee Nation’s claims, *see United States v. Ballard*, No. 24-cv-0626-CVE-SH, 2026 WL 125927, at *7 (N.D. Okla. Jan. 16, 2026).

criminal defendants seeking to avoid punishment from a criminal charge and the interests of sovereign entities seeking to prevent unwarranted intrusion on their authority over their citizens have no obvious similarity.” *Ballard*, 2026 WL 125927, at *7. Moreover, the Nations and the state court defendants are “unrelated in terms of ownership, control, and management.” *Doran*, 422 U.S. at 929; *cf. D.L.*, 392 F.3d at 1226, 1230-31; *Hicks v. Miranda*, 422 U.S. 332, 348-49 (1975). The Nations are therefore not subject to *Younger*, even if they “may even be aligned with the state-court litigant in a common enterprise of vindicating the policy that gives rise to their individual claims.” *D.L.*, 392 F.3d at 1230.

Younger is also inapplicable “where federal preemption [is] readily apparent and [the] state tribunal [is] therefore acting beyond its lawful authority.” *Seneca-Cayuga Tribe v. Oklahoma ex rel. Thompson*, 874 F.2d 709, 716 (10th Cir. 1989) (citing *Baggett v. Dep’t of Prof. Reg.*, 717 F.2d 521, 524 (11th Cir. 1983)). That is the case here, *see* Br. at 15-17. Defendants assert otherwise in their Rule 12(b)(6) motion, Mot. 26 (cross-referencing their Response) to which the Nations reply *infra* at 20-47, with a caveat.⁸

2. The Factors Supporting *Younger* Abstention Do Not Exist.

Younger would not apply here even if Defendants overcame these threshold hurdles. If a state criminal prosecution is ongoing, the court may only abstain where “there exists . . . the presence of an important state interest, and . . . an adequate opportunity to raise federal claims in the state proceedings.” *Travelers Cas. Ins. Co. of Am. v. A-Quality Auto Sales, Inc.*, 98 F.4th 1307, 1317 (10th Cir. 2024) (quotation omitted). Defendants cannot meet these elements.

⁸ Defendants cannot rely on material extrinsic to the Complaint in support of their facial Rule 12(b)(1) motion, *see supra* at 1-2, in particular, the extrinsic material in their “Background” section, the affidavit cited on page 25 of their Response, or their assertions “upon information and belief” on page 27 of the Response, or any other extrinsic material they may seek to raise on reply.

There is no “important state interest” here for several reasons. First, “where, as here, states seek to enforce state law against Indians in Indian country ‘[t]he presumption and the reality . . . are that federal law, federal policy, and federal authority are paramount’ and the state’s interests are insufficient ‘to warrant *Younger* abstention.’” *Ute Indian Tribe v. Utah* (“*Ute VI*”), 790 F.3d 1000, 1008-09 (10th Cir. 2015) (Gorsuch, J.) (quoting *Seneca-Cayuga*, 874 F.2d at 713-14).⁹

Second, Defendants are bound by the Oklahoma Attorney General’s opinion in *In re Kannady*, 2025 OK AG 19, 2025 WL 3724128, *see* ECF No. 53-1, which concludes that “federal law bars application of the Wildlife Code to Member Indians and Five Tribe Nonmember Indians hunting and fishing on the three Nations’ reservations.” *Kannady*, ¶ 4. As the Attorney General explained, “[t]his office’s opinions are binding upon state officials affected by them, and they must follow and not disregard those opinions.” *Id.* ¶ 31 n.21; Okla. Stat. tit. 74, § 18b(A)(18) (Attorney General’s response to a request for an opinion “submitted by a member of the Legislature, regardless of subject matter,” is “*determinative of the law regarding such subject matter.*”) (emphasis added). Such an opinion “is binding on state officials unless the opinion is inconsistent with a *final determination* of a court of competent jurisdiction,” *State ex rel. Fent v. State ex rel. Okla. Water Res. Bd.*, 2003 OK 29, ¶ 16 n.37, 66 P.3d 432, 441 n.37 (emphasis added), and “public officers,” including the Governor, “have the duty to follow Attorney General opinions until they are judicially relieved of compliance,” *Stitt v. Drummond*, 2025 OK 82, ¶ 2 (quoting *Fent*, 2003 OK 29, ¶ 16, 66 P.3d at 441). Defendants cannot claim a state interest in proceedings that are contrary to *Kannady*.

⁹ “Nor would resolution of these issues in state court prevent conflict between the interests of the Tribes, protected by federal law, and the interests of the State. That conflict is inevitable. Because abstention would not mitigate this conflict, the proper forum to resolve it is federal court.” *Seneca-Cayuga*, 874 F.2d at 714.

Third, the State has no legitimate interest in defying the Supreme Court’s ruling in *McGirt v. Oklahoma*, 591 U.S. 894 (2020). *Cf. Ute VI*, 790 F.3d at 1005-06 (finding irreparable harm from efforts of state and county to undo determination of Indian reservation boundaries); Resp. 1 (referring to Creek Reservation recognized in *McGirt* as a “former reservation”); *id.* at 15, 16 (referring to the Nations’ Reservations as “former reservations”). While Defendants point to *Oklahoma v. Castro-Huerta*, Mot. 24, that case did not concern the exercise of state criminal jurisdiction over Indians in Indian country, *see* 597 U.S. 629, 639 n.2 (2022), *id.* at 650 n.6, 655 n.9, nor did it relieve Defendants of their obligation to comply with the Supreme Court holding in *McGirt* that Congress must expressly authorize states to exercise criminal jurisdiction over Indians in Indian country, and Oklahoma lacks such authorization. 591 U.S. at 929, 932.

Nor may Defendants assert that the state interest in wild animals gives it an interest in prosecuting Indians in Indian country, as state power over wildlife is subject to Congress’s constitutional power. *Hughes*, 441 U.S. at 335 (quoting *Douglas v. Seacoast Prods., Inc.*, 431 U.S. 265, 284 (1977)) (“the question is simply whether the State has exercised its police power in conformity with the federal laws and Constitution.”); *Kleppe v. New Mexico*, 426 U.S. 529, 545 (1976) (state “powers over wild animals within their jurisdictions . . . exist only ‘in so far as (their) exercise may be not incompatible with, or restrained by, the rights conveyed to the Federal government by the constitution.”) (quoting *Geer*, 161 U.S. at 528); *Missouri v. Holland*, 252 U.S. 416, 434 (1920) (“the State may regulate the killing and sale of [wildlife], but it does not follow that its authority is exclusive of paramount powers.”).

Younger also requires that there be . . . ‘an adequate opportunity to raise federal claims in the state proceedings.’” *Ute VI*, 790 F.3d at 1008 (quotation omitted), and there is none here. While Defendants assert “individual tribal members can assert defenses that the State’s wildlife

laws do not apply to them in state court,” Mot. 23-24, federal law instead requires that “the federal plaintiff must have an opportunity to press his claim in the state courts.” *Moore v. Sims*, 442 U.S. 415, 432 (1979); *accord D.L.*, 392 F.3d at 1229. The Nations have no such opportunity because they are not parties to the state criminal proceedings and have no right to intervene or defend penal charges against others. *See Ellis v. State*, 2003 OK CR 18, ¶ 41 n.12, 76 P.3d 1131, 1138 n.12; *Robinson v. Stovall*, 646 F.2d 1087, 1092 (5th Cir. Unit A June 1981) (“When . . . availability of intervention in the state proceedings, is absent, the courts have not hesitated to reject an ‘intertwining’ theory.”).

3. *Younger* Abstention Is Barred by the Nations’ Irreparable Injury.

Younger abstention is also barred by “irreparable injury ‘both great and immediate.’” 401 U.S. at 45 (quoting *Fenner v. Boykin*, 271 U.S. 240, 243 (1926)). While “the ‘threat to the plaintiff’s federally protected rights’ is only irreparable if it ‘cannot be eliminated by . . . defense against a single prosecution,’” *Phelps v. Hamilton*, 122 F.3d 885, 889 (10th Cir. 1997) (quoting *Younger*, 401 U.S. at 46), unless enjoined, Defendants can initiate new proceedings against Indians hunting, fishing, and gathering on the Nations’ Reservations, including imposing licensing requirements and punishments that never lead to judicial review, *see* Compl. ¶¶ 101, 108. And the Nations cannot pursue injunctive relief against the Defendants in *criminal* cases to which they are not parties, *see supra* at 9.

4. The AIA Has No Application Here.

Defendants make conclusory and underdeveloped assertions that the Nations’ claims are subject to the AIA, Mot. 3, 22, which should be rejected as inadequately briefed. *See United States v. McBride*, 94 F.4th 1036, 1045 (10th Cir. 2024); *see also Ute Indian Tribe v. Lawrence (Lawrence II)*, 22 F.4th 892, 910 n.22 (10th Cir. 2022). Even if considered, the AIA has no application to this case, as it is inapplicable to strangers to the state court proceeding sought to be

enjoined, *Imperial County v. Munoz*, 449 U.S. 54, 59 (1980); *SEC v. Marquis Props., LLC*, No. 2:16-cv-0040-JNP, 2016 WL 6839513, at *1 (D. Utah July 21, 2016); *see supra* at 5-6. The AIA is inapplicable where, as here, an Indian tribe brings an action under 28 U.S.C. § 1362, seeking to enjoin state court proceedings, and the action is one that the United States could have brought as the tribe’s trustee. *Cayuga Indian Nation v. Fox*, 544 F. Supp. 542, 551 n.5 (N.D.N.Y. 1982) (citing *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976) (citation modified)). *Cf. Pueblo of Pojoaque v. Biedscheid*, 689 F. Supp. 3d 1033, 1129-33 (D.N.M. 2023), *appeal dismissed* No. 23-2149, 2024 WL 4256791 (10th Cir. May 13, 2024) (applying AIA to a Tribe’s federal court suit to enjoin a state court suit brought directly against it).

C. The Nations Have Standing.

The Nations have standing to bring all their claims.¹⁰ Their complaint alleges that:

(1) [they have] 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[s]; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

New Eng. Health Care Emps. Pension Fund v. Woodruff, 512 F.3d 1283, 1288 (10th Cir. 2008).¹¹

¹⁰ The Court should reject Defendants’ invitations to opine on whether the Nations would have standing to bring claims “on behalf of, or involving the Indian country of, non-Plaintiff tribes, and/or (2) claims as *paren[is] patriae* on behalf of nonmember Indians,” Mot. 18, or “on behalf of non-member Indians” under a theory of “associational standing” or otherwise, *id.* at 19, 20 n.6, or whether they can establish an interest *parens patriae* as to non-member Indians, *id.* at 21, as the Nations do not make any such claims. To the extent that Defendants intend to challenge the Nations’ sovereign interests in jurisdiction over non-member Indians, Mot. 20-21, that is an attack on the merits of the Nations’ claims that Defendants’ exertion of state jurisdiction over any Indians hunting, fishing and gathering on the Nations’ Reservations violates the law. The Court must “assume, during the evaluation of the plaintiff’s standing, that the plaintiff will prevail on his merits argument—that is, that the defendant has violated the law.” *Day v. Bond*, 500 F.3d 1127, 1137 (10th Cir. 2007) (citation omitted); *see Ballard*, 2026 WL 125927, at *4 n.6.

¹¹ “At the pleading stage, general factual allegations of injury resulting from the defendant’s conduct” may establish standing. *Kan. Nat. Res. Coal. v. U.S. Dep’t of Interior*, 971 F.3d 1222, 1231 (10th Cir. 2020) (quotation omitted).

The Nations allege injury because Defendants are currently, and will continue, asserting state law jurisdiction over Indians hunting and fishing within the Nations’ Reservations.¹² *Id.* ¶¶ 9-13, 19. “The invasion of tribal sovereignty by the illegal assertion of state jurisdiction over an Indian defendant constitutes an injury that can be redressed by a federal court.” *Ballard*, 2026 WL 125927, at *4 (citing *Ute VI*, 790 F.3d at 1005).¹³ The Nations also easily meet the second and third prongs of the standing analysis. The Defendants’ imposition of state authority causes the harm that is the subject of the Nations’ complaint, Compl. ¶¶ 14-15, and that would be redressed by declaratory and injunctive relief barring Defendants from continuing to impose state jurisdiction on Indians in Indian country, *see Bronson v. Swensen*, 500 F.3d 1099, 1111-12 (10th Cir. 2007); *Ballard*, 2026 WL 125927, at *5.¹⁴

¹² Defendants also assert that “[e]ach of the three Nations lacks standing to assert claims against the State for conduct that is occurring on lands beyond the boundaries of their own Indian country.” Mot. 19. Each Nation may challenge Defendants’ conduct on the other two Nations’ Reservations here, as “[a]t least one plaintiff must have standing to seek each form of relief requested in the complaint.” *Town of Chester v. Laroe Ests., Inc.*, 581 U.S. 433, 439 (2017).

