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

MUSCOGEE (CREEK) NATION, a federally recognized Indian Tribe, *Plaintiff*, v. CITY OF TULSA; G.T. BYNUM, in his official capacity as Mayor of City of Tulsa; WENDELL FRANKLIN, in his official capacity as Chief of Police, Tulsa Police Department; and JACK BLAIR, in his official capacity as City Attorney for City of Tulsa, *Defendants*.	Case No. 4:23-cv-00490-JDR-SH

THE UNITED STATES' MOTION TO INTERVENE
AND OPENING BRIEF IN SUPPORT

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INTRODUCTION

Pursuant to Fed. R. Civ. P. 24, the United States of America ("United States"), acting on its own behalf and as trustee for the Muscogee (Creek) Nation ("Nation"), moves to intervene in this case and file the proposed Complaint-in-Intervention (Ex. 1) against the City of Tulsa and its Mayor, Chief of Police, and City Attorney acting in their official capacities (collectively, "Tulsa"). As set forth below, the United States is entitled to intervene as a matter of right pursuant to Fed. R. Civ. P. 24(a)(2). Alternatively, the United States moves to intervene permissively pursuant to Fed. R. Civ. P. 24(b).

This case involves Tulsa's continued assertion of criminal jurisdiction, without congressional authorization, over Indians for conduct occurring within the boundaries of the Muscogee (Creek) Reservation ("Reservation"). Tulsa's assertion of such jurisdiction violates fundamental principles of federal Indian law deeply rooted in the United States Constitution. The longstanding rule—recently reiterated in *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2459, 2477 (2020)—is that the states and their political subdivisions lack criminal jurisdiction over Indians in Indian country absent congressional authorization. Because Congress has not authorized Oklahoma or Tulsa to exercise such jurisdiction, that rule applies with full force here. *See, e.g.*, *id.* at 2478; *Hooper v. City of Tulsa*, 71 F.4th 1270, 1285 (10th Cir. 2023); *cf. Oklahoma* v. *Castro-Huerta*, 597 U.S. 629, 639 n.2 (2022) (stating that the question of state criminal jurisdiction over Indians in Indian country was not before the Court but noting the "principle of federal law that . . . precludes state interference with tribal self-government").

To protect this rule allocating criminal jurisdiction over Indians in Indian country, and the fundamental principles underlying it, the United States seeks to intervene. The United States has both general and specific interests in intervening. The United States' general interests include

supporting the inherent sovereign power of tribes to exercise criminal jurisdiction over Indians for conduct occurring on their reservations; defending Congress's plenary and exclusive authority over Indian affairs, including the comprehensive statutory scheme Congress has constructed to govern state assumption of criminal jurisdiction over Indians in Indian country; and maintaining the United States' own jurisdiction, authorized by Congress, to address certain crimes committed by Indians in Indian country.

Specific to this case, treaties between the United States and the Nation provide that "[no] State or Territory [shall] ever have a right to pass laws for the government of such Indians, but they shall be allowed to govern themselves," Treaty with the Creeks, Arts. I, XIV, Mar. 24, 1832, 7 Stat. 366, 368 ("Treaty of 1832"), and that the Nation would be "secured in the unrestricted right of self-government" with "full jurisdiction" over Indians within the Reservation, Treaty with the Creeks, etc., 1856, Art. XV, Aug. 7, 1856, 11 Stat. 699, 704 ("Treaty of 1856"). *See McGirt*, 140 S. Ct. at 2460–62. The Supreme Court in *McGirt* held that the Reservation established by this series of treaties was never disestablished. *Id.* at 2459. The United States and the Nation therefore share criminal jurisdiction over Indians within the Reservation, and that shared jurisdiction is exclusive of Oklahoma and its political subdivisions. The United States moves to intervene to protect the rights guaranteed by its treaties with the Nation, to defend exclusive federal and tribal criminal jurisdiction within the Reservation, and to stop Tulsa from unlawfully seizing such jurisdiction for itself.

The United States meets all requirements to intervene as a matter of right under Rule 24(a)(2): this motion is timely; the United States has interests that may be impaired if it is not allowed to intervene; and no existing party adequately represents the United States' interests. Alternatively, permissive intervention is justified under Rule 24(b). As a sovereign that shares

criminal jurisdiction within the Reservation, the United States' participation will protect the United States' interests and aid the Court's full consideration of the legal issues presented.

BACKGROUND

On November 15, 2023, the Nation filed this action against Tulsa. *See* Compl., ECF No. 2. In the Complaint, the Nation alleges, consistent with federal law, that within the Reservation the United States and the Nation "possess criminal jurisdiction over Indians exclusive of the State of Oklahoma and its political subdivisions, which are prohibited under federal law from asserting any such jurisdiction absent the assent of Congress. Congress has not authorized such jurisdiction here." *Id*. at 11. The Nation also alleges that "Tulsa continues to assert criminal jurisdiction over Indians for conduct occurring within the . . . Reservation despite the lack of congressional authorization," and "has repeatedly demonstrated its intention to continue asserting criminal jurisdiction over Indians for conduct within the . . . Reservation absent judicial intervention." *Id.* Accordingly, in addition to filing the Complaint, the Nation moved for a preliminary injunction prohibiting Tulsa "from asserting criminal jurisdiction over Indians within the boundaries of the . . . Reservation." Pl.'s Mot. for Prelim. Inj., ECF No. 9 at 1.

The Nation served Tulsa on November 20, 2023. ECF Nos. 19-22. On December 8, 2023, Tulsa moved to dismiss the Nation's complaint. Def.'s Mot. to Dismiss, ECF No. 28. Both the Nation's motion for preliminary injunction and Tulsa's motion to dismiss have been briefed. ECF Nos. 29, 32, 33, 36. However, this case was not reassigned to the present judge until February 7, 2024. ECF No. 38. The Court has not set a hearing on the pending motions or issued a scheduling order or any other deadlines, and any discovery has not begun.

