No. 24-5011

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

THLOPTHLOCCO TRIBAL TOWN,

Plaintiff/Appellee,

v.

ROGER WILEY, RICHARD C. LERBLANCE, AMOS McNAC, ANDREW ADAMS, III, KATHLEEN R. SUPERNAW, MONTIE DEER, GEORGE THOMPSON, JR., and LEAH HARJO-WARE,

Defendants/Appellants.

Appeal from the United States District Court
for the Northern District of Oklahoma,
Case No. 4:09-cv-00527-JCG-CDL (Hon. Jennifer Choe-Groves)

APPELLANTS' REPLY BRIEF

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In ignoring the MCN Judicial Officers' repeated assertions of sovereign immunity, the district court demonstrated a deeply regrettable indifference to their federally protected rights and those of the Muscogee (Creek) Nation; to the precedents of this Court and the Supreme Court holding that such assertions may not be ignored; and consequently, to the Constitution's limits on federal subject matter jurisdiction.

The district court overstepped that constitutional barrier only to confront and overstep another: the prohibition against advisory opinions. In both respects, the district court acted without jurisdiction. In contending otherwise, the Town declines to acknowledge, much less distinguish, the numerous Tenth Circuit and Supreme Court precedents on which the MCN Judicial Officers rely that foreclose the Town's arguments. The Town, which bears the burden to establish subject matter jurisdiction, has failed to do so.

I. The Town Has Failed To Carry Its Burden on the MCN Judicial Officers' Sovereign Immunity Argument.

The MCN Judicial Officers properly supported their assertion of sovereign immunity and the district court's resulting lack of subject matter jurisdiction. Opening Br. 19–28. The Town bore the burden to rebut those claims or face dismissal. *Id*. at 20 (citing *Havens v. Colo. Dep't of Corr*., 897 F.3d 1250, 1260–61 (10th Cir. 2018)). It has failed to do so.

First, the Town does not dispute that it failed to respond to the MCN Judicial Officers' repeated assertions of immunity below, and it does not respond to their argument here that under this Court's precedents the issue may therefore be deemed conceded. *Id.* at 20–23 & n.3. Nor does the Town address the district court's complete disregard of the MCN Judicial Officers' assertions of immunity and their motion to dismiss on that basis. *See id*. at 23–24 (discussing *Fletcher v. United States*, 116 F.3d 1315 (10th Cir. 1997) (district court's disregard of tribal officials' sovereign immunity constituted reversible error)); *see also United States v. Diaz-Menera*, 60 F.4th 1289, 1294 n.6 (10th Cir. 2023) (appellee waived response to appellant's argument "by failing to include it in the response brief"). Accordingly, the Town has doubly waived any arguments on these points.

Second, should the Court nevertheless entertain the Town's immunity arguments, the Town has failed to allege an ongoing violation of federal law as required by *Ex parte Young*, 209 U.S. 123 (1908). The only such alleged violations included in the Town's Complaint involve the MCN courts' exercise of jurisdiction over the Town in two cases pending when the Complaint was filed, both of which were terminated by the MCN Supreme Court's 2022 decision. Opening Br. 25–28 & n.4.

Despite facing a challenge to the sufficiency of its Complaint to support federal jurisdiction under *Ex parte Young*, the Town's brief (like the district court's

decision) *does not mention its Complaint at all*, much less identify allegations within it of an ongoing violation of federal law. *See* Town Resp. 27, 36–38 (containing all references to *Ex parte Young* in Town's argument section). The closest the Town comes to contending that it has adequately alleged an ongoing violation of federal law is to assert that it *could* allege one (thereby conceding that it has *not* done so):

> [W]ith knowledge of the rule of decision of the MCN courts, Thlopthlocco could bring a new declaratory action that the rule of decision violated federal common law, that Thlopthlocco falls into the class of potential plaintiffs who are adversely affected by the ruling because it has utilized the MCN judiciary and is likely to do so again, and that the rule of decision chills its access to court.

Id. at 38; *see id*. (referring to same as "a hypothetical suit").

The prospects for such a suit would be grim. *See, e.g.*, *Whole Woman's Health v. Jackson*, 595 U.S. 30, 47, 50 (2021) (stating Court's agreement that under *Ex parte Young*, "it is not enough that [claimants] feel inhibited or chill[ed] by the abstract possibility of" a challenged law being applied to them in the future, and that a "more concrete injury" is required (second brackets in original) (quotation marks and citation omitted)).