¹³ Nations’ allegation of injury to sovereignty belies Defendants’ assertion that the Nations are asserting standing “on behalf of” non-member Indians. Mot. 19. The Nations’ injury is Defendants’ interference with *their own* rights to permit Indians to hunt, fish, and gather and to exercise criminal jurisdiction over Indians, free from state interference.

¹⁴ The Nations do not need to demonstrate *parens patriae* standing. *See New Mexico v. GE Co.*, 467 F.3d 1223, 1243 n.30 (10th Cir. 2006) (unnecessary to evaluate *parens patriae* standing where State has identical remedies if suing as public trustee). But they can do so. A *parens patriae* action requires the sovereign to show that it has “an interest apart from the interests of particular parties,” that this interest must be a “quasi-sovereign’ interest,” and that the injury must be to a “sufficiently substantial segment of its population.” *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982). Such interests include “the health and well-being—both physical and economic—of its residents in general,” and “not being discriminatorily denied its rightful status within the federal system,” *id.* The Nations’ claims satisfy this inquiry. They seek to protect the rights of Indians within their Reservations to hunt, fish, and gather exclusive of state jurisdiction. They have enacted comprehensive codes to permit such activities while protecting the abundance and health of fish and game species. These activities are inextricably tied to the health, wellbeing, and culture of their members. *See* Compl. ¶¶ 19(i), 21 22.c, 81. Also, the Nations seek to vindicate their “rightful status within the federal system” by preventing the Defendants from interfering with tribal sovereignty in violation of federal law and congressional

D. The Nations’ Claim Is Not Barred by Equitable Defenses Like Laches.

Defendants argue that “equitable principles as articulated in [*City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005)],” Mot. 13, as well as laches, *id.* at 15 & n.4 (citing *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1337-38 (10th Cir. 1982)), bar the Nations’ claims. But dismissal for an affirmative defense like laches is only proper when the complaint itself admits all the elements of the affirmative defense, *see supra* at 2, and thus is not proper here, as the complaint establishes the Nations’ right to relief, and Defendants rely on various allegations nowhere found in the Complaint, *see* Mot. 15-17 (making claims about ownership of land, state regulation of hunting and fishing, and supposed acquiesce). In addition, *Sherrill* and laches are inapplicable here for several additional reasons.

In *Sherrill*, the Oneida Indian Nation (the “Oneidas”) purchased land in the open market that had been illegally purchased from it two centuries earlier and asserted that its unilateral action “revived the Oneidas’ ancient sovereignty piecemeal over each parcel,” making them immune from the City of Sherrill’s property taxes. 544 U.S. at 202. The Court held that the delay and change in the character of the lands in the two centuries that had passed since the Oneidas last possessed the land “preclude [the Oneidas] from gaining the disruptive remedy it now seeks,” *id.* at 216-17.¹⁵

authority. Defendants’ infringement on the Nations’ sovereignty and treaty rights affects all members.

¹⁵ The Court explicitly did not decide whether the Oneida Reservation had been disestablished, while emphasizing that “only Congress can divest a reservation of its land and diminish its boundaries.” *Id.* at 215 n.9 (quoting *Solem v. Bartlett*, 465 U.S. 463, 470 (1984), and *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998), and citing 18 U.S.C. § 1151 (“defining Indian country”). *McGirt* squarely decided whether the Creek Reservation was disestablished, 591 U.S. at 897-900, and the courts have resolved that question as to the Nations’ reservations, *see Castro-Huerta*, 597 U.S. at 633-34. That defeats Defendants’ reliance on *Sherrill*. *Cayuga Nation v. Tanner*, 6 F.4th 361, 379-80 (2d Cir. 2021) (refusing to “interpret[] *Sherrill* to have effectively disestablished” an Indian reservation because “*McGirt* forecloses” that result).

The Nations did not delay in bringing their suit, *see infra* at 15, but Defendants cannot rely on an assertion of the passage of time here, because *McGirt* held that Oklahoma’s longstanding practice of exercising criminal jurisdiction over cases covered by the Major Crimes Act (“MCA”), 18 U.S.C. § 1153, was illegal and that “[u]nlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. *McGirt*, 591 U.S. at 937-38. *Accord United States v. John*, 437 U.S. 634, 653-54 (1978) (rejecting claims that interruption of federal supervision over Choctaws in Mississippi gave Mississippi criminal jurisdiction in Indian country); *Bd. of Comm’rs v. United States*, 308 U.S. 343, 350 (1939) (“Nothing that the state can do will be allowed to destroy the federal right which is to be vindicated; The state will not be allowed to invade the immunities of Indians, no matter how skillful its legal manipulations.”); *Indian Country, U.S.A., Inc. v. Oklahoma ex rel. Oklahoma Tax Commission*, 829 F.2d at 974 (“[T]he past failure to challenge Oklahoma’s jurisdiction over Creek Nation lands, or to treat them as reservation lands, does not divest the federal government of its exclusive authority over relations with the Creek Nation or negate Congress’ intent to protect Creek tribal lands and Creek governance with respect to those lands.”). 829 F.2d 967, 974 (10th Cir. 1987).

Second, laches does not apply to claims based on treaty rights—such as this one. As the Ninth Circuit held in *United States v. Washington*, 157 F.3d 630, 649 (9th Cir. 1998), “laches . . . is not available to defeat Indian treaty rights. Although . . . the Tribes waited 135 years to assert their shellfishing rights, . . . we reiterate that we are interpreting a treaty, and that treaties enjoy a unique position in our law.” *Accord Swim v. Bergland*, 696 F.2d 712, 718 (9th Cir. 1983) (“Laches . . . is not available to defeat Indian treaty rights. . . . This is true even where the Indians have long acquiesced in use by others”). Courts have rejected reliance on *Sherrill* to contend otherwise. *See United States v. Washington*, 853 F.3d 946, 967 (9th Cir. 2017), *aff’d by equally divided court*,

584 U.S. 837 (2018); *Saginaw Chippewa Indian Tribe v. Granholm*, No. 05-10296-BC, 2008 WL 4808823, at *22-23 (E.D. Mich. Oct. 22, 2008).

Third, this case does not concern the right to possess land. The Nations sue only the state officials who are violating their rights, without affecting the rights of private landowners. *See* Compl. ¶ 61.¹⁶ By contrast, *Sherrill* concerned a claim of sovereign authority ultimately based on an alleged continuing right to the possession of land, and these are the types of cases to which it has been subsequently applied. *See, e.g., Oneida Indian Nation v. County of Oneida*, 617 F.3d 114, 125-26 (2d Cir. 2010); *Cayuga Indian Nation v. Pataki*, 413 F.3d 266, 270-78 (2d Cir. 2005); *Oneida Indian Nation v. Phillips*, 981 F.3d 157, 167 (2d Cir. 2020); *Quapaw Tribe v. Blue Tee Corp.*, 653 F. Supp. 2d 1166, 1192 (N.D. Okla. 2009); *United States v. Osage Wind LLC*, No. 14-cv-704-GKF-JFJ, 2021 WL 3774685, at * (N.D. Okla. Aug. 25, 2021) (“[i]n some circumstances, equitable defenses may apply to Indian land claims . . . only in circumstances similar to [*Sherrill*”).¹⁷

Fourth, even assuming arguendo that *Sherrill* could apply here, the factors described in *Sherrill* are not met here, as there has been no delay, nor did Defendants rely on any actions by the Nations to exercise jurisdiction over Indians hunting and fishing in Indian country. *Cf. Sherrill*, 544 U.S. at 216-17. On October 7, 2025, Defendants claimed the right to exercise jurisdiction over Indians in Indian country under *Stroble v. Oklahoma Tax Commission (In re Stroble)*, 2025 OK 48, Compl. ¶¶ 9-10, 96-97, and “the recommendation of the Legal Committee of the [ODWC],” pursuant to which they “implement[ed] uniform enforcement of the Oklahoma Wildlife

¹⁶ This makes irrelevant Defendants’ assertions as to title to land within the Nations’ Reservations, *see* Mot. 15, which is not supported by the complaint or judicially-noticeable information.

¹⁷ That makes inapplicable the three-part test Judge Frizzell borrowed from *Phillips*, 981 F.3d at 168, *see* Mot. 15. That test would not be satisfied here, for the reasons described *infra* at 15-16.

Code in state courts in accordance with applicable state law,” Compl. Ex. 2; *see also* Ex. 9. This announcement and action would have been unnecessary based on a recent decision and legal advice if ODWC had been exercising jurisdiction over Indians hunting and fishing in Indian country before October 7, 2025. The state Attorney General identified this change in his November 13, 2025, letter to Defendant Free. *Id.* ¶ 100. Defendants Stitt and Cochran asserted jurisdiction over Indians hunting and fishing in Indian country in October 2025 in response to actions by the Oklahoma Attorney General. *See id.* ¶¶ 12-13 & Exs. 3, 5. The Nations filed this lawsuit weeks later. That defeats Defendants’ attempts to rely on the State’s actions in 1909 or 1974, the decision in *McGirt*, or statements they assert one Nation made “nearly 20 years ago,” to establish “constant[]” state jurisdiction or that the Nations “freely acquiesced” to such supposed authority. Mot. 16-17.¹⁸ Defendants also cannot now claim a “legitimate reliance” interest on state jurisdiction, *see Sherrill*, 544 U.S. at 217, in light of *In re Kannady*. *See supra* at 7-8.

Nor is the Nations’ claim disruptive. *See Sherrill*, 544 U.S. at 215, 217. Landowners will not be affected by this case, *see supra* at 14, and the Nations’ cross-deputization agreements with ODWC and the fact that the Nations’ wildlife codes largely mirror the State’s own requirements, Compl. ¶¶ 64, 75, allow for seamless protection of game and fish. Nor has there been tribal acquiescence to state authority, *see Sherrill*, 544 U.S. at 218-19, as the Nations comprehensively regulate hunting, fishing, and gathering activities by Indians on their Reservations, *see* Compl. ¶¶ 57-68. And as the Reciprocity Agreement (“RCA”) makes clear, they do so “free from the encroachment of laws enacted by any State,” as federal law imposes a “continuing constraint on

¹⁸ Defendants cite a document that they attribute to Cherokee Nation, ECF No. 47-1, but it was not part of the Complaint, and they provide no information to support judicial notice, *see* Mot. 16-17. Defendants also strategically omit the statement in that document, regarding state enforcement against Indians, that “the Nation believes that such penalties would be improper,” ECF No. 47-1 at 4. Furthermore, that document could not support laches as to the other Nations.

Oklahoma jurisdiction within Indian country with respect to Indians.” See ECF No. 2-1 at 1-2 (citing *Indian Country, U.S.A.*, 829 F.2d at 979). Indian hunters have relied on tribal licenses on the Reservations, and ODWC upset these reliance interests in October 2025. See Compl. ¶ 22.

Nor can Defendants rely on general principles of laches, see Mot. 15 (citing *Jicarilla*, 687 F.2d at 1337-38).¹⁹ “[L]aches exists ‘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.’” *Mile High Indus. v. Cohen*, 222 F.3d 845, 858 (10th Cir. 2000) (quoting *Jicarilla*, 687 F.2d at 1338). It requires “prejudice to the party asserting the defense as a result of this delay” and “depends on whether ‘equitable relief cannot be afforded without doing injustice.’” *Id.* at 857-58 (quoting *Jicarilla*, 687 F.3d at 1337-38). The Nations did not delay unreasonably in filing suit, see *supra* at 15. Nor are Defendants prejudiced by any action of the Nations, as Defendants relied on *Stroble* to implement their new policy, not the Nations’ actions, and the Nations filed suit promptly. See *supra* at 15-16.²⁰ Because the equitable relief the Nations seek is timely and would not affect private landowners, it would not result in injustice. See *supra* at 14, 16.

E. Defendant Cochran Lacks Absolute Prosecutorial Immunity.

Defendants’ assertion that Defendant Cochran is protected by “absolute prosecutorial immunity,” Mot. 13, is frivolous as he is sued in his official capacity. Compl. ¶¶ 3, 13, and while

[a]n official in a personal-capacity action may, depending on his position, be able to assert personal immunity defenses . . . [but] [i]n an official-capacity action, those

¹⁹ Defendants allude to unnamed defenses “such as” laches. Mot. 13, 17. Mere allusions to unnamed defenses cannot invoke them. See *McBride*, 94 F.4th at 1045. But other “equitable defenses such as laches” would not apply here for the same reasons that laches does not.