ARGUMENT

I. THE UNITED STATES IS ENTITLED TO INTERVENE AS OF RIGHT.

Under Fed. R. Civ. P. 24(a)(2), on timely motion

> the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." In the Tenth Circuit, "a nonparty seeking to intervene as of right must establish (1) timeliness; (2) an interest relating to the property or transaction that is the subject of the action, (3) the potential impairment of that interest, and (4) inadequate representation by existing parties.

Kane Cnty. v. United States, 928 F.3d 877, 879 (10th Cir. 2019) (citation omitted). The United States' intervention satisfies each of the four elements considered in evaluating whether to grant intervention as of right under Rule 24(a)(2).

A. The United States' Motion to Intervene is timely.

Timeliness is evaluated "in light of all of the circumstances." *Okla. ex rel. Edmondson v. Tyson Foods, Inc.*, 619 F.3d 1223, 1232 (10th Cir. 2010); *see NAACP v. New York*, 413 U.S. 345, 366 (1973). Three non-exhaustive factors are "particularly important: (1) the length of time since the movants knew of its interests in the case; (2) prejudice to the existing parties; and (3) prejudice to the movant." *Okla. ex rel. Edmondson*, 619 F.3d at 1232 (cleaned up, citation omitted). "The most important consideration in deciding whether a motion for intervention is untimely is whether delay in moving for intervention will prejudice the existing parties to the case." *Id.* at 1235 (quoting 7C CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 1916, at 541–48 (3d ed. 2007)).

Here, all three factors of the timeliness analysis support intervention. Most significant to the first and second factors is that this case is just beginning. The Court has not issued any scheduling orders or set any deadlines, and any discovery has not begun. Although two motions

are pending, the Court has not yet set a hearing on the motions or engaged the issues raised therein, and resolution of those motions may be aided by the United States' participation.[1] In addition, the case was not reassigned to the current judge until February 7, 2024. In these circumstances, the length of time between this Motion and when the Nation filed the complaint (November 15, 2023) and served Defendants (November 20, 2023) is well within what courts have considered reasonable. Because the United States has moved to intervene at the early stages of this litigation, the existing parties will not be prejudiced. *See Utah Ass'n of Cntys. v. Clinton*, 255 F.3d 1246, 1251 (10th Cir. 2001) (intervention timely "[i]n view of the relatively early stages of the litigation and the lack of prejudice to plaintiffs flowing from the length of time [three years] between the initiation of the proceedings and the motion to intervene"); *W. Energy Alliance v. Zinke*, 877 F.3d 1157, 1164–65 (10th Cir. 2017) (intervention timely "[g]iven how early in the lawsuit the [movant] moved to intervene, and, as a result, the lack of prejudice").[2]

The third factor of the timeliness analysis, prejudice to the movant, considers whether the movant's claims will be impaired by denial of intervention. *Okla. ex rel. Edmondson*, 619 F.3d at 1237. As mentioned above and detailed below, the United States has significant interests that

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[1] If the Court is inclined to grant Tulsa's motion to dismiss, the United States respectfully requests an opportunity to be heard on that motion beforehand.

[2] *See also, e.g.*, *Western Watershed Project v. U.S. Forest Service*, No. 4:19-cv-97-DN-PK, 2021 WL 1171721, at *2 (D. Utah Mar. 29, 2021) (intervention timely where motion filed approximately four months after amended complaint and "[n]o scheduling order had been entered because a partial motion to dismiss is pending"); *Malcolm v. Reynolds Polymer Tech., Inc.*, No. 17-cv-2835-WJM-KLM, 2018 WL 6695921, *3 (D. Colo. Dec. 20, 2018) (existing parties would not be prejudiced by intervention "because the action is still in its initial stages" and "discovery had not yet begun"); *Farnsworth v. Cox*, No. 11-1263-RDR, 2012 WL 2923197, *2 (D. Kan. July 18, 2012) (motion to intervene timely where plaintiff served complaint on December 12, 2011, defendant filed motion to dismiss on December 29, 2011, and motion to intervene filed on March 30, 2012, and that "allowing the movants to weigh in on the motion to dismiss will [not] cause any prejudice to defendants").

could be adversely affected by this litigation, and the United States seeks to intervene in this case to protect those interests. Denial of intervention would prejudice the United States. *See Western Watersheds Project*, 2021 WL 1171721, at *2 ("[I]f the Intervenor Parties are not permitted to intervene, they will suffer prejudice because they will be unable to advocate for their interests in the litigation.").

B. The United States has significant interests in this case.

Whether "an interest [is] sufficient to warrant intervention as a matter of right is a highly fact-specific determination." *W. Energy Alliance*, 877 F.3d at 1165 (citation omitted). An applicant for intervention "must have an interest that could be adversely affected by the litigation." *Kane Cnty.*, 928 F.3d at 891 (citation omitted); *see Utah Ass'n of Cntys.*, 255 F.3d at 1251–52 ("[T]he interest must be direct, substantial, and legally protectable." (citation and internal quotation marks omitted)).

The United States has several significant interests at stake that support intervention. To begin, as one of the prosecuting sovereigns in Indian country, the United States has a strong interest in how criminal jurisdiction in Indian country is allocated. That interest includes protecting the longstanding rule that the states and their political subdivisions lack criminal jurisdiction over Indians in Indian country unless Congress authorizes it. *See McGirt*, 140 S. Ct. at 2459, 2477 ("State courts generally have no jurisdiction to try Indians for conduct committed in 'Indian country,'" and "a clear expression of the intention of Congress" is required before states "may try Indians for conduct on their lands"); *see also, e.g.*, *Hagen v. Utah*, 510 U.S. 399, 401–02, 408 (1994) ("Congress has not granted criminal jurisdiction to . . . Utah to try crimes committed by Indians in Indian country"); *Keeble v. United States*, 412 U.S. 205, 209–212 (1973) (discussing that states lack jurisdiction over crimes by Indians in Indian country); *Ute*

