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

MCKESSON CORPORATION; CARDINAL HEALTH, INC.; AMERISOURCEBERGEN DRUG CORPORATION; CVS HEALTH CORPORATION; WALGREENS BOOTS ALLIANCE, INC.; and WAL-MART STORES, INC., Plaintiffs, vs. TODD HEMBREE, ATTORNEY GENERAL OF THE CHEROKEE NATION, in his official capacity; JUDGE CRYSTAL R. JACKSON, in her official capacity; JUDGE T. LUKE BARTEAUX; and DOE JUDICIAL OFFICERS 1-4; Defendants.	No. 4:17-cv-00323-TCK-FHM

DEFENDANT TODD HEMBREE'S REPLY BRIEF IN SUPPORT OF HIS MOTION TO DISMISS

Plaintiffs have tried to attribute an improper motive to the Cherokee Nation for dismissing the tribal court action and filing a case in state court, accusing the Cherokee Nation of "gamesmanship" and a "transparent effort to divest jurisdiction from this Court." What Plaintiffs seem not to appreciate is that the Cherokee Nation's lawsuit, much like hundreds of other opioid lawsuits now pending in courts nationwide, is driven by an urgent need to try to control the causes of the opioid epidemic, which now kills 115 people per day nationwide. Since the Cherokee Nation filed its original lawsuit almost a year ago, the problem has continued to grow. Even the United States Department of Justice recently stated its support for the wave of opioid lawsuits, and offered its assistance. Cherokee Nation wishes to proceed in an Oklahoma court where jurisdiction is uncontroversial, to reach the merits of the case, rather than to continue litigating tribal jurisdiction with these Plaintiffs for an indefinite period of time in federal court. It is not "gamesmanship" to take heed of this Court's recent comments that "the Cherokee Nation could assert claims to redress any injury in another, non-tribal forum." *See* Preliminary Injunction Order p. 24 (ECF No. 138). That is precisely what the Cherokee Nation did. Because nothing about the Cherokee Nation's conduct suggests it will refile in tribal court, the Court should find there is no Article III jurisdiction, or in the alternative, that prudential mootness applies.

A. Attorney General Hembree's declaration is authoritative and concrete.

In at least ten different places in their brief—including in the headers for two entire sections—Plaintiffs cast the Attorney General's declaration as a mere statement of his "current intent" not to refile in tribal court, which they claim is not enough to moot the case. But that is simply not accurate. General Hembree stated the Cherokee Nation will not refile; it is the Cherokee Nation's policy and *decision* not to refile the case in tribal court. *See* Hembree Dec. ¶ 8 (ECF No. 139-1). These are not mere words—the Cherokee Nation dismissed the tribal court case and refiled elsewhere. The Cherokee Nation has never refiled a case in tribal court under these circumstances.

Id. ¶ 7. Plaintiffs effectively ask this Court to assume the Cherokee Nation's words and actions are just a sham—that the tribe is actually *hoping* to refile the tribal lawsuit.[1] Fortunately, the law does not indulge such conspiracy theories against public officials. Rather, numerous courts have held that statements by government officials, like those contained in Attorney General Hembree's declaration, rule out any reasonable chance the challenged conduct will resume.

For example, in *Brown v. Buhman*, 822 F.3d 1151 (10th Cir. 2016), police began an investigation into an alleged polygamist family for violating Utah's anti-bigamy statute. The family then sought to enjoin the Utah County Attorney, among others, from enforcing the statute, claiming it was unconstitutional. After the case was filed, the County Attorney declared under oath the family would not be prosecuted, which mooted the case. *Id*. at 1158–59, 1170. The Tenth Circuit refused to accept the argument that the County Attorney's declaration was "a sham," because doing so would mean "conclude[ing] the highest-ranking law enforcement official in Utah County had engaged in deliberate misrepresentation to the court." *Id.* at 1170. The Tenth Circuit saw no basis for that conclusion, in part because a prosecutor's change in position in reaction to a lawsuit "does not necessarily make it suspect." *Id.* at 1171. Indeed, "[a] government official's decision to adopt a policy in the context of litigation may actually make it more likely the policy will be followed, especially with respect to the plaintiffs in that particular case." *Id.*

Similarly in *Winsness v. Yocom*, 433 F.3d 727, 736 (10th Cir. 2006), a case involving a potential criminal prosecution under Utah's flag desecration statute, the Tenth Circuit found the plaintiff's case was mooted by the district attorney's affidavit stating that charges would not be pursued. *See id*. at 736. The court added that "[p]laintiffs have provided nothing but speculation,