²⁰ Section 2 of the Act of April 12, 1926, ch. 115, 44 Stat. 239, 240, has no application here. Cf. Mot. 15 n.4. It “applies to suits in which the issues involve title to land. It has no application to other suits.” *United States v. Fixico*, 115 F.2d 389, 392 (10th Cir. 1940). It does not concern suits brought to vindicate the rights of tribes. See *United States v. Russell*, 261 F. Supp. 196, 199 (E.D. Okla. 1966). But even if it did make the state doctrine of laches applicable—which it does not—its application would lead to the same result.

defenses are unavailable. The only immunities that can be claimed in an official-capacity action are forms of sovereign immunity that the entity, *qua* entity, may possess, such as the Eleventh Amendment.

Kentucky v. Graham, 473 U.S. 159, 166-67 (1985) (emphasis added) (citations and footnote omitted). *Kentucky* specifically cited absolute prosecutorial immunity as a “personal immunity defense[]” that is *not* available to official capacity defendants. *See id.* 167 (citing *Imbler v. Pachtman*, 424 U.S. 409 (1976)); accord *Lewis v. Clarke*, 581 U.S. 155, 163 (2017).

F. The Nations Do Not Seek a Universal Injunction.

The Nations seek injunctive relief that would bar Defendants from exercising authority against the Nations and any of the Nations’ members on any Nation’s Reservations or from interfering with the Nations’ prosecutions of violations of tribal law in their courts. Compl. Claims for Relief ¶ 6. Defendants assert that if this injunction is applied “to non-member Indians,” it would constitute “issuance of a ‘universal injunction’” barred by *Trump v. CASA, Inc.*, 606 U.S. 831 (2025). Mot. 21.²¹ It would not. *CASA* defined “universal injunction,” as an injunction that “prohibits the Government from enforcing the law against *anyone*, anywhere.” 606 U.S. at 837 n.1. The Nations only seek relief against Defendants’ imposition of state fish and wildlife laws on the Nations and Indians on the Nations’ Reservations.

G. The Court Should Reject Defendants’ Other Rule 12(b)(6) Arguments.

Finally, Defendants cross-reference their likelihood of success on the merits arguments from their Response, and they assert that these arguments are reasons to dismiss the case for failure

²¹ The Nations do not seek an injunction applying to “non-Plaintiff tribes or their lands,” *see* Mot. 21.

to state a claim. Mot. 26.²² The Nations therefore cross-reference their merits arguments from their Motion for Preliminary Injunction, Br. at 19-31, and their Reply, *infra* § III.

II. The Nations Do Not Seek a Disfavored Preliminary Injunction.

The injunction the Nations seek would not disrupt the status quo and thus is not disfavored. *Cf.* Resp. 13-15. The “last peaceable uncontested status existing between the parties before the dispute developed,” *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1260 (10th Cir. 2005) (quotation omitted), existed in early October 2025, when ODWC was not enforcing state law against Indians in Indian country. That had been the status quo at least as early as October 2022, when Defendant Erdman informed the Choctaw Nation that ODWC wardens could not impose state administrative fines on Indians on the Reservation, but could do so if a tribe established administrative fines. *See* Ex. A, Harvey 2d Suppl. Decl. ¶¶ 4-11. From 2022-24, staff at ODWC understood that ODWC would not impose state law on Indians in Indian country, Ex. B, Henry Suppl. Decl. ¶¶ 4-7; Ex. C, Gamble 2d Suppl. Decl. ¶¶ 9-10, and the Nations were not aware of assertions by ODWC of state jurisdiction over Indians hunting in Indian country, *see* Ex. C ¶¶ 11-15; Ex. D, Berst Suppl. Decl. ¶¶ 11-17; Ex. E, Bishop Decl. ¶¶ 10-12; ECF No. 3-3 ¶ 13. The Nations also entered into the RCA during this time, *cf.* Resp. 15; ECF No. 3-3 at 8-13, asserting their rights and the State’s lack of jurisdiction. And individual Indians understood, based on their own experiences, that they would *not* be subject to state jurisdiction for hunting in Indian country, and they relied on tribal licenses. Ex. F, Woodral Decl. ¶ 5; Ex. G, Lansdale Decl. ¶ 4; ECF No. 3-9 ¶ 9; *see also* ECF No. 3-11 ¶¶ 12-13; ECF No. 3-16 ¶ 8. Before October 2025, ODWC consistently referred hunting charges against Indians to tribal courts—not state courts—where they were prosecuted by the Nations. *See*

²² Defendants’ attempt to redefine what relief the Nations may seek, *see* Mot. 25-26, relies on the correctness of their underlying arguments, and fails for the same reasons as those arguments, *see supra* at 2-18.

Ex. B ¶¶ 7-8; Ex. E, ¶¶ 7-13; Ex. H, Stroud Decl. ¶ 7; Ex. I, Crawford Decl. ¶¶ 7, 12-14. As late as September 2025, ODWC referred an Indian hunting case— apparently arising on state-owned land—to tribal court under tribal law. Ex. G ¶¶ 10-11 & Attach. (citation under Chickasaw Nation Code tit. 17, § 101.2²³); Ex. I ¶¶ 9-10. Defendants reversed policy in early October 2025, causing significant public concern. *See* ECF No. 3-4, ¶ 7; ECF No. 3-6, ¶ 19; ECF No. 3-7, ¶¶ 14, 16; ECF No. 3-10, ¶ 6; ECF No. 3-15, ¶ 9; ECF No. 3-16, ¶ 5; ECF No. 3-18, ¶ 12; Ex. C ¶ 16. The Nations filed suit less than six weeks later.

Nor does the preliminary injunction the Nations seek meet the first or third criteria for disfavored injunctions. *Cf.* Resp. 14.²⁴ The Nations only seek to *stop* Defendants from exerting jurisdiction over Nation members on their Reservations. They do not request Defendants “act in a particular way,” nor does compliance with a prohibition require “ongoing supervision.”²⁵ *Cf. Schrier*, 427 F.3d at 1261; *Ciempa v. Jones*, 745 F. Supp. 2d 1171, 1205 (N.D. Okla. 2010). Nor does the Nations’ motion seek “substantially all the relief” sought in this action. It only concerns the rights of Nation members to hunt free from state regulation on their Reservations, Br. 4, while their suit concerns hunting, *fishing, and gathering* by *all* Indians on their Reservations, Compl. 55-57, so granting it would not “render a trial on the merits largely or completely meaningless.” *Prairie Band v. Pierce*, 253 F.3d 1234, 1247 (10th Cir. 2001) (quotation omitted).

²³ <https://code.chickasaw.net/Title-17> (integrating state criminal offenses).

²⁴ We address both here, although Defendants’ argument on the third criterion is inadequately briefed. *See McBride*, 94 F.4th at 1045.

²⁵ Defendants at Resp. 14 erroneously attribute this quoted language to *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1261 (10th Cir. 2004), which specifically did *not* address the standard for disfavored injunctions, but referred to this criterion as concerning “mandatory rather than prohibitory” injunctions, *see id.* at 1262 n.6.

III. The Nations Have A Substantial Likelihood Of Success On The Merits.

The Nations hold treaty rights and inherent sovereign authority to hunt on their Reservations and to regulate their members engaged in such activities, including their members hunting on another Nation's Reservation under the RCA, and those rights preempt state law. *See* Br. 2. In addition, as Congress has never granted Oklahoma criminal jurisdiction over Indians on Indian reservations, *McGirt*, 591 U.S. at 929, 932; *Ute VI*, 790 F.3d at 1006-07, and the state fish and game laws impose criminal penalties, Resp. 20 & n.20, the State lacks jurisdiction to enforce those laws against Indians on the Nations' Reservations.

A. State Sovereign Authority Does Not Authorize Defendants to Regulate the Treaty Rights the Nations Hold Under Federal Law.

The valid exercise of federal power preempts the exercise of state police power, and thus Defendants cannot rely on the State's inherent sovereign authority to regulate the Nations' Treaty rights.²⁶ *Antoine v. Washington*, 420 U.S. 194, 201, 204 (1975), explicitly rejects the argument that "Congress is not constitutionally empowered to inhibit a State's exercise of its police power" by ratifying an agreement that reserved tribal hunting rights on ceded land, because a congressionally-ratified agreement "is a "[Law] of the United States . . . made in Pursuance" of the Constitution and like "all Treaties made," is binding on States under the Supremacy Clause.²⁷

²⁶ Defendants assert that their police power "require[s] no specific grant of authority in the Federal Constitution," and authorizes them "to provide for the public health, safety, and morals," Resp. 17 (quoting *Dodger's Bar & Grill, Inc. v. Bd. of Cnty. Comm'rs*, 32 F.3d 1436, 1441 (10th Cir. 1994) and citing *Torres v. Lynch*, 578 U.S. 452, 457-58 (2016) and *City of El Paso v. Simmons*, 379 U.S. 497, 508-09 (1965)). None of these cases hold or suggest that the state police power trumps valid exercises of federal authority; nor do they concern state regulation of Indians in Indian country. *See Dodger's*, 32 F.3d at 1441; *Torres*, 578 U.S. at 454; *Simmons*, 379 U.S. at 506-509. The sentence of *Simmons* from which Defendants quote, Resp. 17, simply addresses state authority over "remedial processes" and "to safeguard the vital interests of its people" under the Contract Clause, *see* 379 U.S. at 508.

²⁷ This holding reflects settled law. *See United States v. Sandoval*, 231 U.S. 28, 48-49 (1913) (federal ban on importation of liquor into some Indian country "a legitimate exercise of [federal] power" that "does not encroach upon the police power of the state, or disturb the principle of

In sum, “a state law that burdens a treaty-protected right is pre-empted by the treaty,” *Wash. Dep’t of Licensing v. Cougar Den, Inc.*, 586 U.S. 347, 367 (2019).

Nor can Defendants rely on the Tenth Amendment. *See* Resp. 17. “[T]he Tenth Amendment ‘states but a truism that all is retained which has not been surrendered.’” *New York v. United States*, 505 U.S. 144, 156 (1992) (quotation omitted). Thus, the “significant measure of sovereign authority” retained by the States is only held “to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government.” *Id.* (quotation omitted). The Tenth Amendment does not reserve power over Indians to the States because “‘virtually all authority over Indian commerce and Indian tribes’ lies with the Federal Government.” *Haaland v. Brackeen*, 599 U.S. 255, 273 (2023) (quotation omitted). Accordingly, the exercise of the Federal Government’s plenary power over Indians does not violate the Tenth Amendment.²⁸ And Defendants’ assertion that the State has “inherent sovereign authority to manage, protect, and conserve wildlife in the public trust,” Resp. 1 (citing *Hughes*, 441 U.S. at 338-39), fails for the reasons shown *supra* at 8. In sum, a State’s authority to regulate wildlife must yield when its exercise interferes with Indian treaty rights. *Antoine*, 420 U.S. at 204; *Washington v. Wash. State Com. Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 691-92 (1979).

equality among the states”); *United States v. Sutton*, 215 U.S. 291, 295 (1909) (Congress may forbid introduction of liquor into an Indian reservation despite assertion “that the full police power is lodged in the state, and by it alone can such offenses be punished”).

²⁸ *See Gila River Indian Cmty. v. United States*, 729 F.3d 1139, 1153-54 (9th Cir. 2013) (“[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States” (quoting *New York*, 505 U.S. at 156-57), and thus enactment under the Indian Commerce Clause does not violate the Tenth Amendment); *Carciari v. Kempthorne*, 497 F.3d 15, 39-40 (1st Cir. 2007) (en banc), *rev’d on other grounds*, 555 U.S. 379 (2009) (“Because Congress has plenary authority to regulate Indian affairs, section 465 of the [Indian Reorganization Act] does not offend the Tenth Amendment.”).