Indian Tribe of the Uintah & Ouray Reservation v. Lawrence, 22 F.4th 892, 900 (10th Cir. 2022) (absent congressional authorization, states lack jurisdiction over cases brought against a tribe or its members involving conduct in Indian country); *Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah*, 790 F.3d 1000, 1004 (10th Cir. 2015) ("unless Congress provides an exception to the rule . . . states possess 'no authority' to prosecute Indians for offenses in Indian country" (quoting *Cheyenne-Arapaho Tribes of Okla. v. Oklahoma*, 618 F.2d 665, 668 (10th Cir. 1980))). And contrary to Tulsa's assertion otherwise, the Supreme Court did not disturb that longstanding rule in *Castro-Huerta*, which considered only the "narrow jurisdictional issue" of "the State's exercise of jurisdiction over crimes committed by *non-Indians* against Indians in Indian country." 597 U.S. at 653 (emphasis added); see *id.* at 639 n.2 (state prosecutorial authority over Indians in Indian country is "not before us"); *id.* at 650 n.6 (expressing "no view on state jurisdiction" over crime committed by an Indian against a non-Indian in Indian country); *see also id.* at 693 (Gorsuch, J., dissenting) ("Most significantly, the Court leaves undisturbed the ancient rule that States cannot prosecute crimes by Native Americans on tribal lands without clear congressional authorization—for that would touch the heart of 'tribal self-government.'").[3]

The general rule barring state jurisdiction over Indians in Indian country applies with full force here. Although Congress has authorized some states to exercise criminal jurisdiction over Indians in Indian country, Congress has never authorized Oklahoma to do so. *See Okla. Tax*

[3] Consistent with *Castro-Huerta*, the Supreme Court has repeatedly distinguished between cases involving *non-Indian* conduct in Indian country, like *Castro-Huerta*, and assertions of state jurisdiction over *Indians* in Indian country. *See McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 170–71 (1973) ("State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply."); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980) (it is only where "a State asserts authority over the conduct of non-Indians engaging in activity on the reservation" that "[m]ore difficult questions arise").

Comm'n v. Sac & Fox Nation, 508 U.S. 114, 125 (1993) ("Oklahoma did not assume jurisdiction pursuant to Pub. L. 280" and thus lacks "either civil or criminal jurisdiction"); *Ross v. Neff*, 905 F.2d 1349, 1352, 1353 (10th Cir. 1990) ("Oklahoma has neither received by express grant nor acted pursuant to congressional authorization to assume criminal jurisdiction over this Indian country," and stating that such jurisdiction "must come from" Congress); *United States v. Sands*, 968 F.2d 1058, 1062–63 (10th Cir. 1992) (same).[4] Instead, the United States guaranteed to the Nation that "[no] State or Territory [shall] ever have a right to pass laws for the government of such Indians, but they shall be allowed to govern themselves," Treaty of 1832, Art. XIV, 7 Stat. at 368, and that the Nation would be "secured in the unrestricted right of self-government" with "full jurisdiction" over Indians within the Reservation, Treaty of 1856, Art. XV, 11 Stat. at 704. *See McGirt*, 140 S. Ct. at 2460–62. The United States has a substantial interest in protecting those guarantees to the Nation against contrary assertions of state authority.

The United States also has an interest in protecting from incursion fundamental principles of federal Indian law on which the rule allocating criminal jurisdiction over Indians in Indian country is based. These underlying principles, which Tulsa's actions jeopardize, have been in place since the Founding and are deeply rooted in the structure of the United States Constitution's Indian Commerce and Treaty Clauses. Indeed, "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice v. Olson*, 324 U.S. 786, 789 (1945) (citation omitted).

[4] Although Tulsa relies on the Curtis Act of 1898 as an Act of Congress giving it criminal jurisdiction over Indians in Indian country, the Tenth Circuit has already rejected Tulsa's claim of jurisdiction under Section 14 of that Act. *Hooper*, 71 F.4th at 1285.

The first underlying principle is that tribes are "distinct, independent political communities," *Worcester v. Georgia*, 31 U.S. 515, 559 (1832), which retain powers of self-government not specifically withdrawn by Congress, *United States v. Wheeler*, 435 U.S. 313, 323–25 (1978). One power of self-government that tribes retain—and that the United States has an interest in supporting[5]—is the inherent power to exercise criminal jurisdiction over Indians for conduct occurring on their reservations. *See Denezpi v. United States*, 596 U.S. 591, 598 (2022) (tribes possess "inherent power to prescribe laws for their members and to punish infractions of those laws") (quoting *Wheeler*, 435 U.S. at 322–23); *United States v. Lara*, 541 U.S. 193, 199–200 (2004) (affirming inherent tribal jurisdiction over non-member Indians). Accordingly, tribes have a right, unless withdrawn by treaty or statute, to make their own criminal laws and be governed by them, in accordance with their own needs, cultural standards, and priorities. Giving states concurrent jurisdiction to apply state criminal laws to Indian

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[5] The United States' interest is evidenced by Congress's support for tribal criminal authority, which it has demonstrated by affirming and expanding it. *See, e.g.*, Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258 (relaxing somewhat prior statutory limitations on the sentencing authority of tribal courts); Violence Against Women Reauthorization Act of 2022, Pub. L. No. 117-103, 136 Stat. 49 (further expanding tribal authority against offenders not residing in tribe's Indian country). Congress has also provided substantial funding for tribal public safety programs and criminal justice systems, including tribal law enforcement and tribal courts. *See, e.g.*, Consolidated Appropriations Act of 2022, Pub. L. No. 117-103, 136 Stat. 49, Joint Explanatory Statement Division G at 36 (providing Bureau of Indian Affairs an additional $62 million to implement public safety changes in response to *McGirt*) (available at https://www.appropriations.senate.gov/imo/media/doc/Division%20G%20-%20Interior%20Statement%20FY23.pdf); Bureau of Indian Affairs, Report to the Congress on Spending, Staffing, and Estimated Funding Costs for Public Safety and Justice Programs in Indian Country, 2019 ($238.7 million for law enforcement programs, $116.8 million for detention programs, and $54.4 million for tribal courts) (available at https://www.bia.gov/sites/default/files/dup/assets/bia/ojs/ojs/pdf/2019%20TLOA%20Report%20Final.pdf); Department of Justice, *Justice Department Announces More than $246 Million in Grants for Tribal Nations* (Sept. 21, 2022) (describing $246 million in grants to enhance tribal justice systems, strengthen law enforcement responses, and fund services for crime victims) (available at: https://www.https://www.justice.gov/opa/pr/justice-department-announces-more-246-million-grants-tribal-nations).