[1] Without any evidence, Plaintiffs proclaim that the Cherokee Nation is "clinging onto a chance of resuming its prohibited conduct" and that the dismissal of the tribal court lawsuit actually "foreshadows" that that the "the Tribe's unlawful conduct" will continue. Response at 2.

that the prosecutors will change their policies if this lawsuit is dismissed. We therefore find it 'absolutely clear' that the threat of prosecution has been eliminated. Nothing in our case law prevents government actors from responsibly retreating from an ill-advised prosecution. . . ." *Id.* *See also Chicago United Indus., Ltd. v. City of Chicago*, 445 F.3d 940, 947 (7th Cir. 2006) (holding that City of Chicago's statement it had rescinded "without prejudice" an allegedly unconstitutional action mooted the case, because comity "requires us to give some credence to the solemn undertakings of local officials" and that "[w]hen the defendant is not a private citizen but a government actor, there is a rebuttable presumption that the objectionable behavior will not recur if the injunction is lifted.") (citations and quotations omitted).

Disregarding case law to the contrary, Plaintiffs cite a number of cases that provide minimal support, if any, for their argument. Indeed, they inaccurately cite *Knox v. Serv. Emp. Intern. Union*, 567 U.S. 298 (2012) for the proposition that "the Supreme Court directs that '*maneuvers designed to insulate*' a party from court action '*must be viewed with a critical eye*.'" Response Brief at 3 ("Response") (quoting *Knox* at 307). Carefully omitted from Plaintiffs' quotation of Justice Alito's sentence in *Knox* are the bolded portions below, which plainly alter its meaning: "***postcertiorari*** maneuvers designed to insulate ***a decision from review by this Court*** must be viewed with a critical eye." *Id.* Outside the post-certiorari context, lower courts have allowed—and sometimes even seemed to encourage—government defendants to correct challenged conduct in direct response to litigation. *See, e.g., Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1118 (10th Cir. 2010) (citing Wright & Miller for the proposition "although governmental defendants might take action as a direct response to litigation, 'at any rate, self-correction again provides a secure foundation for mootness so long as it seems genuine'").

Next, Plaintiffs cite *City of Mesquite v. Aladdin's Castle, Inc.* to argue voluntary cessation

does not moot a case if the defendant would be left "free to return to his old ways." Response at 3 (quoting *Aladdin's Castle*, 455 U.S. 283, 289 n.10 (1982)). But Plaintiffs fail to mention the Tenth Circuit expressly limited the Supreme Court's comments from *Aladdin's Castle* to cases where a legislature "has openly expressed its intent to reenact the challenged law." *Camfield v. City of Oklahoma City*, 248 F.3d 1214, 1223 (10th Cir. 2001). That obviously is not the situation here.

In Plaintiffs' other cases, the courts sometimes recited stringent-sounding formulations of the "voluntary cessation" doctrine, but then found the cases were nevertheless moot. For example, in *Tandy v. City of Wichita*, 380 F.3d 1277 (10th Cir. 2004), disabled bus passengers sued the City of Wichita for failing to offer buses and bus routes that were compliant with the Americans with Disabilities Act. After the trial court entered an injunction, Wichita submitted documents showing it voluntary fixed the accessibility issues. This was enough for the Tenth Circuit to conclude "it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* at 1292 (quotations and citation omitted). Wichita did not institute any kind of formal legislative change; presumably it could have reverted to the offending bus routes. What mattered was that Wichita gave credible assurances and took action to cease the challenged conduct (much like the Cherokee Nation has done). Plaintiffs' favorable reliance on *Tandy* begs the question: If Plaintiffs agree the evidence from *Tandy* made it "absolutely clear" the challenged conduct would not resume, how can Plaintiffs credibly claim that, despite the words and actions taken by the Cherokee Nation, its challenged conduct presents an imminent threat of resuming?

Plaintiffs' reliance on *Chihuahuan Grasslands Alliance v. Kempthorne*, 545 F.3d 884 (10th Cir. 2008) is also puzzling. There, the plaintiffs claimed the U.S. Bureau of Land Management ("BLM") unlawfully leased land to an oil company without duly evaluating the environmental impact. The plaintiffs sought to void the leases and enjoin BLM from relying on "the same flawed

process in the future." *Id*. at 890. By the time of appeal, the leases had been cancelled, and thus, in substance, the plaintiffs obtained the relief they were seeking. *Id.* at 887. BLM argued the appeal was moot, and the Tenth Circuit agreed. *Id.* Plaintiffs tried to avoid mootness by focusing on BLM's flawed evaluation process—which if not enjoined, could result in future unlawful leases. *Id.* at 890. However, the court found that issue would have to wait for another day. *Id.* at 893. As in *Kempthorne*, Plaintiffs here obtained the substance of what they sought in their complaint.