Regardless, the Town cannot outrun its Complaint by conjuring an alternative complaint on appeal. *Ex parte Young* turns on the substance of the actual complaint, *see Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (*Ex parte Young* requires that a party's "*complaint* alleges an

ongoing violation of federal law" (emphasis added) (citation omitted)); *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1166 (10th Cir. 2012) (same); *Jojola v. Chavez*, 55 F.3d 488, 494 (10th Cir. 1995) ("[A]rguments in an appellate brief may not be relied upon to circumvent pleading defects.").

The Town has foregone every opportunity (here and below) to identify how its Complaint supports subject matter jurisdiction under *Ex parte Young*. Because the Town bears that burden, *see Pruitt*, 669 F.3d at 1167 (referring to what "plaintiffs must show"), that failure alone should end this case. *See Clay v. Lares*, No. 23-1151, 2024 WL 79966, at *2 (10th Cir. Jan. 8, 2024) (upholding grant of motion to dismiss where claimant "fails to point to allegations *in his … complaint*" sufficient to support claim); *Lebahn v. Owens*, 813 F.3d 1300, 1307–08 (10th Cir. 2016) (it is "not the court's job … to make the non-movant's arguments for him" (citation omitted)); *Teets v. Great-W. Life & Annuity Ins. Co.*, 921 F.3d 1200, 1228 (10th Cir. 2019) (Court has "neutral role in the adversarial process" and does not "make a party's case for it" (citation omitted)).

Third, the Town contends that because this Court found *Ex parte Young* applicable in 2014, its "prior ruling should apply." Town Resp. 27 (citing *Thlopthlocco Tribal Town v. Stidham*, 762 F.3d 1226, 1242 (10th Cir. 2014)). This contention simply wishes away subsequent developments. The two tribal court proceedings alleged to be ongoing violations of federal law in the Town's

Complaint were pending when this Court decided *Stidham* but were thereafter dismissed. *See* Opening Br. 26–28. "[S]overeign immunity must be reassessed" where the jurisdictional facts have changed. *Iowa Tribe of Kan. and Neb. v. Salazar*, 607 F.3d 1225, 1232 (10th Cir. 2010); *see* Opening Br. 27 n.4. The Town argues without regard to that need for reassessment and hence again fails to carry its burden.[1]

II. This Case is Moot.

Because the MCN Judicial Officers enjoy sovereign immunity, the Court need not consider mootness. If it does, the MCN Judicial Officers have demonstrated mootness under Circuit and Supreme Court precedent, Opening Br. 28–43, and the Town, ignoring those precedents, has failed to rebut that showing.

[1] The Town's miscellany of additional arguments likewise fails. Its contentions that *Ex parte Young* allows claims for "*declaratory or injunctive relief*" and does not "require an existing ongoing proceeding," Town Resp. 37–38 (citing *Reed v. Goertz*, 598 U.S. 230, 234 (2023), and *Steffel v. Thompson*, 415 U.S. 452 (1974)), are strawman arguments. The MCN Judicial Officers have never suggested that *Ex parte Young* is limited to injunctive relief or requires an ongoing proceeding. But it *does* require that an ongoing violation of federal law be alleged in the complaint, *Verizon*, 535 U.S. at 645; *Pruitt*, 669 F.3d at 1166, which the Town has failed to do. And the Town patently mischaracterizes *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877 (1986). *See* Town Resp. 35–36. There, North Dakota, conditioned tribal access to state courts in any matter on tribal acquiescence "to the coercive jurisdiction of state courts for *all* matters occurring on the reservation" and "to the application of state law in all suits to which [the tribe] is a party," 476 U.S. at 888, 891. The Town has alleged nothing remotely analogous.

A. The Town Has Failed To Rebut the MCN Judicial Officers' Affirmative Showing of Mootness.[2]

The Town identifies a single issue on which it contends a live dispute remains: "whether Thlopthlocco can withdraw a waiver and consent once filed." Town Resp. 29. However, as the MCN Judicial Officers argued: (1) the MCN Supreme Court's resolution of the two tribal court cases gave the Town all the relief it sought in its Complaint, Opening Br. 29–30; (2) no case is pending or impending in which an MCN court is asserting or threatening to assert jurisdiction over the Town after a withdrawn immunity waiver, *id*. at 32–34; and (3) accordingly, no declaration on that issue could affect the behavior of the MCN Judicial Officers toward the Town in other than a hypothetical future case, *id*. at 30. The Town disputes none of these assertions in its Response.