defendants would effectively supplant tribal decisions on these issues, interfering with tribal self-government. *See Ute Indian Tribe*, 790 F.3d at 1006 (Gorsuch, J.) ("[T]here's just no room to debate" that state prosecution of Indian defendants "create[s] the prospect of significant interference with [tribal] self-government." (citation omitted)); *cf. New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 338 (1983) (concurrent state jurisdiction over hunting and fishing by nonmembers would "effectively nullify" tribal authority and allow tribe to exercise authority "only at the sufferance of the State"); *McClanahan*, 411 U.S. at 179–180 (state concurrent jurisdiction to tax reservation Indians would intrude into "sphere which the relevant treaty and statutes leave for the Federal Government and for the Indians themselves"). And concurrent state jurisdiction would subject Indians "to a forum other than the one they have established for themselves," which would "plainly . . . interfere with the powers of [tribal] self-government." *Fisher v. Dist. Court*, 424 U.S. 382, 387–88 (1976); *see also Cnty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 265 (1992) (jurisdiction over reservation Indians for tax purposes "would have been significantly disruptive of tribal self-government").

The second underlying principle is that the United States Constitution vests Congress with "plenary and exclusive" authority over Indian affairs. *See Haaland v. Brackeen*, 599 U.S. 255, 272–73 (2023) (collecting cases); *United States v. McGowan*, 302 U.S. 535, 539 (1938) ("Congress alone has the right to determine the manner in which this country's guardianship over the Indians shall be carried out[.]"). Congress's authority over Indian affairs encompasses subjects, including criminal law, that in other contexts are within the purview of the states. *Brackeen*, 599 U.S. at 275–77.

In the context of criminal law, Congress has exercised its exclusive authority over Indian affairs by constructing a comprehensive statutory scheme governing state assumption of criminal

jurisdiction over Indians in Indian country. Through federal statutes like Public Law 280 and the tribal consent provision of the Indian Civil Rights Act, Congress has confirmed that states assume such jurisdiction only as expressly authorized by Congress and with tribal consent. *See* 18 U.S.C. § 1162; 25 U.S.C. § 1321(a)(1); *see also Bryan v. Itasca Cnty.*, 426 U.S. 373, 376 n.2 (1976) ("Congress has . . . acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation . . . and therefore 'State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply.'" (citations omitted)); *Williams v. Lee*, 358 U.S. 217, 221 (1959) (where "Congress has wished" states to have such authority, "it has expressly granted them jurisdiction"); *McClanahan*, 411 U.S. 177–78 ("Congress has now provided a method whereby States may assume jurisdiction over reservation Indians" but only with tribal consent). The United States has a strong interest in defending Congress's "plenary and exclusive" authority over Indian affairs, *see Brackeen*, 599 U.S. at 272–73 (citation omitted), and the statutory system constructed pursuant to that authority, which Tulsa's assertion of criminal jurisdiction directly contravenes.

Lastly, the United States has an interest in maintaining its own jurisdiction to address certain crimes committed by Indians in Indian country in cooperation with tribes as an aspect of the general trust relationship, and without the complications that would be introduced by a state's independent efforts to enforce its own laws against reservation Indians. That interest is evidenced by statutes authorizing federal jurisdiction over certain crimes committed by Indians in Indian country. Intervention is warranted by the United States' interest in maintaining its authority under statutes likely to be interpreted in this case—such as the General Crimes Act, Major Crimes Act, and Public Law 280. *Cf. SEC v. U.S. Realty & Improvement Co.*, 310 U.S. 434, 460

(1940) (recognizing the federal government's "interest in the maintenance of its statutory authority and the performance of its public duties" as warranting permissive intervention).

In sum, the United States has numerous and significant interests in this case, all of which could be adversely affected by this litigation.

C. The United States' interests may be impaired without intervention.

The United States' significant interests may be impaired if intervention is denied. A ruling that Tulsa has criminal jurisdiction over Indians in Indian country would disrupt the understanding since the Founding that states do not have such jurisdiction and conflict with the statutes and treaties embodying that understanding. It would interfere with the inherent power retained by tribes to exercise criminal jurisdiction over reservation Indians exclusive of the states. It would interfere with Congress's exclusive authority over Indian affairs and the comprehensive statutory scheme Congress has created pursuant to that authority to govern state assumption of criminal jurisdiction over Indians in Indian country. And it would interfere with the United States' own jurisdiction to address certain crimes committed by Indians in Indian country. Thus, because the United States' interests may be seriously impaired by the outcome of this case, intervention is warranted.

D. Existing parties do not adequately represent the United States' interests.

Although the United States and the Nation share some common objectives, the Nation does not represent, and is incapable of representing, the United States' interests in this case. The United States has independent statutory authority to exercise significant criminal jurisdiction over Indians in Indian country, and it has an independent interest in protecting that jurisdiction from state intrusion. In addition, the United States' interests transcend any single Indian reservation or tribe; its interests concern criminal jurisdiction throughout Indian country. The

United States' interests are therefore separate and distinct from, and may not always align with, the Nation's interests. The United States and the Nation may disagree on the United States' role in the case, interpretation of law, and the historical record, among other things.