Defendants’ assertion that the State’s “inherent sovereign authority” includes “authority to ‘impose reasonable and nondiscriminatory regulations on an Indian tribes’ treaty-based hunting, fishing, and gathering rights on state land when necessary for conservation,” Resp. 18 (quoting *Herrera v. Wyoming*, 587 U.S. 329, 339-40 (2019)), misunderstands the law. The conservation necessity standard is federal law, *see* Br. 16-17, not an element of state sovereign authority, and “[t]he measure of the legal propriety of those kinds of conservation measures is [] distinct from the federal constitutional standard concerning the scope of the police power of a State.” *Puyallup Tribe v. Dep’t of Game* (“*Puyallup I*”), 391 U.S. 392, 401 n.14 (1968) (citations omitted). But Defendants do not satisfy the conservation necessity standard.²⁹ They simply assert the right to apply state law to Indians on the same terms as to non-Indians and contend that the exercise of their authority “to regulate hunting and fishing on all fee lands . . . is essential to the State’s overall

²⁹ “The first prong of the legal standard is that a regulation must be reasonable and necessary for conservation. Conservation in the context of treaty usufructuary rights includes the perpetuation of a species or resource as well as measures designed to ensure a reasonable margin of safety against extinction.” *Lac Courte Oreilles Band v. Wisconsin* (“*LCO*”), 668 F. Supp. 1233, 1235-36 (W.D. Wis. 1987) (citations omitted). “A conservation regulation is reasonable if it is ‘appropriate to its purpose,’” and it “is necessary if it is ‘essential to conservation.’” *Id.* (quoting *United States v. Washington*, 384 F. Supp. 312, 342 (W.D. Wash. 1974), *aff’d*, 520 F.2d 676 (9th Cir. 1975)). “The essential nature of the regulation depends upon a showing that there is a need to limit the taking of the particular species or resource in the particular geographic area, and that the particular regulation is necessary to accomplish that limitation.” *Id.* (citing *Sohappy v. Smith*, 302 F. Supp. 899, 908 (D. Ore. 1969)). “In addition, the state must demonstrate not only that the regulation is a reasonable and necessary conservation measure, but also that its application to the tribes is ‘necessary in the interest of conservation.’” *Id.* (quoting *Antoine*, 420 U.S. at 207). As the Supreme Court made clear in *Fishing Vessel Association*, “[a]lthough nontreaty fishermen might be subjected to any reasonable state fishing regulation serving any legitimate purpose, treaty fishermen are immune from all regulations save that required for conservation.” 443 U.S. at 682. “The second prong of the basic test for state regulation is that the regulations must not discriminate against the Indians.” *LCO*, 668 F. Supp. at 1237. “It is well established in the case law that a facially neutral state regulation applied in a non-discriminatory manner nonetheless may discriminate against tribal usufructuary rights.” *Id.* (citing *Dep’t of Game v. Puyallup Tribe* (“*Puyallup IIP*”), 414 U.S. 44, 48 (1973)).

wildlife conservation goals.” Resp. 18; *id.* at 25 (citing ECF No. 46-1 ¶ 5).³⁰ These contentions are patently insufficient.

First, the State has no authority to require an Indian exercising a treaty right to obtain a state license; nor can it justify the imposition of such a requirement under the conservation necessity standard. *See* Br. 14 (quoting *Tulee v. Washington*, 315 U.S. 681, 685 (1942), and *Cougar Den*, 586 U.S. at 367). Second, the Supreme Court has rejected the contention that a treaty right entitles Indians to only an equal opportunity to hunt and fish, “else Congress preserved nothing which the Indians would not have had without that legislation,” which would be “an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more.” *Antoine*, 420 U.S. at 206 (quoting *United States v. Winans*, 198 U.S. 371, 380 (1905), and *Puyallup I*, 391 U.S. at 397-398). In *Fishing Vessel Association*, the Court reaffirmed its rejection of “the State’s ‘equal opportunity’ approach,” holding that *Puyallup I* “reaffirmed both of the holdings that may be drawn from *Winans*—the treaty guarantees the Indians more than simply the ‘equal opportunity’ along with all of the citizens of the State to catch fish, and it in fact assures them some portion of each relevant run.” 443 U.S. at 679, 681-82 & 681 n.24. As the Ninth Circuit later explained, “[d]irect regulation of treaty Indian fishing in the interests of conservation is permissible only after the state has proved unable to preserve a run by forbidding the catching of fish by other citizens under its ordinary police power jurisdiction.”

³⁰ The affidavits Defendants rely on, *see* Defs. Ex. 1-6, 13, ECF Nos. 46-1 to 46-6, 46-13, show no cognizance of the conservation necessity standard, identify no conservation necessity that would justify the application of state law to Nation members under that standard, and instead assert that the State’s wildlife management and code should apply to Indians on the same terms as everyone else. Defendants also ignore the provisions of the RCA that require each Nation to subject its members to a single bag limit wherever they hunt, ECF No. 3-3 at 10 (art. 2.E.), the effect of which is to avoid any increase in the fish and game harvest within the State as a result of the Nations’ Treaty rights.

Washington, 520 F.2d at 686. Defendants’ inverse approach of regulating Indians from the jump, excises the “necessity” from “conservation necessity.”³¹

B. Defendants’ Attack on the Nations’ Treaty Rights Is Rejected by the Treaty Terms, Established Law, and the High Standard for Treaty Abrogation.

Defendants contend that “no treaty expressly authorize tribal members to hunt and fish free of State regulation,” *id.* at 21, that “no federal law preempts State jurisdiction over hunting and fishing within its borders and the Nations do not contend otherwise,” *id.* at 20, and that “no such implied right extends to fee lands.” *Id.* at 22. These contentions fail for the following reasons.

1. The Nations Have Treaty Rights to Hunt On-Reservation, Free From State Interference.

The Choctaw and Chickasaw Nations’ right to hunt on their Reservations is an element of their right to “exist as a nation and live on” the lands within the boundaries of the territory conveyed to the Choctaw Nation under the Treaty of Dancing Rabbit Creek, art 2., Sep. 27, 1830, 7 Stat. 333 (“1830 Treaty”), and confirmed to the Chickasaw Nation under the Treaty of Doaksville, art. 1, Jan. 17, 1837, 11 Stat. 573.³² Their right to regulate such activities by Nation members,³³ including those hunting pursuant to the RCA, is included within their “jurisdiction and government of all the persons and property” within their Reservations, *id.* art. 4; *see* Br. 10 (quoting *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 197-98 (1978)), and their right to be free from state interference with those rights is held under the promise that “no . . . State shall ever have a

³¹ Defendants cannot meet this test for the additional reason that the Nations’ regulation of hunting and fishing protects species using standards nearly identical to the State’s, as Defendants acknowledge, *see* Resp. 19-20. Effective tribal regulation establishes the absence of a conservation necessity. “So long as the tribes responsibly insure that the run of each species in each stream is preserved, the legitimate conservation interests of the state are not infringed.” *Washington*, 520 F.2d at 686.

³² That secured to the Chickasaw Nation “all the rights and privileges” of the Choctaw Nation under the 1830 Treaty, *Okla. Tax Comm’n v. Chickasaw Nation*, 515 U.S. 450, 465 n.15 (1995).

³³ The Nations’ motion only seeks relief as to their and their members’ rights. Br. 1 n.1.

right to pass laws for the government of the Choctaw Nation of Red People,” 1830 Treaty art. 4. Cherokee Nation holds these same rights under the Treaty of New Echota, Dec. 29, 1835, 7 Stat. 478, by which they were “guarantied” the territory described in in that Treaty “to be conveyed by patent,” *id.* art. 2, were secured “the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country belonging to their people or such persons as have connected themselves with them,” and were promised that their lands would “in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory,” *id.* art. 5. The breadth of these Treaty terms plainly encompasses the Nations’ and their members’ right to hunt within reservation boundaries, including Nation members doing so under the RCA, and the Nations’ rights to regulate this activity, and defeats Defendants’ contention that the Nations’ Treaties are silent with respect to those rights. *See* Resp. 21.³⁴

As earlier shown, Br. 15, the Nations’ Treaties are “the supreme Law of the Land,” U.S. Const. art. VI, cl. 2, and “a state law that burdens a treaty-protected right is pre-empted by the

³⁴ Defendants argue that “*N. Arapahoe Tribe [v. Hodel]*, 808 F.2d [741], 748 [(10th Cir. 1987), confirms that any implied rights to hunt and fish are ‘rights of possession’ that are ‘derived from [a tribe’s] status as occupants of the land.’” Resp. 22. *N. Arapahoe* simply applied the general rule to the unique circumstances of the Arapahoe, who had been placed on the Shoshone Tribe’s reservation over the Shoshone’s objection and in violation of the Shoshone’s Treaty, *N. Arapahoe*, 808 F.2d at 743, though “their status as occupants of the land [was] confirmed by congressional and executive acts,” *id.* at 748 (citing *Shoshone Tribe v. United States*, 299 U.S. 476, 486-90 (1937)). On that basis, the Arapahoe held “rights to hunt and fish [as] part of [their] larger rights of possession.” *Id.* (citing *Winans*, 198 U.S. at 381; *Menominee Tribe v. United States*, 391 U.S. 404, 406 & n.2 (1968)). Defendants also rely on the Bureau of Indian Affairs Manual to support their contention, Resp. 22 n.12 (quoting Indian Affairs Manual, Part 56, ¶ 1.2(B) (issued Feb. 13, 2017), <https://www.bia.gov/policy-forms/manual>). But the provision on which they rely concerns *off-reservation* hunting, fishing, and gathering, and the Manual does not address the Nations’ Treaty rights.

treaty,” *Cougar Den*, 586 U.S. at 367; *see also Fishing Vessel Ass’n*, 443 U.S. at 691-92.³⁵ Thus, Defendants’ contention that “no federal law preempts State jurisdiction over hunting and fishing within its borders and the Nations do not contend otherwise,” Resp. 20, fails.

Relying on *Castro-Huerta*, Defendants also assert that the Nations’ treaties were repealed by Oklahoma’s admission to the Union. Resp. 21 (quoting *Castro-Huerta*, 597 U.S. at 654). As earlier shown, Br. 12 & 12-13 n.15, that argument is rejected by *Herrera*, 587 U.S. at 341-42, *Minnesota v. Mille Lacs Band*, 526 U.S. 172, 207 (1999), and *Indian Country, U.S.A.*, 829 F.2d at 979. *Castro-Huerta* did not unsettle these rulings as it narrowly considered Section 3 of the Oklahoma Enabling Act “[w]ith respect to crimes committed by non-Indians against Indians in Indian country,” and it only “recognize[d] that the Federal Government and the State have concurrent jurisdiction over crimes committed by non-Indians against Indians in Indian country.” 597 U.S. at 655-56; *accord id.* at 655 n.9. *See Indian Country, U.S.A.*, 829 F.2d at 978 (“[U]pon Oklahoma’s admission to statehood in 1907, federal authority ended with regard to non-Indians [while] federal authority continued with regard to Indians.”); *McGirt*, 591 U.S. at 928-29. The *Castro-Huerta* Court’s brief discussion of “treaties from the 1800s,” *id.* at 653, is limited for the same reasons; namely, the Court only considered those treaties “[w]ith respect to crimes

³⁵ Defendants also rely on 18 U.S.C. § 1165, *see* Resp. 20-21, which the Nations only cited to show its inclusion in the quote from *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983), on which they relied. *See* Br. 13. Section 1165, which establishes that it is a federal misdemeanor to hunt, trap, or fish on certain Indian lands, is not relevant here as this case concerns the State’s lack of jurisdiction over Nation members hunting, fishing, and gathering on the Nations’ Reservations. While Defendants also contend that 25 U.S.C. § 1301(2) “says nothing about exclusivity or a limit on the State’s jurisdiction,” Resp. 21, § 1301(2). Tribal jurisdiction is exclusive under § 1301(2) because Congress has not expressly authorized the State to exercise criminal jurisdiction over crimes by Indians in Indian country, as *McGirt* squarely held. 591 U.S. at 929, 932.

committed by non-Indians against Indians in Indian country,” *id.* at 655, and limited its opinion to that issue.³⁶

2. The Nations’ Treaty Rights to Hunt Continue to Exist Within the Boundaries of Their Reservations.

Defendants contend that if “pre-statehood treaties impliedly permitted tribal members to hunt and fish on trust land, no such implied right extends to fee lands.” Resp. 22. This argument fails because the Nations’ Treaties secured to them rights to hunt, and regulatory authority over that activity—including as authorized by the RCA—on all land within the boundaries of their reservations, *see supra* at 25-26, and these rights remain in effect unless abrogated under the high standard that federal law imposes. *See infra* at 29. Defendants accuse the Nations of “seeking to extend *McGirt* well beyond its express holding,” asserting that *McGirt* “decided ‘only’ the narrow issue of ‘the statutory definition of “Indian country” as it applies in federal criminal law under the MCA.” Resp. 2 (quoting *McGirt*, 591 U.S. at 935) (emphasis added by Defendants). In fact, the Court stated that “[t]he *only* question before us . . . concerns the statutory definition of ‘Indian country’ as it applies in federal criminal law under the MCA,” 591 U.S. at 935 (emphasis added). To resolve that question, the *McGirt* Court first decided that Congress had established a reservation for the Creek that continues to exist, *id.* at 899-927. These holdings were essential to the Court’s decision, because the continuing existence of the Reservation made the MCA applicable to *McGirt*’s crime, as the MCA only applies to certain crimes committed by Indians in Indian country,