The MCN Judicial Officers cited numerous Circuit and Supreme Court mootness precedents establishing that the foregoing facts are jurisdictionally dispositive. *See id*. at 29–35. The Town does not address *any* of those precedents. *See United States v. Banks*, 884 F.3d 998, 1014 (10th Cir. 2018) (admonishing litigant for "ignor[ing] our caselaw").

For example, while not disputing that the MCN Supreme Court's resolution of the tribal court proceedings gave the Town all the relief it sought in its

[2] This subsection replies to the Town's "Proposition A" arguments, *see* Town Resp. 27–40.

Complaint, the Town nowhere grapples with this Court's directive that "[i]f full relief is accorded by another tribunal, a proceeding seeking the same relief is moot[.]" *Moongate Water Co., Inc. v. Dona Ana Mut. Domestic Water Consumers Ass'n*, 420 F.3d 1082, 1088 (10th Cir. 2005) (citation omitted); *see also Fed. Bureau of Investigation v. Fikre*, 601 U.S. 234, 240 (2024) (case is moot when claimant "secure[s] outside of [federal] litigation all the relief he might have won in it").

Similarly, the Town asserts (as the district court held) that a live dispute remains because a declaration may benefit the Town in a hypothetical future lawsuit. Town Resp. 45 (declaratory relief is necessary "to protect Thlopthlocco from future disruption … the next time Thlopthlocco files suit," and "[m]ost important, future incoming [Town] officials" will benefit from the declaration in hypothetical future litigation); *id*. at 38 (asserting Town's Article III stake "[i]n such a hypothetical suit"); App. Vol. I at 196 (benefit of declaration in hypothetical future lawsuit is "the most urgent reason" to issue it).

In so asserting, the Town (like the district court) does not acknowledge, much less distinguish, this Court's clear admonitions that "the effect[] of [a declaratory] judgment in hypothetical unfiled future litigation … [is] not a legally cognizable interest that will defeat mootness" and that "[s]eeking to litigate [an] ostensible controversy now over unfiled, potential future … claims is the very sort

of speculative, hypothetical factual scenario that would render such a … judgment a prohibited advisory opinion," *Schell v. OXY USA Inc*., 814 F.3d 1107, 1115 (10th Cir. 2016) (quotation marks omitted). If the benefits of a ruling for a hypothetical future lawsuit "were enough to avoid mootness, no case would ever be moot." *Id*. (citation omitted); *see also United States v. Juvenile Male*, 564 U.S. 932, 937 (2011) (per curiam) (potential "benefit in a future lawsuit cannot save *this* case from mootness"); *Front Range Equine Rescue v. Vilsack,* 782 F.3d 565, 569 (10th Cir. 2015) (courts "are without power to render an advisory opinion on a question simply because [they] may have to face the same question in the future" (citation omitted)). The MCN Judicial Officers invoked all these precedents here and below, Opening Br. 16, 32–34; Defs.' Resp. Br. in Supp. of Dismissal (Dkt. 180) at 4. The Town ignores them here, as it did below. *See Wicker v. Bayview Loan Servs., LLC*, 843 F. App'x 117, 119 (10th Cir. 2021) (admonishing party for "fail[ing] to acknowledge relevant legal precedent, much less distinguish it").

The Town (like the district court) further contends that a live controversy remains merely because a legal question purportedly remains unresolved from the dismissed tribal court proceedings. Town Resp. 27 ("[T]he question of the ability to withdraw consent was not answered by the Creek Courts and remain[s] a 'live case.'"); *id*. at 21 (same). The Town again fails to acknowledge contrary Circuit case law: "In every case dismissed as moot, legal questions are necessarily left

unresolved. When the underlying facts illuminating the legal issue no longer exist," the case is no longer "within our purview under article III." *Park Cty. Res. Council, Inc. v. U.S. Dep't of Agric.*, 817 F.2d 609, 615 (10th Cir. 1987), overruled in part on unrelated issue by *Vill. of Los Ranchos De Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992). This is so "[n]o matter how vehemently the parties continue to dispute" the legal issue. *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013). Opening Br. 33–35 (citing additional cases).