Moreover, Tulsa contends that *Castro-Huerta* makes *Bracker*, 448 U.S. 136, applicable to determining whether states have criminal jurisdiction over Indians in Indian Country. Although the United States disagrees with that argument, Tulsa's invocation of *Bracker* implicates the federal interests that would be weighed in a *Bracker* balancing test if such a test were applied. Because the federal government is uniquely and best situated to present and articulate its interests, the United States' full participation is required.

II. PERMISSIVE INTERVENTION IS ALSO JUSTIFIED.

The United States alternatively moves for permissive intervention under Rule 24(b), which provides multiple grounds for permissive intervention. Under Rule 24(b)(1)(B), the Court may, "[o]n timely motion," permit "anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." Additionally, under Rule 24(b)(2), the Court may permit a federal officer or agency to intervene if an existing party's claim or defense is based on "a statute or executive order administered by the officer or agency; or . . . any regulation, order, requirement or agreement issued or made under the statute or executive order." On either ground, Rule 24(b)(3) requires the Court to "consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights."

Here, Rule 24(b) is easily satisfied. As discussed above, the United States' claims in intervention are timely, would not prejudice existing parties, and share common questions of law and fact with the Nation's existing claims. Both the United States and the Nation claim, as detailed above, that Tulsa's assertion of criminal jurisdiction over Indians for conduct on the

Reservation violates federal law. Thus, permissive intervention is justified under Rule 24(b)(1)(B).

Permissive intervention is also justified under Rule 24(b)(2). The United States is seeking to intervene at the request of the Department of the Interior. An Act of Congress provides for the Commissioner of Indian Affairs, under the direction of the Secretary of the Interior, to manage all Indian affairs and all matters arising out of Indian relations. *See* 25 U.S.C. § 2. Matters concerning the allocation of criminal jurisdiction over Indians in Indian country, including law enforcement functions of the Bureau of Indian Affairs and federal funding of tribal law enforcement efforts, falls squarely within the scope of that statutory authority. And the allocation of jurisdiction concerns other federal agencies, including the Department of Justice. Moreover, the prohibition against Tulsa's assertion of criminal jurisdiction over Indians within the Reservation is derived from, and recognized by federal law, including the United States Constitution; treaties between the United States and the Nation; and federal statutes, regulations, and executive orders. And because Congress has imparted criminal jurisdiction to the United States over certain crimes committed by Indians in Indian country, the United States is required to administer and enforce federal criminal statutes therein. The United States' interest in maintaining its statutory authority to address certain crimes in Indian country also supports permissive intervention under Rule 24(b)(2). *See U.S. Realty & Improvement Co.*, 310 U.S. at 460. Thus, this litigation is based on and related to federal laws administered by the United States such that permissive intervention is justified.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court grant it leave to intervene as of right pursuant to Fed. R. Civ. P. 24(a)(2) or, in the alternative, allow intervention permissively pursuant to Fed. R. Civ. P. 24(b).

DATED: May 13, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 13, 2024, I electronically filed this document with the Clerk of the Court by using the CM/ECF system, which will serve and send a notice of electronic filing to all parties or their counsel of record.

/s/ Cody McBride
CODY MCBRIDE

Exhibit 1

[The United States' Proposed Complaint-In-Intervention]

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

MUSCOGEE (CREEK) NATION, a federally recognized Indian Tribe, *Plaintiff*, and THE UNITED STATES OF AMERICA, *Plaintiff-Intervenor*, v. CITY OF TULSA; G.T. BYNUM, in his official capacity as Mayor of City of Tulsa; WENDELL FRANKLIN, in his official capacity as Chief of Police, Tulsa Police Department; and JACK BLAIR, in his official capacity as City Attorney for City of Tulsa, *Defendants*.	Case No. 4:23-cv-00490-JDR-SH **THE UNITED STATES' COMPLAINT-IN-INTERVENTION**

The United States of America ("United States"), pursuant to the authority of the Attorney General and at the request of the Secretary of the Department of the Interior, files this Complaint-in-Intervention and alleges as follows:

NATURE OF ACTION

1. The United States intervenes in this action, on its own behalf and as trustee for the Muscogee (Creek) Nation ("Nation"). The United States seeks declaratory and injunctive relief against the City of Tulsa and its Mayor, Chief of Police, and City Attorney (collectively,

"Tulsa"), to prevent Tulsa from unlawfully enforcing its municipal laws and ordinances against Indians within the boundaries of the Creek Reservation ("Reservation").

2. Tulsa's assertion of criminal jurisdiction to prosecute Indians within the Reservation violates fundamental principles of federal Indian law that have been in place since the Founding and are deeply rooted in the United States Constitution. The longstanding rule, recently reiterated by the United States Supreme Court in *McGirt v. Oklahoma*, is that states and their political subdivisions lack criminal jurisdiction over Indians in Indian country unless Congress authorizes it. 140 S. Ct. 2452, 2459, 2477 (2020) ("State courts generally have no jurisdiction to try Indians for conduct committed in Indian country," and "a clear expression of the intention of Congress" is required before states "may try Indians for conduct on their lands"). Congress has not authorized the State of Oklahoma or Tulsa to exercise criminal jurisdiction here. *See, e.g.*, *McGirt*, 140 S. Ct. at 2459; *Hooper v. City of Tulsa*, 71 F.4th 1270, 1285 (10th Cir. 2023); *cf. Oklahoma* v. *Castro-Huerta*, 597 U.S. 629, 639 n.2 (2022) (stating that the question of state criminal jurisdiction over Indians in Indian country was not before the Court but noting the "principle of federal law that . . . precludes state interference with tribal self-government"). Within the Reservation, therefore, the United States and the Nation share exclusive criminal jurisdiction over Indians.

JURISDICTION AND VENUE

3. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1345. This action arises under the Constitution, treaties, and laws of the United States, and the United States is bringing the action.

4. Venue in this Court is appropriate pursuant to 28 U.S.C. § 1391(b) because one or more of the Defendants are located, reside, or discharge their official duties in this District, and a substantial part of the events or omissions giving rise to the claim occurred in this District.