³⁶ *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), confirms that that the Nations’ Treaties were not abrogated by statehood. There the Court held that the banks and bed of the Arkansas River are held by the Nations under their treaties, and did not pass to the State on its admission to the Union. *Id.* at 627-28. In so holding, the Court emphasized that “the United States accompanied its grants to petitioners with the promise that ‘no part of the land granted to them shall ever be embraced in any Territory or State.’” *Id.* at 635. And, of course, *McGirt* confirms the treaty promise of a Reservation and the jurisdictional implications thereof continued past statehood, *see infra* at 27-28.

which expressly includes “all land within the limits of any Indian reservation.” *McGirt*, 591 U.S. at 898 (quoting 18 U.S.C. § 1151(a)). Reliance on these holdings to show that the Nations’ Reservations also include all land within their boundaries does not improperly extend *McGirt*.³⁷ As the Nations’ Reservations have not been disestablished, they include all land within their boundaries, whether held in trust or in fee, as 18 U.S.C. § 1151(a) makes clear. *McGirt*, 591 U.S. at 906; *see also Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 359 (1962); *United States v. Celestine*, 215 U.S. 278, 285 (1909).³⁸ It is also settled that the definition of Indian country in 18 U.S.C. § 1151 can be relied on to determine the existence of rights to hunt and fish. In *Cheyenne-Arapaho Tribes v. Oklahoma*, 618 F.2d 665, 666 (10th Cir. 1980), the court determined the extent of the Tribe’s hunting and fishing right by deciding “what part of the pertinent land is within Indian Country as that term is defined in 18 U.S.C. s 1151.” It was undisputed that the Cheyenne-Arapaho Reservation had been disestablished. *Id.* at 667. The court held that Indian allotments were Indian country under 18 U.S.C. § 1151(c), and that that “lands held in trust by the United States for the Tribes are Indian Country within the meaning of § 1151(a).” *Id.* at 667-68.³⁹

³⁷ “When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound.” *Seminole Tribe v. Florida*, 517 U.S. 44, 67 (1996); *see also Bucklew v. Precythe*, 587 U.S. 119, 136 (2019) (“[J]ust as binding as [a] holding is the reasoning underlying it.”).

³⁸ Defendants cannot rely on the dissent in *McGirt* and stray quotes from other cases to rewrite the pre-statehood and allotment history, Resp. 18-19, with respect to which *McGirt* controls. Their reliance on *Choctaw Nation*, Resp. 19, also fails for reasons described *supra* at 28 n.37.

³⁹ Defendants mistakenly assert that “Oklahoma’s jurisdiction over fee lands within Indian country was specifically recognized in *Cheyenne-Arapaho*, 618 F.2d at 667-69, where the Tenth Circuit found that state wildlife laws did not apply to hunting and fishing by member Indians ‘on land held as Indian allotments and on land held in trust by the United States for the Tribes,’ but hunting and fishing on fee lands was subject to a system of ‘dual regulation.’” Resp. 26. In *Cheyenne-Arapaho*, it was undisputed that the disestablished reservation’s former boundaries included “non-Indian land publicly and privately owned.” *Id.* at 667. The court referred to a “system of dual regulation” as to “non-Indian lands” within the *disestablished reservation*. *Id.* at 667. The court did

Defendants argue that even if “pre-statehood treaties impliedly permitted tribal members to hunt and fish on trust lands, no such implied rights extend to fee lands.” Resp. 22. This argument fails, “Congress ‘must clearly express’ any intent to abrogate Indian treaty rights,” *Herrera*, 587 U.S. at 340 (quoting *Mille Lacs*, 526 U.S. at 202), which requires “clear evidence” showing “Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty,” *United States v. Dion*, 476 U.S. 734, 740 (1986). Congress has never taken action that would satisfy that standard.

Menominee demonstrates that the transfer of Reservation land in fee to a third party does not terminate treaty hunting rights. *Menominee* considered whether the Tribe’s rights were abrogated in the Menominee Indian Termination Act, 391 U.S. at 407, pursuant to which the Secretary transferred title to the Tribe’s property to a Wisconsin corporation, see 26 Fed. Reg. 3726 (Apr. 26, 1961), and at which time “all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe.” *Menominee*, 391 U.S. at 412. The Court held the Act did not abrogate treaty rights: “although federal supervision of the tribe was to cease and all tribal property was to be transferred to new hands, the hunting and fishing rights granted or preserved by the Wolf River Treaty of 1854 survived the Termination Act of 1954. . . . We decline to construe the Termination Act as a backhanded way of abrogating the hunting and fishing rights of these Indians.” *Id.* at 411-12 (footnote omitted).

not endorse “dual regulation” of *on-reservation* fee lands. The Tenth Circuit later clarified this, restating that the reservation had been disestablished and holding that “[o]ur reference to dual control was a recognition that dual control had been permitted in certain situations. It was not a holding that dual control was proper in the case before us.” *Cheyenne-Arapaho Tribes v. Oklahoma*, 681 F.2d 705, 706 (10th Cir. 1982).

Lower Brule Tribe v. South Dakota, 711 F.2d 809 (8th Cir. 1983), reached the same conclusion, holding that “[w]hen Congress established the Lower Brule Reservation in the 1868 Fort Laramie Treaty, the Lower Brule Sioux acquired the right to hunt and fish on the reservation free of state law,” *id.* at 821, that the reservation had not been diminished, *id.* at 814-21, that “[i]n order to abrogate treaty rights and authorize the application of state law . . . Congress must expressly do so,” and that “Congress did not intend to abrogate the Indians’ treaty-reserved hunting and fishing rights,” *id.* at 822 (emphasis in original) (citation omitted). “When, as here, the statutes in question have not disestablished reservation boundaries, general language referring to the ‘entire interest’ or ‘all claims’ in certain land falls short of stating a clear purpose to abrogate specific treaty rights.” *Id.* at 822-23.

Defendants make no attempt to show that the Nations’ Treaty rights have been abrogated under the strict standard that *Herrera* reaffirmed. *See* 587 U.S. at 340. To the extent that their assertion that “[a]ny implicit treaty-based hunting and fishing is ownership-based and flows with the land,” Resp. 22, suggests that the Nations’ treaty rights were affected by allotment, it has no merit. The Choctaw and Chickasaw Reservations were allotted under the Atoka Agreement—set forth in the Act of June 28, 1898, ch. 517, § 29, 30 Stat. 495, 505—and the Act of July 1, 1902, ch. 1362, 32 Stat. 641. The Cherokee Nation Reservation was allotted under the Act of July 1, 1902, ch. 1375, 32 Stat. 716. The Atoka Agreement and these statutes provided the Nations’ lands would be allotted and patented to their members. Not a word of these texts mentions Nations’ treaty rights to hunt, and it is inconceivable that the Nations would have silently given up those rights as to lands where their members would continue to reside and require subsistence. As *Lower*

Brule makes clear, language of this kind does not abrogate the Nations’ Treaty rights. 711 F.2d at 822.⁴⁰

3. Defendants’ Reliance on Cases Involving Other Tribes, Treaties, and Issues Do Not Show That the Nations’ Treaty Rights Were Abrogated.

Defendants rely on cases that deal with other tribes, other treaties, and other issues to argue that the Nations’ Treaty rights somehow disappeared when their lands were transferred to others.

Oregon Department of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753 (1985), *see* Resp. 23, has no relevance here because it concerned “an asserted right of tribal members to hunt and fish outside the reservation boundaries established in 1901, free of state regulation,” 473 U.S. at 764. The land on which the right was asserted was off-reservation. *Id.* at 755-61. In contrast, the Nations’ rights are only asserted on-reservation.

Defendants’ reliance on *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008), Resp. 22, fails because it concerned whether a tribal court had jurisdiction over a suit concerning whether tribal law restrained an on-reservation fee land transaction between non-Indians. *Id.* at 320, 331-32. *Plains Commerce* does not address treaty rights to hunt. In discussing the scope of tribal authority related to the issue it did consider, the Court noted that the tribe generally could not regulate the use of fee land by non-Indians, but that under the exceptions of *Montana v. United States*, 450 U.S. 544, 565-66 (1981), tribal authority to regulate non-Indians

⁴⁰ The Atoka Agreement expressly recognized the Choctaw and Chickasaw Nations’ power to enact laws “affecting the land of the tribe, *or of the individuals, after allotment*,” subject to the approval of the President of the United States. 30 Stat. at 512 (emphasis added). And in *Morris v. Hitchcock*, the Court upheld the validity of a privilege tax on livestock enacted by the Chickasaw Nation, ruling that “the right of [the Chickasaw Nation] to control the presence within the territory assigned to it of persons who might otherwise be regarded as intruders” was held under the 1855 Treaty and 1866 Treaty, and that under those Treaties, “the Chickasaw Nation has exercised the power to attach conditions to the presence *within its borders* of persons who might otherwise not be entitled to remain within the tribal territory.” 194 U.S. 384, 389, 393 (1904) (emphasis added).

could extend to *conduct on* fee land, though not to the sale of land. 554 U.S. at 329-30, 334-35.⁴¹ Authority over non-Indian sale of land is not involved here—indeed, the tribal laws at issue respect private property rights, *see supra* at 16—nor does this case implicate a Tribe’s “plenary jurisdiction” over land, *cf.* Resp. 22.

Defendants rely on *Nevada v. Hicks*, 533 U.S. 353, 360 (2001), to state that “[t]he ‘absence of tribal ownership [is] virtually conclusive of the absence of tribal civil jurisdiction.’” Resp. 22. That misstates the opinion, as the entire sentence reads: “Hitherto, the absence of tribal ownership has been virtually conclusive of the absence of tribal civil jurisdiction; with one minor exception, we have never upheld under *Montana* the extension of tribal civil authority over nonmembers on non-Indian land.” *Id.* at 360. Thus, the Court was not stating a rule but rather commenting on past cases—and none of the cases the Court cited considered treaty rights to hunt, *see id.*

Defendants also rely on *South Dakota v. Bourland*, 508 U.S. 679 (1993), Resp. 22, but that decision only considered tribal regulation of hunting and fishing by non-Indians, on lands and waters owned by the United States for a dam project. 508 U.S. at 681-82. The Court expressly stated that it did not address tribal jurisdiction over nonmember Indians. *Id.* at 685 n.6. Furthermore, the court below had expressly held, relying on *Lower Brule*, that “the taking acts did not abrogate the hunting and fishing rights guaranteed to the Sioux tribes in the Fort Laramie Treaty. Thus, the Sioux retain their right to hunt and fish on their reservation free from state

⁴¹ However, the Court did reaffirm the *Montana* exceptions under which “tribes may exercise ‘civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands,’” *Plains Commerce*, 554 U.S. at 329 (quoting *Montana*, 450 U.S. at 565), including instances in which nonmembers enter into consensual relations with a tribe or its members, and cited “four cases in explanation of *Montana*’s first exception,” *id.* at 332, which include *Morris v. Hitchcock*, which we discuss *supra* at 31 n.41. And as we show *infra* at 38-39, the first *Montana* exception authorizes the exercise of jurisdiction by one Nation over members of another Nation hunting under the terms of the RCA.

regulation.” *South Dakota v. Bourland*, 949 F.2d 984, 990 (8th Cir. 1991) (citing *Lower Brule*, 711 F.2d at 826-27). The State did not seek Supreme Court review of that ruling in its petition, *see* Br. for Pet’r at i, *Bourland*, 508 U.S. 679 (No. 91-2051), 1992 WL 541268, at *i, nor did the Court unsettle it. On the question presented, *Bourland* held that “Congress ha[d] abrogated the Tribe’s rights under the Fort Laramie Treaty to regulate hunting and fishing by non-Indians in the area taken for the Oahe Dam and Reservoir Project,” 508 U.S. at 687, but left unresolved whether the tribe could assert such jurisdiction under other authorities, specifically referencing the *Montana* exceptions, and it left that issue to be resolved on remand, *id.* at 695-96.⁴²

No question of tribal jurisdiction over non-Indians is presented here. *See* Br. 13 n.16. Accordingly, the Supreme Court’s ruling in *Bourland* offers Defendants no support. It does, however, show that the existence of a tribe’s treaty rights to hunt and fish on fee lands, upheld by the court of appeals, is distinct from the question of a tribe’s right to regulate hunting and fishing by non-Indians on fee land within reservation boundaries. As *Lower Brule* makes clear: “the Tribe’s treaty hunting and fishing rights are severable from their treaty rights to *exclusively* own, occupy and utilize the land granted to them as a reservation.” 711 F.2d at 823 (emphasis in original). *Bourland* also confirms that even when a tribe has lost its treaty right to regulate such activity, it may establish such authority under the *Montana* exceptions.