Finally, the Town makes no attempt to show that a declaration on the waiver withdrawal issue will affect the behavior of the MCN Judicial Officers toward the Town. *See* Opening Br. 15–16, 30. What makes a declaration "a proper judicial resolution of a 'case or controversy' rather than an advisory opinion … is in the settling of some dispute which affects the behavior of the defendant towards the plaintiff." *Hewitt v. Helms*, 482 U.S. 755, 761 (1987) (emphasis omitted); *see also Smith v. Becerra*, 44 F.4th 1238, 1247 (10th Cir. 2022) ("declaratory relief claim is moot if the relief would not affect the behavior of the defendant toward the plaintiff." (quotation marks omitted)). And again, invoking a hypothetical future lawsuit is insufficient. *Schell*, 814 F.3d at 1115.[3]

[3] The Town suggests a live dispute by contending that "[b]ecause of the MCN, Thlopthlocco's basic governmental function … has been disrupted because it has had to defer elections pending the result of this tribal court litigation[.]" Town Resp. 45. This contention contains no citation to the record. *See Sandoval v. City of*

In sum, there simply is no case or other circumstance, pending or impending, where the waiver withdrawal issue is embedded in a live dispute. "Under Article III, federal courts do not adjudicate hypothetical or abstract disputes." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021).

B. The Town Has Failed To Carry Its Burden Under the Capable-of-Repetition-Yet-Evading-Review Exception to Mootness.[4]

The capable-of-repetition-yet-evading-review exception to mootness is restricted to "exceptional situations." *Jordan v. Sosa*, 654 F.3d 1012, 1035 (10th Cir. 2011) (citations omitted). It requires that (1) the challenged conduct be inherently short in duration, and (2) the specific controversy is likely to recur. *Id.* at 1035. The Town bears the burden on both elements, *see id*., and falls short on both.

1. The Town Has Failed To Establish the Duration Element.

The duration element requires that the challenged conduct "is *necessarily* of short duration," *Jordan*, 654 F.3d at 1036, and thus "present[s] an *inherent* problem of limited duration that will cause it to evade review in future litigation,"

Boulder, 388 F.3d 1312, 1320 (10th Cir. 2004) (the Court will not "comb through the … record [including the Town's 2,500-page appendix] and make a party's case for it by locating materials not referenced by that party"). More fundamentally, *it appears nowhere in the Complaint*. *See Lawmaster v. Ward*, 125 F.3d 1341, 1346 n.2 (10th Cir. 1997) ("[b]ecause [plaintiff] failed to raise the … claim … in his complaint, we refuse to consider it" in resolving motion to dismiss); *Jojola*, 55 F.3d at 494 (Arguments in brief cannot "circumvent pleading defects.").

[4] This subsection replies to the Town's "Proposition C" arguments, *see* Town Resp. 46–50.

Disability Law Ctr. v. Millcreek Health Ctr., 428 F.3d 992, 997 (10th Cir. 2005) (emphasis added) (quotation marks omitted); *see also, e.g.*, *Spencer v. Kemna*, 523 U.S. 1, 18 (1998) (challenged conduct must be of a type "*always* so short as to evade review" (emphasis added)); *Front Range*, 782 F.3d at 570 (first element requires conduct "*by nature*, so ephemeral as to elude … judicial review" (emphasis added) (citation omitted)). *See* Opening Br. 37–38 & n.7.

Once again, the Town ignores these precedents. Nor does it attempt to defend the district court's flawed reasoning on this element. *See id*. at 38–40. It instead argues that it could not obtain federal review because it was "a prisoner of the exhaustion of tribal remedies," which rendered "the exercise of jurisdiction … very long," while "the ability to challenge was extremely short, and … was thwarted by the very decision made by the Defendants." Town Resp. 47.

First, the Town's fact-bound argument ignores that the challenged conduct must be *categorically*—i.e., necessarily (*Jordan*), always (*Spencer*), inherently (*Disability Law Ctr.*), and by nature (*Front Range*)—of short duration. And while election disputes often meet this test because election cycles are inherently short, the Town acknowledges that the district court erred in viewing the challenged assertion of tribal court jurisdiction as an election dispute for purposes of the duration analysis. Town Resp. 46 ("[T]he extended length or brevity of opportunity to challenge the MCN actions was *not caused by … events such as elections*."

(emphasis added)); Opening Br. 38–39 (addressing district court's error on this point).