PARTIES

5. Plaintiff Muscogee (Creek) Nation is a federally recognized Indian tribe organized under the Indian Reorganization Act of 1934, 25 U.S.C. § 5123. *See* Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 89 Fed. Reg. 944, 946 (Jan. 8, 2024). The Nation retains its inherent sovereign power to exercise criminal jurisdiction over Indians for conduct occurring within the Reservation.

6. Plaintiff-Intervenor the United States, suing on its own behalf in its sovereign governmental capacity and its capacity as trustee for the Nation, has statutory authority to address certain crimes committed by Indians in Indian country.

7. Defendant City of Tulsa, through its officers, continues to assert that it has criminal jurisdiction to prosecute Indians for conduct occurring within the Reservation.

8. Defendant G.T. Bynum is the Mayor of the City of Tulsa and is sued in his official capacity.

9. Defendant Wendell Franklin is the Chief of Police of the Tulsa Police Department and is sued in his official capacity.

10. Defendant Jack Blair is the City Attorney for the City of Tulsa and is sued in his official capacity.

GENERAL ALLEGATIONS

A. Absent express authorization from Congress, which Oklahoma does not have, the states and their political subdivisions lack criminal jurisdiction over Indians for conduct occurring in Indian country.

11. "The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice v. Olson*, 324 U.S. 786, 789 (1945) (citation omitted).

12. The United States Constitution vests Congress with "plenary and exclusive" authority over Indian affairs. *See Haaland v. Brackeen*, 599 U.S. 255, 272–73 (2023) (collecting cases). Congress's authority over Indian affairs encompasses subjects, including criminal law, that are normally within the purview of the states. *Id.* at 275.

13. Tribes are "distinct, independent political communities," *Worcester v. Georgia*, 31 U.S. 515, 559 (1832), that retain powers of self-government not specifically withdrawn by Congress, *United States v. Wheeler*, 435 U.S. 313, 323 (1978). One power of self-government that tribes retain is the inherent power to exercise criminal jurisdiction over Indians for conduct occurring on their reservations. *See Denezpi v. United States*, 596 U.S. 591, 598 (2022) (tribes possess "inherent power to prescribe laws for their members and to punish infractions of those laws") (quoting *Wheeler*, 435 U.S. at 322-23); *United States v. Lara*, 541 U.S. 193, 199–200 (2004) (affirming inherent tribal jurisdiction over non-member Indians).

14. These fundamental principles of federal Indian law result in a longstanding rule regarding allocation of criminal jurisdiction over Indians for conduct occurring in Indian country: the states do not have criminal jurisdiction over Indians for conduct occurring in Indian country absent express authorization by Congress. *See, e.g.*, *McGirt*, 140 S. Ct. at 2459, 2477 ("State courts generally have no jurisdiction to try Indians for conduct committed in 'Indian country,'" and "a clear expression of the intention of Congress" is required before states "may try Indians for conduct on their lands"); *Ute Indian Tribe of the Uintah & Ouray Reservation v.*

Lawrence, 22 F.4th 892, 900 (10th Cir. 2022) (absent congressional authorization, states lack jurisdiction over cases brought against a tribe or tribal members involving conduct in Indian country). As discussed below, the Supreme Court's recent decision in *Castro-Huerta* did not displace that rule.

15. The rule that the states lack criminal jurisdiction over Indians in Indian country applies to "a state and its subdivisions." *See Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah*, 790 F.3d 1000, 1006 (10th Cir. 2015) (Gorsuch, J.).

16. Over the last 200 years, Congress has repeatedly passed laws embodying the rule that States and their political subdivisions assume criminal jurisdiction to prosecute crimes committed by Indians in Indian country only as expressly authorized by Congress. *See, e.g.*, *Bryan v. Itasca Cnty.*, 426 U.S. 373, 376 n.2 (1976) ("Congress has . . . acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation . . . and therefore 'State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply.'" (citations omitted)).

17. Examples of such statutes articulating a comprehensive policy of exclusive federal and tribal jurisdiction over crimes committed by Indians in Indian country include but is not limited to:

a. The General Crimes Act of 1817 ("GCA") authorizes the federal government to prosecute all crimes committed between Indians and non-Indians within Indian country. Notably, the GCA does not "extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe . . . ." 18 U.S.C. § 1152. Further, the

GCA preserved exclusive tribal jurisdiction over crimes committed by Indians where reserved by treaty. *Id.*

b. The Major Crimes Act ("MCA") extended federal jurisdiction over certain crimes committed by Indians in Indian country. 18 U.S.C. § 1153. Congress passed the MCA based on its understanding that only tribes had jurisdiction to punish such crimes. *See Ex parte Kan-gi-shun-ca (Crow Dog)*, 109 U.S. 556, 557 (1883); *United States v. Kagama*, 118 U.S. 375 (1886).

c. Public Law 280 delegated federal authority to several states (but not Oklahoma) to prosecute crimes committed by Indians in Indian country. *See* 18 U.S.C. § 1162. Congress provided its understanding that the statute "confer[s] jurisdiction" on states "not having jurisdiction." *See* Pub. L. No. 280, § 7, 67 Stat. 588, 588, 590. Additionally, through both Public Law 280 and the tribal consent provision of the Indican Civil Rights Act, Congress made clear that other states may assume jurisdiction over crimes committed by Indians in Indian country, but only with the consent of the Indian tribe. 18 U.S.C. § 1162; 25 U.S.C. § 1321(a)(1).

18. Oklahoma has not assumed authority under Public Law 280 to prosecute crimes committed by Indians in Indian country, and Congress has not otherwise authorized Oklahoma to do so. *See, e.g.*, *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 125 (1993); *United States v. Sands*, 968 F.2d 1058, 1061–63 (10th Cir. 1992); *Ross v. Neff*, 905 F.2d 1349, 1352 (10th Cir. 1990).