Finally, the State has not been “delegated” authority over tribal hunting and fishing at Chickasaw National Recreation Area (“NRA”).⁴³ *Cf.* Resp. 12; *see also* Resp. 28-29. At the

⁴² On remand, the Court of Appeals held that the tribe lacked jurisdiction over non-Indians but refused to address authority over non-member Indians since that issue had not been pleaded in the District Court. *South Dakota v. Bourland*, 39 F.3d 868, 870-71 (8th Cir. 1994).

⁴³ The State does not “cooperate” with the National Park Service to “manage” the Chickasaw NRA. *See Chickasaw NRA*, Okla. Dep’t of Wildlife Conservation, <https://www.wildlifedepartment.com/hunting/wma/southeast/chickasaw-nra> (last visited Jan. 19, 2026) (stating under “Area Specific Hunting Regulations” tab that “Chickasaw NRA is owned and managed by the National Park

Chickasaw NRA, the Secretary of Interior is required under 16 U.S.C. § 460hh-2 to “permit hunting and fishing on lands and waters within the recreation area in accordance with applicable Federal and State laws.” State hunting and fishing laws are not “applicable” to Indians in Indian country. State law is not applicable under 16 U.S.C. § 460hh-5, either. That section cannot affect the federal government’s specific and sole authority over hunting and fishing in Section 460hh-2, as “[g]eneral language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment.” *RadLAX Gateway Hotel, LLC v. Amal. Bank*, 566 U.S. 639, 646 (2012) (quotation omitted). Furthermore, these provisions say nothing at all about tribal treaty rights. As there is no “clear evidence” that Congress considered treaty rights and decided to abrogate, *Dion*, 476 U.S. at 739-40, Section 460hh-5 cannot abrogate treaty rights and permit from state jurisdiction. Instead, Section 460hh-5 provides a process—which does not apply anywhere else—under which the State would agree to accept some jurisdiction in the former Platt National Park while giving up some jurisdiction in the Arbuckle Reservoir. *See* 43 Fed. Reg. 35120 (Aug. 8, 1978); ECF No. 46-12 at 1. In the ensuing agreement, the federal government “accept[ed]” legislative jurisdiction “*from*” the State over lands not within the former Platt National Park. *See* ECF No. 46-12 at 2. Chickasaw NRA does not allow hunting on the former Platt National Park lands.⁴⁴ Therefore, State did not receive

Service.”). Chickasaw NRA is administered under the National Park Service Organic Act, Act of Aug. 25, 1916, ch. 408, 39 Stat. 535, *see* 16 U.S.C. § 460hh-3(a); 36 C.F.R. §§ 2.2(b), 7.50. It is not a “national wildlife refuge,” Resp. 28; *cf.* 16 U.S.C. § 668dd(a)(1); 50 C.F.R. § 32.7(jj), and is not governed by 50 C.F.R. § 32.2. *Cf.* Resp. 28-29. In any event, Defendants’ reliance on that inapposite regulation is question-begging, because it concerns “required” state licenses, 50 C.F.R. § 32.2(a), and “applicable” state laws and regulations, *id.* § 32.2(d).

⁴⁴ *Compare Hunting*, Nat’l Park Serv., <https://www.nps.gov/chic/planyourvisit/hunting.htm> (map showing hunting zones), and *Platt National Park Guidebook-1930s*, Nat’l Park Serv., <https://www.nps.gov/chic/learn/historyculture/guidebook1930s.htm> (showing Platt National Park boundaries) (both websites last visited Jan. 19, 2026).

any jurisdiction over hunting on the Chickasaw NRA: it *ceded* jurisdiction. But none of that concerns jurisdiction over Indian hunting, as the State never had such jurisdiction to cede in the first place.

C. The Nations’ Inherent Sovereign Authority Authorizes Their Regulation of Nation Members Hunting, Fishing, and Gathering on Their Reservations.

As our opening brief shows, Br. at 13, *Mescalero Apache* reaffirmed that “‘absent governing Acts of Congress,’ a State may not act in a manner that ‘infringed on the right of reservation Indians to make their own laws and be ruled by them,’” 462 U.S. at 332-33 (quoting *McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164, 171-72 (1973), as well as the breadth of tribal inherent sovereign authority, citing the decisions in *McClanahan*, *Montana*, and *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). *McClanahan* and *Montana* confirm the Nations’ inherent sovereign authority to regulate their members hunting on their Reservations, including those doing so under the RCA. *Bracker* does too, assuming *arguendo* it can be applied here. While Defendants contend otherwise, relying principally on *Bracker*, Resp. 24-29, their effort fails.

1. The Nations Have Inherent Sovereign Authority to Regulate Nation Members on Their Reservations, Including Under the RCA.

As we have earlier shown, Br. 13-14, applying state jurisdiction to Nation members hunting, fishing, and gathering on the Nations’ Reservations, including under the RCA, infringes on “the right of reservation Indians to make their own laws and be ruled by them,” *Mescalero Apache*, 462 U.S. at 332-33 (quoting *McClanahan*, 411 U.S. at 171-72, and *Williams v. Lee*, 358 U.S. 217, 219-20 (1959)).

This conclusion is amply confirmed by *McClanahan*.⁴⁵ The Court first held that “[t]he Indian sovereignty doctrine . . . provides a backdrop against which the applicable treaties and federal statutes must be read,” 411 U.S. at 172; which for this case is described in our opening brief, Br. 13, and augmented by the Nations’ uniquely powerful Treaties, under which they were “[i]n many respects . . . promised virtually complete sovereignty over their new lands” in what is now Oklahoma. *Choctaw Nation*, 397 U.S. at 635 (citing *Atl. & Pac. R.R. v. Mingus*, 165 U.S. 413, 435-36 (1897)). The Court then held that state jurisdiction was preempted by treaty and statute, *id.* at 181, as it is here too.

McClanahan held state jurisdiction on the Navajo Reservation was preempted by the Navajos’ treaty, in which the United States promised the Reservation would be “‘set apart’ for ‘the[Navajos’] permanent home.’” 411 U.S. at 174. This conclusion applies *a fortiori* to the Nation’s Treaties, *see supra* at 25-26. *McClanahan* then found that the Arizona Enabling Act, ch. 310, 36 Stat. 557, 569 (1910), supported its holding by providing that “the State would ‘forever disclaim all right and title to . . . all lands lying within said boundaries owned or held by any Indian or Indian tribes,’ until Congress acquired Indian title. 411 U.S. at 175. The Oklahoma Enabling Act protects Indian rights in even stronger terms. *See supra* at 27. “Section one is a general reservation of federal and tribal jurisdiction over ‘Indians, their lands, [and] property,’ except as extinguished by the tribes or the federal—not state—government.” *Indian Country, U.S.A.*, 829 F.2d at 979 (alteration in original). And it bars state jurisdiction over Indians in Indian country. *See Tiger v. W. Inv. Co.*, 221 U.S. 286, 309 (1911); *Bd. of Comm’rs v. Seber*, 130 F.2d 663, 668

⁴⁵ Even if *Castro-Huerta* could properly be said to apply here—which it cannot, *see infra* at 47, reliance on *McClanahan* to show that state criminal jurisdiction over crimes by Indians in Indian country is preempted is fully consistent with that decision as the Court cited *McClanahan* approvingly for the “principle of federal law that . . . precludes state interference with tribal self-government,” 597 U.S. at 639 n.2.

(10th Cir. 1942) (“Oklahoma, has by acceptance of statehood under Section one of the Enabling Act, conceded the power and authority of the United States government to make any law or regulation respecting Indians, their lands, property, or other rights by treaties, agreement, law or otherwise.” (citations omitted)), *aff’d* 318 U.S. 705 (1943); *see also The Kansas Indians*, 72 U.S. (5 Wall.) 737, 756 (1866).

Finally, *McClanahan* also made clear that “Congress has . . . provided a method whereby States may assume jurisdiction over reservation Indians,” set forth in P.L. 280. 411 U.S. at 177. Absent compliance with P.L. 280, a state has “no choice but to” concede that it “can exercise neither civil nor criminal jurisdiction over reservation Indians.” *McClanahan*, 411 U.S. at 178 & n.19 (citations omitted). Oklahoma has “never acquired jurisdiction over Indian country through Public Law 280,” *Murphy v. Royal*, 875 F.3d 896, 937 (10th Cir. 2017), *aff’d sub nom. Sharp v. Murphy*, 591 U.S. 977 (2020) (per curiam), and it therefore remains subject to that rule.⁴⁶ And even if Oklahoma did comply with P.L. 280, that statute does not apply to hunting, trapping, or fishing, so the State would still be confined by the default rule explained in *McClanahan*.⁴⁷ Accordingly, *McClanahan* rejects Defendants’ jurisdictional claim in this case.

⁴⁶ Defendants assert that “*Castro-Huerta* [] foreclosed any argument that Public Law 280 or the General Crimes Act somehow preempt concurrent state jurisdiction.” Resp. 21 n.10 (citing *Castro-Huerta*, 597 U.S. at 647. To the contrary, *Castro-Huerta* states that “our resolution of the narrow jurisdictional issue in this case does not negate the significance of Public Law 280 in affording States broad criminal jurisdiction over other crimes committed in Indian country, such as crimes committed by Indians,” 592 U.S. at 648. And regarding the General Crimes Act, the Court concluded that it “does not preempt state jurisdiction over crimes committed by non-Indians against Indians in Indian country.” *Id.* at 647.

⁴⁷ Public Law 280, 25 U.S.C. § 1162(b) and 25 U.S.C. § 1321(b), “specifically confirms the power of tribes to regulate on-reservation hunting and fishing,” *Mescalero Apache*, 462 U.S. at 337. Public Law 280 by excepting “hunting, trapping, or fishing or the control, licensing or regulation thereof,” *id.* at n.21 (quoting 25 U.S.C. § 1162(b) and 25 U.S.C. § 1321(b)), from the criminal jurisdiction that it permits States to assume under certain conditions. Notably, this protection afforded to on-reservation hunting and fishing is not tied to the ownership of land.

While Defendants suggest that the Nations' authority to regulate their members' hunting is limited by *Montana*, Resp. 25, that is incorrect. First, these rights are held by treaty, and have not been abrogated, *see supra* at 25-26, 29. Second, under the RCA, which relies on the Nations' inherent sovereign authority, ECF No. 3-3 at 8 (art. 1 fifth whereas cl.), each Nation has consented to the application of the host Nation's laws to their members' hunting activities on the host Nations' Reservation, and Nation members choosing to engage in such activity under the RCA have given their consent as well.⁴⁸ *Montana* does not purport to apply to regulation by one tribe of another tribes' members' on-reservation activity pursuant to an inter-tribal agreement, authorized both by Treaty and inherent sovereign authority. Furthermore, Defendants do not challenge the validity of the RCA or the effectiveness of its terms. *See* Jan. 8, 2026 Tr. of Sch'g at 13:25-15:21.

Third, assuming *Montana* were applicable, it recognizes that “[e]ven on non-Indian fee lands . . . [a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.” 450 U.S. at 565. Under the first *Montana* exception, Nation members who hunt under the RCA have consented to the application of the host Nation's laws to their activities, “even on non-Indian fee lands.”. To hunt on fee land, each

⁴⁸ *See* ECF No. 3-3 at 11 (art. 2.F.) (“Each signatory Nation will enact law to require its members or citizens who seek to hunt, fish, trap, and/or gather on another signatory Nation’s reservation to *comply fully with the wildlife laws of the other Nation that apply generally to such activity.*” (emphasis added)); *id.* (“[E]ach 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.”); *id.* (art. 2.G.) (“Each signatory Nation will coordinate with each other signatory Nation to provide members and citizens with information regarding the laws applicable within each reservation, including information concerning licensing, tagging, permitting, and other matters pertaining to wildlife conservation.”).

signatory Nation’s laws require the consent of the landowner, *see* Br. 4-5, which they may grant or deny as they wish. *Montana* is no impediment to their making that decision.