B. Defendant has authority over all litigation decisions of the Cherokee Nation.

Plaintiffs suggest the Cherokee Nation's Tribal Council may pass some hypothetical future legislation forcing the Attorney General to refile the tribal case. For this they point to provisions of Cherokee law requiring the Tribal Council to *authorize* certain lawsuits against non-members, and allowing the Tribal Council to review the *settlements* of certain lawsuits. These provisions are facially irrelevant to whether the Tribal Council could *order* the Attorney General to initiate a lawsuit in tribal court. That the Cherokee Nation's Constitution states the Attorney General "shall have such other duties as the Council may prescribe by law" adds nothing to Plaintiffs' argument. The duties of virtually every public office are theoretically subject to some legislative amendment.[2]

Finstuen v. Crutcher, 496 F.3d 1139 (10th Cir. 2007) does not say anything different. There, a pair of same-sex adoptive parents sought to enjoin an Oklahoma statute prohibiting *all* state agencies from recognizing out-of-state adoptions by same-sex couples. On appeal, the Oklahoma State Department of Health ("OSDH") argued the case was moot, because it interpreted the adoption statute in a manner that would exempt the plaintiffs' adoption. *Id*. at 1148. The Tenth Circuit disagreed the case was moot, however, because OSDH's interpretation did not bind other

[2] For example, Oklahoma's Constitution contains an almost identical provision—*i.e.*, providing the Attorney General "shall perform such duties as may be designated in this Constitution or prescribed by law." Okla. Const., § VI-1. Surely, that does not mean an official statement by the Oklahoma Attorney General is not entitled to deference in the mootness context.

state actors. For example, state courts remained legally bound to disregard the validity of same-sex adoptions, regardless of what OSDH said. By contrast, Attorney General Hembree has responsibility for all litigation decisions of the Cherokee Nation. *See* Hembree Dec. ¶ 2. He is the only party who could refile the lawsuit against Plaintiffs, and he will not do so.

C. The mootness cases under *National Farmer's Union* should direct the outcome here.

In the motion to dismiss, Attorney General Hembree cited five highly instructive federal cases from the context of *National Farmer's Union Insurance Co. v. Crow Tribe*, 471 U.S. 845 (1985) where courts confronted mootness issues substantially identical to the one presented here. In response, Plaintiffs did not cite any contrary authority, but instead tried to distinguish Defendant's cases either by pointing out inconsequential differences or by mischaracterizing them.

All five of Defendant's authorities—including the recent *Henderson* case from the Tenth Circuit, *see Henderson*, 696 Fed. App'x 355 (10th Cir. 2017)—stand for the basic position that a plaintiff lacks standing to challenge tribal jurisdiction unless there is a tribal court action *currently* pending. Additionally, all of the cases except *Henderson* involved the dismissal of the underlying tribal court case while the plaintiffs' federal injunction actions were pending; and, all of the courts that confronted that issue held the federal cases were mooted. Three of the cases—*Moss v. Bossman*, 2009 WL 891867 (D. S.D. Mar. 31, 2009), *State of Nev. v. Hicks*, 944 F. Supp. 1455 (D. Nev. 1996), and *Tamiami Partners. v. Miccosukee Tribe*, 898 F. Supp. 1549 (S.D. Fla. 1994)—also involved voluntary cessation by tribal officials, and the courts in those cases did not find that the voluntary cessation doctrine saved the cases from mootness.[3] Plaintiffs also try to distinguish

[3] Plaintiffs' assertion that the court in *Bossman* "did not consider the voluntary cessation exception to the mootness doctrine," Response at 10, is inexplicable. In fact, the court wrote: "Plaintiffs argue [the case is not moot] because the petition was dismissed without prejudice, [and the tribe] could file the same Petition again in Tribal Court…. The Court finds the claims against [the tribal officials] are moot. Plaintiffs' claim that [the tribe could refile the tribal complaint] is mere speculation and not the basis for a claim." *Bossman*, 2009 WL 891867, at *6.