19. Congress has demonstrated its support for tribal criminal authority by affirming and expanding it. *See, e.g.*, Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258 (codified at 25 U.S.C. § 1302) (somewhat relaxing prior statutory limitations on the sentencing authority of tribal courts); Violence Against Women Reauthorization Act of 2022,

Pub. L. No. 117-103, 136 Stat. 49 (further expanding tribal authority against offenders not residing in tribe's Indian country).

20. Congress has also provided substantial funding for tribal public safety programs and criminal justice systems, including tribal law enforcement and tribal courts. *See, e.g.*, Consolidated Appropriations Act of 2022, Pub. L. No. 117-103, 136 Stat. 49, Joint Explanatory Statement Division G at 36 (providing Bureau of Indian Affairs an additional $62 million to implement public safety changes in response to *McGirt*) (available at https://www.appropriations.senate.gov/imo/media/doc/Division%20G%20-%20Interior%20Statement%20FY23.pdf); Bureau of Indian Affairs, Report to the Congress on Spending, Staffing, and Estimated Funding Costs for Public Safety and Justice Programs in Indian Country, 2019 ($238.7 million for law enforcement programs, $116.8 million for detention programs, and $54.4 million for tribal courts) (available at https://www.bia.gov/sites/default/files/dup/assets/bia/ojs/ojs/pdf/2019%20TLOA%20Report%20Final.pdf); Department of Justice, *Justice Department Announces More than $246 Million in Grants for Tribal Nations* (Sept. 21, 2022) (describing $246 million in grants to enhance tribal justice systems, strengthen law enforcement responses, and fund services for crime victims) (available at: https://www.https://www.justice.gov/opa/pr/justice-department-announces-more-246-million-grants-tribal-nations).

21. Giving the states and their political subdivisions concurrent jurisdiction to apply state criminal laws to Indians in Indian country would undermine tribal self-government. *See McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 179–180 (1973) (state concurrent jurisdiction to tax reservation Indians would intrude into the "sphere which the relevant treaty and statutes leave for the Federal Government and for the Indians themselves"). It would effectively supplant tribes' right to make their own criminal laws and be governed by them. *See*

Ute Indian Tribe, 790 F.3d at 1006 (Gorsuch, J.) ("[T]here's just no room to debate" that state prosecution of Indian defendant "create[s] the prospect of significant interference with [tribal] self-government." (citation omitted)); *cf. New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 338 (1983) (concurrent state jurisdiction over hunting and fishing by nonmembers would "effectively nullify" tribal authority and allow tribe to exercise authority "only at the sufferance of the State"). And it would subject Indians "to a forum other than the one they have established for themselves," which would "plainly . . . interfere with the powers of [tribal] self-government." *Fisher v. Dist. Court*, 424 U.S. 382, 387–88 (1976); *see also Cnty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 265 (1992) (*in personam* jurisdiction over reservation Indians for tax purposes "would have been significantly disruptive of tribal self-government").

22. As evidenced by congressional support for and funding of tribal criminal authority, public safety programs, and criminal justice systems, the United States as trustee has an interest in protecting the inherent tribal sovereign power to exercise criminal jurisdiction over Indians for conduct occurring on their reservations exclusive of the states.

B. The Creek Reservation remains Indian country.

23. In a series of treaties during the 1800s between the United States and the Nation, the Creek Reservation was established as a new and "permanent home to the whole Creek Nation" in what is now the State of Oklahoma. Treaty With the Creeks, preamble, Feb. 14, 1833, 7 Stat. 418 ("1833 Treaty"); *see McGirt*, 140 S. Ct. at 2459 ("In exchange for ceding 'all their land, East of the Mississippi river,' the U.S. government agreed by treaty that '[t]he Creek country west of the Mississippi shall be solemnly guarantied to the Creak Indians.'" (quoting Treaty with the Creeks, Arts. I, XIV, Mar. 24, 1832, 7 Stat. 366, 368) ("1832 Treaty"))).

24. The United States further promised the Nation that "[no] State or Territory [shall] ever have a right to pass laws for the government of such Indians, but they shall be allowed to govern themselves." 1832 Treaty, Art. XIV, 7 Stat. 368; *see McGirt*, 140 S. Ct. at 2459.

25. And the United States promised the Nation that it would be "secured in the unrestricted right of self-government" with "full jurisdiction" over Indians within the Reservation. Treaty with the Creeks, etc., 1856, Art. XV, Aug. 7, 1856, 11 Stat. 699, 704 ("1856 Treaty"); *see McGirt*, 140 S. Ct. at 2461–62.

26. An 1866 treaty reduced the size of the Reservation but otherwise preserved it. Treaty Between the United States and the Creek Nation of Indians, Art. III, June 14, 1866, 14 Stat. 786 ("1866 Treaty").

27. The Oklahoma Enabling Act authorized the creation of the State of Oklahoma and the adoption of a state constitution but expressly provided that nothing in the constitution "shall be construed to limit or impair the rights of person or property pertaining to the Indians . . . or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this Act had never been passed." Oklahoma Enabling Act, ch. 3335, § 1, 34 Stat. 267, 267–68 (1906). It also provided that "Indian lands shall remain under the absolute jurisdiction and control of the Congress and the United States." *Id.*, § 25, 34 Stat. 267, 279. This disclaimer of jurisdiction in the Oklahoma Enabling Act represented Congress's understanding that "States lacked jurisdiction over [Indians] living on the reservation." *See McClanahan*, 411 U.S. at 175.

28. In *McGirt v. Oklahoma*, the United States Supreme Court held that Congress never disestablished the Reservation and, therefore, all land within the Reservation remains

"Indian country" as defined by 18 U.S.C. § 1151(a). *McGirt*, 140 S. Ct. at 2459. As a result, Oklahoma lacked jurisdiction to prosecute an Indian for the commission of a major crime within the Reservation. *Id.* at 2478.

C. Nevertheless, Tulsa continues to exercise criminal jurisdiction over and prosecute Indians for conduct occurring within the Creek Reservation.