If more were needed to confirm the Nations authority to regulate Nation members hunting under the RCA, it is provided by “[a] tribe’s power to exclude nonmembers entirely or to condition their presence on the reservation,” *Mescalero Apache*, 462 U.S. at 332 (citing *Montana*; *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982)), which *Morris v. Hitchcock* confirms is held by the Nation. *See supra* at 31 n.41.

Finally, there is no question that the Nations have “inherent power . . . to exercise criminal jurisdiction over all Indians” on their Reservations. 25 U.S.C. § 1301(2). And 25 U.S.C. § 1301(4) makes such jurisdiction applicable to any person who would be subject to federal jurisdiction under the MCA for a crime committed in Indian country. As Indian country includes all land within reservation boundaries—including fee land, 18 U.S.C. § 1151(a)—the Nations’ criminal jurisdiction extends to all such lands, too.

2. *Bracker* Does Not Authorize State Regulation of Indians on Indian Reservations, Nor Would It Support State Jurisdiction if It Did Apply.

Bracker is inapplicable here because this case only concerns tribal jurisdiction over Indians in Indian country. The Supreme Court “formulated the balancing test to address the ‘difficult questio[n]’ that arises when ‘a State asserts authority over the conduct of non-Indians engaging in activity *on the reservation*.’” *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 110 (2005) (quoting *Bracker*, 448 U.S. at 144-45 (alteration in original) (emphasis in original)). Indeed, *Bracker* acknowledges that “[w]hen on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State’s regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest.” 448 U.S. at 144 (citing *Moe*, 425 at 480-81, and *McClanahan*, 411 U.S. 164). To be sure, the Court applied

Bracker to the on-reservation activities of tribal members in *California v. Cabazon Band*, 480 U.S. 202, 216 (1987), as it “involve[d] a state burden on tribal Indians *in the context of their dealings with non-Indians* since the question is whether the State may prevent the Tribes from making available high stakes bingo games *to non-Indians coming from outside the reservations.*” (emphasis added). This case only involves the activities of tribal Indians on Indian reservations. *Bracker* is also inapplicable because the State’s authority over hunting is limited by the conservation necessity standard, which Defendants do not satisfy. *See supra* at 22-24.

Even assuming, *arguendo*, that it were necessary to apply the *Bracker* test here, state jurisdiction is preempted. Under *Bracker*, state jurisdiction is preempted “if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State interests at stake are sufficient to justify the assertion of State authority.” *Mescalero Apache*, 462 U.S. at 334 (citing *Bracker*, 448 U.S. at 144). “[T]raditional notions of Indian sovereignty” guide consideration of federal and tribal interests under the test and provide a backdrop “against which any assertion of State authority must be assessed,” *id.* (citing *Bracker*, 448 U.S. at 143),⁴⁹ under “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.” *Bracker*, 448 U.S. at 145.⁵⁰

⁴⁹ In this case, those traditions are found in the decisions of the Supreme Court affirming tribal inherent sovereign authority, *see* Br. 13-14, in “[t]he policy of leaving Indians free from state jurisdiction and control [that] is deeply rooted in this Nation’s history,” *McGirt*, 591 U.S. at 928 (quoting *Rice v. Olson*, 324 U.S. 786, 789 (1945)), and “in a number of congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development,” *Bracker*, 448 U.S. at 143, as well as in the Executive Branch’s consistent support of self-determination, *see Message on the 50th Anniversary of the Federal Policy of Indian Self-Determination*, 2020 Daily Comp. Pres. Doc. 503 (July 8, 2020).

⁵⁰ While Defendants suggest the *Bracker* test distinguishes between trust and fee land, Resp. 24-25, *Bracker* actually distinguishes between off- and on-reservation land, *Wagon*, 546 U.S. at 112 (recognizing that the *Bracker* test applies “exclusively to *on-reservation* transactions” (emphasis

The State interests here are minimal. The State cannot claim an interest in requiring a Nation member to obtain a state license to hunt and fish on the Nations' Reservations because it has no authority to require an Indian exercising a treaty right to obtain a state license. Br. 16 (citing *Tulee*, 315 U.S. at 685 and *Cougar Den*, 586 U.S. at 367). Nor can Defendants claim a regulatory interest to support their jurisdiction. They have agreed that the Nations' "hunting and fishing regulations . . . are largely modeled after and 'nearly identical to' the [ODWC] Code and ODWC regulations." Resp. 9 (quoting Br. 17); *see id.* at 19-20 ("the Nations modeled their own wildlife regulations after the State Code, specifically including such practices as hunting seasons and bag limits" (citing ECF No. 3-13, ¶ 5; ECF No. 3-14, ¶ 5; ECF No. 3-7, ¶ 4)). Defendants consider their own code to protect the State's interests in wildlife. *See id.* at 18. Accordingly, the Nations' wildlife codes also protect the State's wildlife interests.⁵¹

Defendants assert that "Oklahoma's authority to conserve and manage wildlife resources on all fee lands within its borders is a core incident of state sovereignty," that "States hold wildlife in trust for the benefit of the public and may enact reasonable regulations to conserve species, protect public safety, ensure equitable access, and preserve habitat," that the State has enacted such regulations, and that the relief sought by the Nations would frustrate the State's objectives. Resp. 25 (citing *White Earth Band v. Alexander*, 683 F.2d 1129, 1137 (8th Cir. 1982), and ECF No. 46-

in original). Furthermore, *Bracker* emphasizes that "[t]he cases in this Court have consistently guarded the authority of Indian governments over their reservations." 448 U.S. at 151 (quoting *United States v. Mazurie*, 419 U.S. 544, 558 (1975)). Defendants also rely on *Hicks* to assert that "when 'state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal land,'" Resp. 24 (quoting *Hicks*, 533 U.S. at 362), but no off-reservation interests are at stake here.

⁵¹ Defendants are wrong to rely on *White Mountain Apache Tribe v. Arizona Department of Game & Fish*, 649 F.2d 1274, 1283 (9th Cir. 1981), Resp. 24, as it "present[ed] the question whether an Indian tribe can prevent a state from enforcing state hunting and fishing license requirements and substantive regulations against *non-Indians* who hunt," 649 F.2d at 1277 (emphasis added).

1 ¶ 5). These arguments fail because Indian hunting rights established by the valid exercise of federal power preempt state authority claimed under the police power, *see supra* at 20-22, because the conservation necessity standard, not the police power, determines the extent of the State’s authority to regulate the exercise of Indian treaty rights, *see supra* at 22-23, and because the State has advanced no justification for its assertion of jurisdiction that would satisfy the conservation necessity standard, *see supra* at 23-24. And while Defendants refer to *Puyallup III*, Resp. 26-27, that decision only upholds state authority under the conservation necessity standard, *see infra* at 47, which is not satisfied here.⁵²

Nor is *White Earth Band* helpful to Defendants, *see* Resp. 25. There the court of appeals affirmed the judgment of the district court, which had “issued a permanent injunction prohibiting the state from enforcing its gaming laws against Band members” within their reservation, relying on the preclusive effect of *State v. Clark*, 282 N.W.2d 902 (Minn. 1979), in which “[t]he issue . . . was whether the state had jurisdiction to enforce its gaming laws against Band members on non-Indian owned land within the thirty-two non-ceded townships within the Reservation,” and the court held that the state lacked such jurisdiction. *White Earth Band*, 683 F.2d at 1133, 1138.⁵³

⁵² Defendants’ stray reference to *Organized Village of Kake v. Egan*, 369 U.S. 60, 75-76 (1962), *see* Resp. 27, provides them no help. *Egan* “concern[ed] the fishing rights of nonreservation Indians. It did not purport to provide guidelines for the exercise of state authority in areas set aside by treaty for the exclusive use and control of Indians.” *McClanahan*, 411 U.S. at 176 n.15 (citing *Egan*, 369 U.S. at 62).

⁵³ While *White Earth Band* also affirmed the district court ruling that “state regulation over non-members on trust lands located within the Reservation had not been preempted by federal law,” *id.* at 1137, 1138, the Band had not developed a conservation program, which it urged “would be a relevant factor in a subsequent Bracker inquiry,” *id.* at 1137, and which distinguishes that case from this one. In addition, the court of appeals stated that it “would ordinarily be inclined to remand this issue for consideration of the ‘relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence,’ *Bracker*, 448 U.S. at 144-45,” but “conclude[d] that a remand would serve no useful function here because the Band has not met its burden of showing that the state’s gaming laws were unreasonable and unrelated to its regulatory authority.” *Id.* at

Relying on *Montana*, Defendants also assert that “[t]he Supreme Court has repeatedly found that state interests outweigh tribal interests on non-trust fee lands,” and claim that just as the *Montana* petitioners had long exercised jurisdiction over fee lands in Montana, Defendants have done the same in Oklahoma. Resp. 25-26 (citing and quoting *Montana*, 450 U.S. at 557, 563-67). But *Montana* did not apply *Bracker*, and while Defendants do not even acknowledge the *Montana* exceptions, the first exception authorizes the jurisdiction the Nations seek to protect here. See *supra* at 39. In any event, state law already defines what interests the State may assert over hunting on fee land. State law authorizes landowners, not the State, to decide whether to permit others to hunt and fish on their land. Resp. 8 (quoting Okla. Stat. tit. 29 § 5-202(A)). As to its own fee lands, the State has already given its consent to hunting in the very statute Defendants quote, Okla. Stat. tit. 29 § 5-202. Subsection (A) provides that landowner consent is required “[e]xcept as otherwise provided,” and Subsection (C) then provides that “[e]xcluding land primarily devoted to farming, ranching, or forestry purposes as set forth in Section 1835.2 of Title 21 of the Oklahoma Statutes, *areas exempt from the provisions of subsection A of this section are lands belonging to this state which are not leased and occupied by a resident, excluding school land.*” (emphasis added). And as the Nations’ laws also require the consent of the landowner to hunt on private land, Br. 4-5, there is no regulatory need for state law to do the same.

Finally, while Defendants seek to distinguish the facts of *Mescalero Apache*, Resp. 27-28, the Nations rely on the principles *Mescalero Apache* affirms, not its facts. See *supra* at 35-36, 39, 40. Further, while Defendants purport to compare tribal land ownership as described in *Mescalero Apache* and in Oklahoma’s Indian country, their discussion of the latter lacks citation other than a

1138 (citing *Washington v. Confederated Tribes*, 447 U.S. 134, 160 (1980)). That burden is met here for the reasons shown *supra* at 22-23.

reference to Defendants’ “information and belief,” *see* Resp. 27, which is alone sufficient to reject it. Defendants’ analysis also suffers from a more fundamental flaw: Defendants offer no rule of law that makes this unsupported comparison relevant. *See id.* at 27-28. They simply assert that the Nations’ interest over their Indian country is not comparable to the interest at issue in *Mescalero Apache*, and that “[i]n fact, any tribal interest in the fee lands at issue here is arguably non-existent.” *Id.* at 27. This contention is rejected by the Nations’ Treaty rights, by their inherent sovereign authority, including that held under the first *Montana* exception, and by their comprehensive system of wildlife regulation, established and administered under Nation law.

Defendants’ final volley is to assert that the Nations’ interest here is diminished by the State’s prior exercise of jurisdiction over the Nations’ Indian country and the recency of *McGirt*. Resp. 28. Just the opposite is true. *McGirt* determined that while the State “historically th[ought] it could try Native Americans for any crime committed on restricted allotments or anywhere else,” it was mistaken. 591 U.S. at 918-19. The State cannot base its interest on conduct that was contrary to law. And *McGirt* enhanced, not lessened, the Nations’ interests in tribal self-government and the regulation of hunting, fishing, and gathering on their Reservations.

The federal and tribal interests here are amply demonstrated. The United States has filed actions in this Court and others seeking to enjoin State officials from exercising criminal jurisdiction over Indians in Indian country, *Ballard* and *United States v. Iski*, No. 24-CV-0493-CVE, 2026 WL 123292 (E.D. Okla. filed Dec. 23, 2024), and secured a ruling in *Oklahoma v. United States Department of Interior*, 640 F. Supp. 3d 1110, 1119-20 (W.D. Okla. 2022), that “the Creek, Choctaw, and Cherokee Reservations were not disestablished and qualify as ‘Indian reservation[s] under the jurisdiction of the United States.’” (quoting *McGirt*, 591 U.S. at 898-99). The United States’ support of tribal self-government and self-determination has been steadfast, *see*

supra at 41 n.50. The Nations’ interests in the regulation of their members that hunt on their Reservations are rooted in their treaties, *supra* at 25-26, grounded in their inherent sovereign authority, *supra* at 36-39, and implemented comprehensively in their wildlife codes, *see* Br. 4-6.