Second, the Town contends that federal review was "thwarted" when the MCN Supreme Court dismissed the two cases and affirmed the Town's sovereign immunity. But that gave the Town all the real-world relief it sought in its Complaint. *See* App. Vol. I at 33, ¶ 49 ("[t]his action is brought … to stop … the exercise of jurisdiction" in violation of the Town's sovereign immunity). That establishes mootness, not an exception to it. *See Moongate Water Co.*, 420 F.3d at 1088 ("If full relief is accorded by another tribunal, a proceeding seeking the same relief is moot[.]" (citation omitted)); *Fikre*, 601 U.S. at 240 (case is moot if party secures elsewhere "all the relief" sought in federal complaint).[5]

Third, the Town's contention that "the exercise of jurisdiction was very long and the ability to challenge was extremely short," Town Resp. 47, makes no sense. There was a remand for tribal exhaustion, at the end of which the Town prevailed completely, mooting the case. The Town does not explain how the availability of federal review would have been different if the MCN courts had completed the exhaustion proceedings in the Town's favor within a month, a week, or even a day.

[5] This outcome is consistent with the tribal exhaustion doctrine, which exists to provide a tribal court with "full opportunity to determine its own jurisdiction and to rectify any errors it may have made." *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 857 (1985) (footnote omitted). In dismissing all pending tribal court actions against the Town, the MCN courts fulfilled that purpose.

Nor could it. It was the Town-friendly outcome of those proceedings, not their duration, that foreclosed federal review.[6]

2. The Town Has Failed To Establish the Capable-of-Repetition Element.

Because the Town has not carried its burden under the first element, the Court "need not" address the second, *Jordan*, 654 F.3d at 1035–36. The Town fails this element in any event. It contends that the capable-of-repetition element is met because of "the likelihood that [MCN] judicial proceedings will be needed [by the Town] in the future[.]" Town Resp. 48; *see also id*. at 39 ("[F]uture access to MCN courts is not speculative."); *id.* at 10, 25, 44 (same).

However, whether a litigant may appear in court in the future is not the test.[7] The test is whether there is "a reasonable expectation that the *same controversy* … will recur," *Rio Grande Found. v. Oliver*, 57 F.4th 1147, 1167 (10th Cir. 2023)

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[6] The MCN Judicial Officers acknowledge that the tribal court proceedings took significantly longer than necessary. As they have noted, the MCN district court judge who presided over the two cases during that time is no longer a member of the MCN judiciary, and the judge to whom the cases were reassigned resolved them expeditiously. Opening Br. 7 & n.1. But the Town has raised the issue simply to color this Court's view of the MCN judiciary. The Town has identified no point of law—whether regarding mootness or the MCN Judicial Officers' sovereign immunity—with respect to which the actual duration of the tribal court proceedings has any bearing.

[7] Accordingly, when counsel for the MCN Judicial Officers agreed at oral argument that the Town may access MCN courts in the future, that was not the concession the Town believes it to be. *See* Town Resp. at 44 ("MCN counsel has conceded a 'reasonable possibility' of the recurrence of litigation by Thlopthlocco").

(emphasis added) (citation omitted), and "a mere … theoretical possibility" will not suffice, *Nathan M. ex rel. Amanda M. v. Harrison Sch. Dist. No. 2*, 942 F.3d 1034, 1041 (10th Cir. 2019) (citation omitted).

The district court understood that more is required than a likely future court appearance. It nevertheless erred in concluding that the Town satisfies the element because it will likely file suit in MCN courts in the future and "is likely to withdraw its waiver of sovereign immunity under certain circumstances," and that there exists "a reasonable expectation that Plaintiff will … be subjected to a similar lawsuit … *if* its withdrawal of a waiver of sovereign immunity is not accepted," App. Vol. II at 441 (emphasis added). The district court did not explain why a Town withdrawal is likely; and its last-stated contingency—i.e., that a withdrawal might not be accepted—is rank speculation, the likelihood of which the district court did not even address. *See* Opening Br. 41–43; *Colo. Interstate Gas Co. v. FERC*, 83 F.3d 1298, 1302 (10th Cir. 1996) (capable-of-repetition element not met where alleged future harm involves "contingencies … and the need for this court to speculate regarding how those contingencies might be resolved"). The Town does not acknowledge, much less counter, the MCN Judicial Officers' critique (grounded in Circuit case law) of the district court's reasoning on this issue. Opening Br. 41–43.

Nor can the Town salvage its argument by referring to a purported "rule of decision" of the MCN courts forbidding withdrawals of immunity waivers, Town Resp. 23. As the MCN Judicial Officers have explained, there is no per se rule against such withdrawals under MCN law, and the MCN courts did not establish one. Opening Br. 41–42. Indeed, the Town stated below that its ability to withdraw an immunity waiver was not "taken up by the MCN Supreme Court." Pl.'s Mot. for Declaratory J. (Dkt. 176) at 28. *See also id*. at 19 ("[T]he MCN Supreme Court ruling bodes no objection to Thlopthlocco's withdrawal of consent[.]"). The Town reiterated that view here. Town Resp. 27 ("[T]he question of the [Town's] ability to withdraw consent was not answered by the Creek Courts[.]"); *id*. at 50 (same).