29. A large portion of Tulsa is located within the boundaries of the Reservation.

30. The Nation has entered into 69 cross-deputization agreements with state and local jurisdictions, including the City of Tulsa. Under the Nation's agreements with Tulsa, all cross-deputized officers (tribal and non-tribal) possess authority to arrest all persons (Indian and non-Indian) for tribal, state, and municipal offenses, including traffic offenses, committed within the Reservation. After an arrest or traffic stop is made, the arresting jurisdiction can refer the case to the jurisdiction with authority to prosecute it.

31. In *McGirt*, Tulsa argued to the Supreme Court that, if the Reservation had not been disestablished and remained Indian country, Tulsa would lack criminal jurisdiction to prosecute Indians for crimes committed therein. *See* Tulsa Amicus Br., *McGirt*, 2020 WL 1433475, at *1–2, *29 (stating that if the Creek Reservation is found to be Indian country, "state criminal jurisdiction would be stripped in any crime involving an Indian perpetrator," and that "Tulsa and its courts still could not enforce Oklahoma law in crimes involving Indians").

32. Nevertheless, after the Supreme Court's decision in *McGirt*, Tulsa continued to prosecute Indians for the commission of municipal offenses, including misdemeanors and traffic offenses, within the Reservation, instead of referring such cases to the Nation for prosecution. *See, e.g.*, *City of Tulsa v. O'Brien*, Case Nos. 72066-720766D (Mun. Criminal Ct. of Tulsa Aug. 17, 2023) (dismissing for lack of subject matter jurisdiction August 30, 2021 charges filed against Indian defendant for municipal offenses occurring on Reservation).

33. Tulsa initially argued that Congress gave it jurisdiction to do so pursuant to Section 14 of the Curtis Act of 1898, which "provided a path for municipalities in the Indian Territory to incorporate, hold elections, levy taxes, operate schools, and pass and enforce ordinances based on Arkansas law[,] . . . and provided that all inhabitants of appropriately organized municipalities would be eligible to vote and subject to the municipalities' laws." *Hooper*, 71 F.4th at 1280 (citing Curtis Act, § 14, 30 Stat. 495, 499–500 (1898)). In *Hooper*, however, the Tenth Circuit held that "Section 14 no longer grants jurisdiction to Tulsa" because the statute only applied to certain towns and municipalities in the Indian Territory before Oklahoma statehood. 71 F.4th at 1285. Thus, once Oklahoma entered the Union, its state law, not the Curtis Act, applied to and governed the powers of Tulsa. *Id.*

34. Despite the Tenth Circuit's decision in *Hooper*, and despite being a party to that case, Tulsa has made clear in filings in this case and in municipal state court that, absent judicial intervention, it will continue to prosecute Indians for municipal offenses occurring within the Reservation and not refer such cases to the Nation for prosecution. *See, e.g.*, ECF No. 29, Def.'s Resp. to Pl.'s Mot. for Prelim. Inj. ("Tulsa's Resp.").

35. In such filings, Tulsa continues to argue, in direct contradiction to *Hooper*, that Section 14 of the Curtis Act gives it criminal jurisdiction over Indians for conduct occurring within the Reservation. *See, e.g.*, Tulsa's Resp. at 15.

36. Given the Tenth Circuit's decision in *Hooper*, Tulsa also cites the Supreme Court's opinion in *Castro-Huerta*. According to Tulsa, the Supreme Court in *Castro-Huerta* reversed (without saying so) the long-standing rule that, absent congressional authorization, the states and their political subdivisions lack criminal jurisdiction over Indians in Indian country. *See, e.g.*, Tulsa's Reps. at 3–8. Tulsa reads *Castro-Huerta* too broadly. *Castro-Huerta*

considered only the "narrow jurisdictional issue" of "the State's exercise of jurisdiction over crimes committed by *non-Indians* against Indians in Indian country." 597 U.S. at 648, 653 (emphasis added). The Supreme Court stressed that the question of state criminal jurisdiction over *Indians* in Indian country was "not before us," and it "express[ed] no view on state jurisdiction over a criminal case of that kind." *See id.* at 639 n.2, 650 n.6; *see also id.* at 693 (Gorsuch, J., dissenting) ("Most significantly, the Court leaves undisturbed the ancient rule that States cannot prosecute crimes by Native Americans on tribal lands without clear congressional authorization—for that would touch the heart of 'tribal self-government.'").

37. Consistent with *Castro-Huerta*, the Supreme Court has repeatedly distinguished between cases involving *non-Indian* conduct in Indian country, like *Castro-Huerta*, and assertions of state jurisdiction over *Indians* for conduct occurring in Indian country. *See McClanahan*, 411 U.S. at 170–71 ("State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply."). It is only where "a State asserts authority over the conduct of non-Indians engaging in activity on the reservation" that "[m]ore difficult questions arise." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980).

CLAIM FOR RELIEF

38. The United States realleges each of the preceding paragraphs as if fully set forth herein.

39. Within the Reservation, the Nation has inherent sovereign authority to prosecute crimes committed by Indians, and the United States has statutory authority to prosecute Indians who commit certain crimes. However, because Congress has not authorized it, Oklahoma and its political subdivisions lack criminal jurisdiction over Indians within the Reservation.

40. Nevertheless, in violation of federal law, Tulsa continues to assert criminal jurisdiction to prosecute crimes committed by Indians within the Reservation. And Tulsa has demonstrated its intent to continue asserting such jurisdiction absent judicial intervention.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff-Intervenor the United States respectfully requests that the Court grant the following relief:

a. Declare, pursuant to 28 U.S.C. § 2201, that Tulsa lacks criminal jurisdiction over Indians for conduct occurring within the Creek Reservation, and that Tulsa's continued assertion of such jurisdiction violates federal law;

b. Preliminarily and permanently enjoin Tulsa from asserting criminal jurisdiction over and prosecuting Indians for conduct occurring within the Creek Reservation absent express authorization from Congress;

c. Award the United States all costs of suit to the maximum extent permissible; and

d. Grant such other and further relief as the Court deems just and proper.

DATED: May 13, 2024

Respectfully submitted,

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