Bossman, *Hicks*, and *Tamiami Partners* by claiming the underlying tribal cases were dismissed "prior to any rulings on the merits in federal court." Of course, "[a] preliminary injunction… is not a ruling on the merits," either. *Malik v. Clarke*, 2008 WL 1780935, at *3 (W.D. Wash. 2008). Even if it were, Plaintiffs do not explain why this supposed distinction matters. If anything, the Court's preliminary injunction order makes it less likely Cherokee Nation would refile in tribal court, since the Court already held the exhaustion requirement does not apply here.

D. The "absolute clarity" test has been clarified since *Laidlaw*.

Plaintiffs assert a case is not moot "unless it is 'absolutely clear' that the challenged conduct ***will not recur***." Response at 2 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Services*, Inc., 528 U.S. 167 (2000)). First, that distorts what the Supreme Court actually wrote in *Laidlaw* by omitting half of it, *i.e.*, that it should be "absolutely clear the allegedly wrongful behavior ***could not reasonably be expected to recur***." *Already, LLC v. Nike, Inc.*, 568 U.S. 85 (2013) (quoting *Laidlaw*). Moreover, the Tenth Circuit has noted that "[t]he Supreme Court's voluntary cessation cases suggest the word 'absolutely' adds little to this formulation." *Brown*, 822 F.3d at n.16. "After reciting this standard, the [Supreme] Court sometimes omits 'absolutely' from its subsequent analysis, instead using the 'reasonably be expected' language as shorthand." *Id.* And even if the word "absolutely" does some work in the formulation of the burden, at bottom, "the question the voluntary cessation doctrine poses" is: "Could the allegedly wrongful behavior reasonably be expected to recur?" *Already*, 568 U.S. at 92. But regardless of the precise formulation of the movant's burden, the practical reality is that to obtain equitable relief, it is *Plaintiffs* who must ultimately show a *likelihood* or a *good chance* the Cherokee Nation will refile the tribal lawsuit.[4] It would be impossible for Plaintiffs to do so. Even if Plaintiffs' complaint had

[4] *See Rio Grande*, 601 F.3d at 1112 ("[A] plaintiff cannot maintain a declaratory or

alleged a risk of being sued again in tribal court (which it does not), such allegations are purely speculative. Plaintiffs have no evidence of a *likelihood* the Cherokee Nation will refile the tribal case; they have offered nothing besides colorful insinuations that Attorney General Hembree is lying under oath, which are contradicted by the record. [5]

E. Plaintiffs have not identified an "ongoing violation" to meet *Ex Parte Young*.

Plaintiffs contend the *Ex Parte Young* exception allows suit against state or tribal officials for a "threatened" violation of federal law. This argument is unconvincing for several reasons. *First*, it requires disregarding repeated statements to the contrary by the Tenth Circuit.[6]

Second, no Tenth Circuit appellate case supports Plaintiffs' position. The one appellate case Plaintiffs cited is not actually about *Young*. Plaintiffs say the court in *Reed v. Bryant*, 2017 WL 6368842, at *6 (10th Cir. Dec. 13, 2017) adopted the view that even a non-imminent threat of future law violation is sufficient under *Young*. But *Bryant* involved a claim by a state prisoner under 42 U.S.C. § 1983 and §§ 2000cc-1, the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). Importantly, RLUIPA by its own force abrogates a state's sovereign immunity

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injunctive action unless he or she can demonstrate a good chance of being likewise injured [by the defendant] in the future."); *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983) ("the issue here is not whether [the injunction claim] has become moot but whether Lyons meets the preconditions for asserting an injunctive claim in a federal forum. . . . for Lyons' lack of standing does not rest on the termination of the police practice but on the speculative nature of his claim that he will again experience injury as the result of that practice even if continued.").

[5] Plaintiffs mention a media comment by a Cherokee Nation attorney that she believed tribal court had jurisdiction. It should be unremarkable that lawyers believe in the positions they advance in their legal briefs, otherwise they would not have advanced them.