These statements should doom the Town's arguments under this exception. If the MCN courts have not resolved the issue, and the MCN Supreme Court's final word on the Town's sovereign immunity "*bodes no objection* to Thlopthlocco's withdrawal of consent," Dkt. 176 at 19 (emphasis added), then by the terms of the Town's own argument, whether the MCN courts will reject a Town withdrawal in a future case is at best a mere theoretical possibility, not a reasonable expectation that can trigger the exception. *See Nathan M.*, 942 F.3d at 1041 ("mere … theoretical possibility" does not suffice (citation omitted)); *Rio Grande Found.*, 57 F.4th at 1166 (element not met where recurrence of controversy is "conditional and speculative").

This conclusion is underscored emphatically by the unique factual circumstances underlying the waiver withdrawal issue in the MCN courts. Indeed, the Town submitted a *2,200-page appendix* setting forth those circumstances for the district court. *See* App. Vol. I at 160. As this Court has recently explained (in yet another precedent ignored by the Town), "[a] legal controversy so sharply focused on a unique factual context will rarely present a reasonable expectation that the same complaining party would be subjected to the same actions again." *Nathan M.*, 942 F.3d at 1043–44 (brackets and citation omitted). This principle applies with exceptional force here. As the MCN Judicial Officers explained, Opening Br. 42, the MCN district court's analysis—which spanned *eight* pages, *see* App. Vol. I at 81–89[8]—focused on four interrelated lawsuits involving the Town, of which Case No. CV-2007-39 was the last. As the MCN district court stated:

> These cases do not exist in a vacuum and they do not exist completely independent of one another. There is significant overlap between the issues presented in each of the cases and the parties involved in each of the cases are nearly the same. One case builds on the prior case and spills over to the next one.

Id. at 83. In the first three cases, the Town pressed consistent jurisdictional arguments on which it prevailed in the MCN district court and MCN Supreme

[8] Thus, the Town's contention that the MCN district court resolved the issue "with a wave of the hand," Town Resp. at 7, is false.

Court over several years, only to suddenly reverse course "when it [did] not like the outcome of some of this Court's rulings" in Case No. CV-2007-39, *id*. at 82. At that juncture, the Town sought to unilaterally terminate the case pursuant to arguments representing "a one hundred and eighty degree turn from its pleadings in all [of the] cases up to this point," *id.* at 88–89. Under those exceptionally fact-bound circumstances, the MCN district court determined as an equitable matter that the Town could not terminate the case at that late juncture "without leave of court," *id*. at 89, and nevertheless dismissed the case on other grounds.[9]

The MCN district court's equitable reasoning under that unique and fact-intensive context says nothing about how an MCN court is likely to rule in a future case under inevitably different facts. It addressed instead precisely the sort of "legal controversy so sharply focused on a unique factual context [that] will rarely" meet the second element of the test. *Nathan M.*, 942 F.3d at 1043 (brackets and citation omitted). Ignoring the MCN Judicial Officers' arguments and Circuit precedents on this point, the Town has made no attempt to explain how this case

[9] As discussed below, *infra* pp. 21–23, federal law does not, contrary to the Town's contention, permit all sovereigns to withdraw immunity waivers and terminate any case at will. States, for example, may not do so where they voluntarily initiated the court's jurisdiction. *See, e.g.*, *Wagoner Cty. Rural Water Dist. No. 2 v. Grand River Dam Auth.*, 577 F.3d 1255, 1258 (10th Cir. 2009) (contrary rule would create "unfairness" (citation omitted)); *Sutton v. Utah State Sch. for Deaf and Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999) (contrary rule would be "grossly inequitable").

escapes that principle. As with the first element of the exception, the Town has failed to carry its burden on the second.

C. The "Voluntary Cessation" Exception Does Not Apply.[10]

The Town also invokes the "voluntary cessation" exception to mootness, which the district court did not address. Under that exception, a defendant's unilateral cessation of challenged conduct will not moot a case where the defendant "changed course simply to deprive the court of jurisdiction." *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1115 (10th Cir. 2010) (citation omitted). "Otherwise, a defendant could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends." *Smith*, 44 F.4th at 1250 (citation omitted).