Thus, assuming *arguendo* that *Bracker* were applicable here, it would confirm the Nations’ jurisdiction preempts the application of state law to the Nations’ members hunting, fishing, and gathering on their Reservations, including those doing so under the RCA.

D. *McGirt* Establishes That the State Lacks Criminal Jurisdiction Over Indians on Their Reservations and *Castro-Huerta* Is Not to the Contrary.

As earlier shown, Br. 17-21, *McGirt* reaffirmed that “[t]he Supreme] Court has long ‘require[d] a clear expression of the intention of Congress’ before the state or federal government may try Indians for conduct on their lands,” and held that “Oklahoma cannot come close to satisfying this standard.” *McGirt*, 591 U.S. at 929 (quoting *Ex parte Crow Dog*, 109 U.S. 556, 572 (1883)).⁵⁴ That holding is dispositive here, as state law imposes criminal penalties for fish and game violations, *see* Br. 20 & n.20, and it rejects Defendants’ assertion that this argument “finds no support in the law,” Resp. 29. Defendants’ assertion that *McGirt* only determined that the Creek Reservation is Indian country for purposes of applying the MCA, Resp. 29-30, also fails, *see supra* at 27-28, as does their further assertion that *McGirt* “did not purport to disturb longstanding state jurisdiction over wildlife offenses,” Resp. 30, since any such “longstanding state jurisdiction” violated the Nations’ Treaties. *See supra* at 13, 44-45.⁵⁵

⁵⁴ The Tenth Circuit has also made clear that states lack criminal jurisdiction over Indians in Indian country absent congressional consent. *Ute VI*, 790 F.3d at 1003-04; *see also Ross v. Neff*, 905 F.2d 1349, 1352-53 (10th Cir. 1990); accord *Muscogee (Creek) Nation v. City of Henryetta*, No. 6:25-cv-00227-JAR, 2025 WL 3215729, at *3 (E.D. Okla. Nov. 18, 2025) (“Congress alone defines the reach of state authority in Indian country,” and when “Congress has said nothing[,] [u]nder the Supremacy Clause, that silence is a boundary the States may not cross.”).

⁵⁵ Defendants’ reliance on *Freedom Mortgage Corp. v. Springer*, No. 25-CV-288-DES, 2025 WL 2528834, at *2 (E.D. Okla. Sept. 3, 2025), which they assert “refus[ed] to extend *McGirt* to a civil

Nor may Defendants rely on *City of Tulsa v. O'Brien*, 2024 OK CR 31, *Stroble*, or *Stitt v. City of Tulsa*, 2025 OK CR 5, 565 P.3d 857, to support their position as these decisions are not binding on this Court, and are inconsistent with and cannot control over *McGirt*. This Court is not bound by a state court's interpretation of federal law, *Ballard*, 2026 WL 125927, at *6 n.11 (citing *Dutcher v. Matheson*, 840 F.3d 1183, 1195 (10th Cir. 2016), and *TMJ Implants, Inc. v. Aetna, Inc.*, 498 F.3d 1175, 1181 (10th Cir. 2007)), nor should it defer to state courts' rulings on such questions, see *Payne v. WS Servs., LLC*, No. CIV-15-1061, 2016 WL 3926486, at *1 (W.D. Okla. July 18, 2016) (citing *TMJ*, 498 F.3d at 1180). In addition, while *O'Brien* asserted, 2024 OK CR 31, ¶ 26 n.4, that *McGirt* was "undermined" by *Castro-Huerta*, only the Supreme Court can overrule its precedents, see *Agostini v. Felton*, 521 U.S. 203, 237 (1997).

Defendants seek to rely on *Puyallup I* and *III* to support the authority they assert in this case, Resp. 31 (quoting *Puyallup I*, 391 U.S. at 398 and citing *Puyallup III*, 433 U.S. at 171-73). That argument fails because the state court criminal cases brought by Defendants do not seek to enforce the conservation necessity standard set forth in *Puyallup I*, 391 U.S. at 398, which *Puyallup III* extended to on-reservation fishing "with particular reference to the facts of this case," 433 U.S. at 171, 175; nor can Defendants establish jurisdiction under that standard on the very different facts present here. See *supra* at 23-24.

As we earlier shown, Br. 20, *Castro-Huerta* cannot be argued to authorize states to exercise criminal jurisdiction over Indians in Indian country because the Court did not consider that issue, as the Court expressly and repeatedly emphasized, see 597 U.S. at 639 n.2, 648, 650 n.6; see also

law foreclosure action," Resp. 30, is unavailing because the Nations make no such claim here, and because the Tenth Circuit held long ago that the definition of Indian country set forth in 18 U.S.C. § 1151 may properly be applied to determine the areas subject to treaty hunting and fishing rights, *Cheyenne-Arapahoe*, 618 F.2d at 667-68. Finally, *Freedom Mortgage* simply remanded the case to state court for lack of subject matter jurisdiction. 2025 WL 2528834, at *2.

id. at 648, and also expressly limited its holding to the question before it, *see id.* at 652. Defendants cannot rely on quotes from the *Castro-Huerta* opinion as expressing the Court’s views on a question it did not consider. *See* Resp. 29.⁵⁶ “[R]espect for past judgments also means respecting their limits,” *Brown v. Davenport*, 596 U.S. 118, 141 (2022), as *Castro-Huerta* itself underscored, *see* 597 U.S. at 646.

IV. Plaintiffs Would Be Irreparably Harmed By Denial Of A Preliminary Injunction.

Defendants’ conduct deprives of the Nations and their members of their Treaty rights to hunt—including for subsistence and cultural purposes—except at risk of arrest, citation, fine, and punishment, avoidable only by complying with state law or not engaging in treaty-protected activities, as shown by declarations of Nation members.⁵⁷ This is irreparable harm, as the illegal exercise of jurisdiction over the Nations and their members cannot be undone, *see Ute VI*, 790 F.3d at 1005, nor is a damages remedy for such harm available against the State, Br. 22, which also makes the harm irreparable. *Black Emergency Response Team v. Drummond*, 737 F. Supp. 3d 1136, 1156 (W.D. Okla. 2024) (quotation omitted). In addition, Defendants’ conduct virtually voids the Nations’ right to regulate their members’ hunting activities. Br. 13-14. Defendants say these are harms to Nation members rather than the Nation, Resp. 33, but these impacts are an

⁵⁶ Defendants assert that the same argument is applicable to the Nations’ reliance on *McGirt*, Resp. 31, but nothing in *McGirt* expressly limits reliance on its determination of the existence of the Creek Reservation and its status as Indian country to the MCA, nor did the Court disclaim its application in the civil context. 591 U.S. at 935 (recognizing that the Court’s decision would have an impact in the non-criminal context because “many federal civil laws and regulations do currently borrow from § 1151 when defining the scope of Indian country.”); *see id.* at 971 (Roberts, C.J., dissenting) (*McGirt* would have impact “[b]eyond the criminal law”).

⁵⁷ *See, e.g.*, ECF No. 3-8, ¶¶ 4-6; ECF No. 3-9, ¶¶ 4-6, 8-9; ECF No. 3-19, ¶¶ 7-9; ECF No. 3-10, ¶¶ 3-8; ECF No. 3-18, ¶¶ 5, 9-12; ECF No. 3-4, ¶¶ 7, 10-11; ECF No. 3-16, ¶¶ 5, 8; ECF No. 3-7, ¶ 14; ECF No. 3-6, ¶¶ 19-20; Ex. E ¶¶ 5-13; Ex. F ¶ 12.

“invasion of tribal sovereignty” that *does* “constitute irreparable injury.” *Ute VI*, 790 F.3d at 1005 (quotation omitted). And Defendants do not dispute that these cases so hold.⁵⁸

Finally, Defendants say that the Nations’ declarations do not show “enforcement is occurring or is about to occur on trust land,” Resp. 32, and urge that “[t]he possibility of criminal prosecution is not irreparable unless ‘the threat to the plaintiff’s federally protected rights . . . cannot be eliminated by his defense against a single criminal prosecution.’” *id.* at 33 (quoting *Younger*, 401 U.S. at 46), but Defendants’ denial of the existence of the Nations’ Treaty rights, Resp. 22-22, and multiple prosecutions of Nations members exercising their Treaty rights, cannot be stopped except by the injunction the Nations seek here.⁵⁹

V. The Injury To The Nations Outweighs Any Harm To Defendants And Issuance Of An Injunction Is In The Public Interest.

Defendants do not challenge the Nations’ showing on the balancing of the equities and public interest prongs of the preliminary injunction standard, *see* Br. 24-25. Instead, they label the harms to the Nation as “minimal,” and describe their own as “immediate and significant harms.” Resp. 34. These contentions fail because Defendants’ actions are ultra vires, and they therefore will not be injured by an injunction, *see* Br. 24 (citing Br. Section I; *Ute VI*, 790 F.3d at 1007; *Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792, 806 (10th Cir. 2019)), and because “the public interest is served by enjoining ultra vires actions of a state officer,” *id.* at 25 (citing

⁵⁸ While Defendants rely, Resp. 32, on *Nova Health Systems v. Edmondson*, 373 F. Supp. 2d 1234 (N.D. Okla. 2005), that court held plaintiff had not shown a likelihood of success on the merits and found an absence of irreparable harm based on that same holding. *Id.* at 1239-40. In this case, the Nations’ strong showing of the likelihood of success factor also establishes irreparable harm. Defendants’ reliance, Resp. 32, on *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), fails because the irreparable harm here is “both great and immediate,” *id.* at 112. And Defendants’ assertion that the Nations delayed in seeking relief and that the relief the Nations seek would alter the status quo, Resp. 33, is rejected for the reasons set forth *supra* at 13, 18-20.

⁵⁹ Defendants also recycle their claim that the relief the Nations seek would alter the status quo, Resp. 33, which is wrong for the reasons shown *supra* at 18-20.

Chamber of Com. of U.S. v. Edmondson, 594 F.3d 742, 771 (10th Cir. 2010)). Just as “the State has no legitimate interest in enforcing a law determined to be unconstitutionally vague,” *Drummond*, 737 F. Supp. 3d at 1157 (citing *Free the Nipple*, 916 F.3d at 807), it has no legitimate interest in enforcing laws that violate treaty rights.

While Defendants allege impacts of an injunction on their enforcement of the State wildlife laws on fee lands, Resp. 34, they fail to recognize that the Nations’ laws require the consent of the landowner to hunt, fish, and gather on private land, Br. 4-5, that the Nations “base their codes, seasons, and bag limits on those of the State,” *id.* at 5, and that as each Nation has cross-deputized ODWC game wardens they may enforce each Nation’s conservation code and cite Indian offenders into tribal court, *id.* Defendants assert that “indiscriminately enjoining ODWC’s ability to enforce state wildlife laws interferes with and threatens contractual and legal obligations,” Resp. 35, but they do not show how compliance with federal law would prevent ODWC from meeting those obligations—and in any event, the State cannot contract its way out of compliance with federal law. The Nations’ collection and sharing of information about harvests and cooperation with ODWC ensures the continued protection of species, as well. Ex. B ¶¶ 9-11; Ex. C ¶¶ 4-7; Ex. D ¶¶ 4-10; Ex. J, Kindle Decl. ¶¶ 3-9. Furthermore, Defendants do not attempt to show that the concerns they allege rise to the level of a conservation necessity under federal law, *see supra* at 22-24, and if conservation concerns were to arise Defendants may discuss those concerns with the Nations, so that an appropriate course of action can be implemented.

Finally, Defendants complain that if they cannot require Indians to purchase state hunting and fishing licenses, ODWC will lose revenue that requiring such licenses would generate. Resp. 5, 7. That claim fails because federal law makes clear that the State has no authority to require an Indian exercising a treaty right to obtain a state license. Br. 16.

CONCLUSION

For the foregoing reasons, the Nations respectfully request that the Court deny Defendants' motion to dismiss and grant a preliminary injunction enjoining Defendants from interfering with the Nations' and their members' exercise of their federal rights to hunt on their Reservations, including Nation members doing so under the RCA, and from interfering with the Nations' rights to regulate all Nation members hunting on their Reservations.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 20, 2026, I electronically filed the above and foregoing documents with the Clerk of Court via the ECF System for filing.

/s/ Frank S. Holleman

Frank S. Holleman