[6] *See Merryfield v. Jordan*, 431 Fed. Appx. 743, 746 (10th Cir. 2011) (emphasizing that under *Young*, a plaintiff "must allege that there is an *ongoing* violation of his rights" and affirming dismissal because of plaintiff asserted only a "conclusory allegation" of ongoing violation); *see also Rounds v. Clements*, 495 Fed. Appx. 938, 940 (10th Cir. 2012) (*Young* exception met where plaintiff's "complaint alleges that he is currently, on an ongoing basis, being denied [federal rights]" being "currently and wrongfully withheld" by defendant who was "currently participating in an ongoing scheme"). There are many other Tenth Circuit cases stating there must be an "ongoing violation," and none using the "threatened violation" language Plaintiffs propose.

with respect to prospective equitable claims. *See Worthen v. Oklahoma Dept. of Corr.*, 2007 WL 4563644, at *2 (W.D. Okla. Dec. 20, 2007). The reason the *Bryant* court reversed the trial judge was *not* because the judge applied the *Young* exception too narrowly, but rather because the judge failed to recognize that an injunction is available under RLUIPA regardless of *Young*'s requirements, *i.e.*, the same basic error Plaintiffs have made in their brief by citing *Bryant*.

Third, because there is no support from the Tenth Circuit, Plaintiffs rely on *Summit Med. Assoc. v. Pryor*, 180 F.3d 1326 (11th Cir. 1999), which views the *Young* exception more broadly than the Tenth Circuit has ever recognized in any published opinion. But even *Summit* is arguably limited to situations where *criminal* prosecution is threatened. It involved Alabama's threatened enforcement of an anti-abortion statute that carried a maximum 99-year prison sentence. Most of *Summit*'s discussion of *Young* (other than the part Plaintiffs quote) pertained to why criminal enforcement cases presented special considerations. General Hembree has not threatened Plaintiffs even with *civil* prosecution in tribal court—and certainly not criminal prosecution—so there is no reason *Young* would allow a preemptive strike against him, even under the rationale of *Summit*.

Lastly, regardless of whether the underlying "law violation" must be "ongoing," "imminent," or merely "threatened" to meet the *Young* exception, Plaintiffs do not dispute they have the burden on this issue. Unlike the voluntary cessation doctrine, which requires the ceasing party to make a showing the challenged conduct will not reasonably recur, it is entirely Plaintiffs' burden to show sovereign immunity does not apply. To do so, Plaintiffs must show the law violation is "ongoing," or at the very least, "imminent" or "threatened." Plaintiffs cannot do so, because the Cherokee Nation's actions do not equate with even "threatened" violation of the law.

F. Plaintiffs misapprehend the scope of proceedings going forward.

Plaintiffs say "little, if any, additional factual development will be required prior to motions for final judgment." Response at 10. Plaintiffs naturally wish to downplay the length and

complexity of the proceedings ahead. In declaratory judgment actions, however, courts generally allow regular discovery. *Nautilus Ins. v. 8160 S. Mem'l Drive*, 436 F.3d 1197, 1200 (10th Cir. 2006) ("[D]istrict courts should 'refrain from giving a declaration unless there is a full-bodied record developed through adequate adversary proceedings with all interested parties before the court.'" (quoting Wright & Miller)). Courts also typically permit adequate discovery before resolving contested jurisdictional issues, especially when there are materially disputed facts.

The same principles apply in cases about tribal jurisdiction arising under *National Farmer's Union. See Attorney's Process & Investig. Servs., Inc. v. Sac & Fox Tribe*, 609 F.3d 927, 937 (8th Cir. 2010) ("Questions of subject matter jurisdiction often require resolution of factual issues before the court may proceed, and that is particularly true of inquiries into tribal jurisdiction." (citation omitted)). The second *Montana* exception involves a fact-intensive inquiry, and discovery is necessary to develop facts. *See Burlington N. Santa Fe R. Co. v. Assiniboine & Sioux Tribes*, 323 F.3d 767, 774 (9th Cir. 2003) (holding tribe was entitled to take discovery on the "nature of the threat facing them" before court could rule on the *Montana* exception); *Elliot v. White Mountain Apache Tribal Court*, 566 F.3d 842, 849 (9th Cir. 2009) (considering the extent of the alleged damage to tribe before deciding that tribe had colorable jurisdiction to regulate fire permits). Indeed, the "key rationale underlying the tribal exhaustion requirement is to provide federal courts with the benefit of a full factual record on the relevant issues and the benefit of tribal court expertise." *Norton v. Ute Indian Tribe*, 862 F.3d 1236, 1245 n.3 (10th Cir. 2017). Although this Court dispensed with the exhaustion requirement, there is still a need to develop a full factual record before making a significant legal ruling on the jurisdiction of an Indian tribe. *See Burlington*, 323 F.3d at 775 (reversing grant of summary judgment and remanding to permit discovery on the second *Montana* exception).

Respectfully submitted,

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CERTIFICATE OF SERVICE

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