Nothing about this case comes close to triggering this exception.

First, "[t]his exception is designed to counteract gamesmanship[.]" *N.M. Health Connections v. U.S. Dep't of Health & Human Servs.*, 946 F.3d 1138, 1159 (10th Cir. 2019). Courts "begin by examining the timing" of the cessation of the challenged conduct vis-à-vis the federal suit to determine whether cessation was a ploy to evade review, *Smith*, 44 F.4th at 1251. Here, the MCN Supreme Court

[10] This subsection replies to the Town's "Proposition B" arguments, *see* Town Resp. 40–46.

terminated the challenged assertions of jurisdiction over the Town in 2022—*thirteen years* after the Town initiated its federal action (and within which period the MCN Judicial Officers vigorously participated in the federal review proceedings in the district court and this Court). This forecloses any suggestion that the MCN Judicial Officers dismissed the cases "*when sued*," *id.* at 1250 (emphasis added) (citation omitted), "in response to this litigation," *id.* at 1246, "in an effort to evade judicial review," *O'Connor v. Washburn Univ.*, 416 F.3d 1216, 1221 (10th Cir. 2005). When those basic elements are absent, "the voluntary cessation doctrine does not apply." *Smith*, 44 F.4th at 1246; *see also King v. Ciolli*, No. 23-1201, 2024 WL 1179908, at *3 n.1 (10th Cir. Mar. 19, 2024) (voluntary cessation exception inapplicable where claimant offered no "evidence that this judicial proceeding had any impact on the timing of" defendant's cessation of the challenged conduct).

Second, the exception applies where the defendant "has unilaterally changed its procedures in an effort to evade judicial review" and not where "the controversy has become moot through the normal course of events rather than through the unilateral action of the defendant." *O'Connor*, 416 F.3d at 1221–22. Here, the matter did not become moot because the MCN courts unilaterally shut down the two pending cases in response to the Town's federal suit (as noted above, the timing alone forecloses that suggestion). It became moot because the Town—

"through the normal course of events," *id*. at 1222, that happen in a lawsuit—appealed to the MCN Supreme Court, which after consideration of the Town's arguments granted the very relief demanded by the Town. There was nothing unilateral about that, and nothing in the record suggests the MCN Supreme Court acted for any reason other than the appropriate discharge of its judicial function.

Third, the doctrine applies where there are "*clear showings* of reluctant submission [by governmental actors] and a desire to return to the old ways." *Rio Grande Silvery Minnow*, 601 F.3d at 1117 (brackets in original) (citation omitted). The Town's arguments beg the question of what "old ways" are at issue. The district court issued a declaration that the Town may "withdraw its waiver of sovereign immunity *under appropriate circumstances*." App. Vol. II at 456 (emphasis added). This plainly recognizes that there are circumstances under which a withdrawal would not be appropriate. The Town agrees. Town Resp. 3 (district court "properly entered a declaratory judgment that Thlopthlocco … may withdraw its waiver … under appropriate circumstances").

The MCN district court did not rule otherwise. It simply found that the unique facts of Case No. CV-2007-39 did not present such circumstances. *See supra* pp. 16–17. At best, then, the Town's position is that the MCN district court erred in finding the highly fact- and context-specific circumstances of that case not

appropriate for unilateral withdrawal of an immunity waiver. And that argument fails under this Court's precedents, which hold that where, as here,

> the "allegedly wrongful behavior" … is highly fact- and context-specific, rather than conduct that is likely to "recur" on similar facts and in the same context…., *the "voluntary cessation" doctrine is inapplicable*, because our review of future instances of "wrongful behavior" may be quite different than the complained-of example that already has ceased.

Unified Sch. Dist. No. 259 v. Disability Rights Ctr. of Kan., 491 F.3d 1143, 1150 (10th Cir. 2007) (emphasis added); *Rio Grande Silvery Minnow*, 601 F.3d at 1119 (same); *Audubon of Kan., Inc. v. U.S. Dep't of Interior*, 67 F.4th 1093, 1104 (10th Cir. 2023) (same).

D. This Court Need Not Address the Town's Reading of *Beers*.

The Town asserts that the MCN district court's dicta regarding the waiver withdrawal issue in Case No. CV-2007-39 violated *Beers v. Arkansas*, 61 U.S. (20 How.) 527 (1857), and *Iowa Tribe*, 607 F.3d 1225, under which the Town contends a sovereign may terminate a case it initiated at will. Second Am. Compl. (Dkt. 47) at 25 n.23 (citing *Beers* and *Iowa Tribe*); *see also id*. ¶ 94 (withdrawal of immunity waiver terminated "all subject matter jurisdiction of the MCN judiciary to adjudicate Thlopthlocco's Complaint").

This Court has no occasion to address the argument because this case is moot, the MCN Judicial Officers are immune, and neither conclusion would be altered if the Court were to accept the Town's argument. *See Shawnee Tribe v.*

United States, 405 F.3d 1121, 1124 (10th Cir. 2005) (finding issue moot and "leaving the issue … for another day"); *Havens*, 897 F.3d at 1253 (where plaintiff "has not overcome [defendant's] assertion of sovereign immunity, … we accordingly do not reach the merits"); Opening Br. 36 n.6.

The MCN Judicial Officers nevertheless briefly address the Town's reading of *Beers* and *Iowa Tribe* in light of its repeated claims that the MCN Judicial Officers have flouted those precedents. While the Town initiated Case No. CV-2007-39 as a plaintiff, *Beers* and *Iowa Tribe* involve a sovereign's pre-existing statutory consent to be brought into court as a defendant. *See Beers*, 61 U.S. (20 How.) at 528 (involving statute authorizing certain "suits [to] be commenced against the State" (citation omitted)); *Iowa Tribe*, 607 F.3d at 1230 (involving statute authorizing suits in which "[t]he United States may be named as a defendant," 5 U.S.C. § 702). As this Court recognized, the principle underlying both cases is that where a sovereign "permit[s] itself *to be made a defendant*" and "consents *to be sued*," it may thereafter "withdraw its consent" and end the case, *id.* at 1234 (quoting *Beers*, 61 U.S. (20 How.) at 529) (emphases altered).

Whether this principle extends to suits *initiated* by a sovereign is not as straightforward as the Town assumes. For example, *Beers* notwithstanding, states cannot unilaterally terminate a court's jurisdiction in a proceeding they initiated. *See, e.g.*, *Lapides v. Bd. of Regents of Univ. Sys. of Georgia*, 535 U.S. 613, 619

(2002) (where a state initiates federal jurisdiction, "it will be bound thereby and cannot escape the result of its own voluntary act by invoking" immunity later (quoting *Gunter v. Atl. Coast Line R.R. Co.*, 200 U.S. 273, 284 (1906))); *Wagoner Cty. Rural Water Dist. No. 2 v. Grand River Dam Auth.*, 577 F.3d 1255, 1258 (10th Cir. 2009) (quoting same and acknowledging the "unfairness that a contrary rule of law would create" (quoting *Lapides*, 535 U.S. at 622)); *Sutton v. Utah State Sch. for Deaf and Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999) (contrary rule would be "grossly inequitable"). These precedents are in clear tension with the Town's reading of *Beers*. They also suggest that this Court's passing reference to *Beers* in *Stidham*, *see* 762 F.3d at 1240, may not have been intended as a comprehensive exposition of the law.

In any event, whether the rule set forth in the foregoing cases applies equally when a tribe (as opposed to a state) initiates suit is an interesting academic question, but here it is no more than that because the issue is not embedded in any live controversy and the MCN Judicial Officers are immune.

E. The Town Has No Answer to the MCN Judicial Officers' Prudential Mootness Argument.

The MCN Judicial Officers argued that this case is prudentially moot. Opening Br. 43–45. The Town does not respond. The MCN Judicial Officers accordingly stand on their opening brief except to note that the Town's inability to assert any stake in these proceedings beyond a potential benefit in a hypothetical

future lawsuit only confirms that the matter has "become too attenuated" to justify continued costly litigation, *Bacote v. Fed. Bureau of Prisons*, 94 F.4th 1162, 1166 (10th Cir. 2024).

III. The Town's "Mandate" Arguments Misapprehend the Law.

The Town contends that this Court "directed a mandate to the MCN defendants" to address the waiver withdrawal issue and that the MCN courts acted in "defiance" of that mandate. Town Resp. 6; *see also id*. at 32, 45–46 (MCN courts "reject[ed]" and "disregarded" and failed to "faithfully follow[]" mandate).

The MCN Judicial Officers do not take lightly the assertion that they have less than full respect for the rulings of this Court, and here the Town's assertion reflects an inaccurate understanding of the law. The Town's frivolous resort to YouTube notwithstanding, *id*. at 9 n.12, federal courts do not issue mandates directing tribal courts on how to adjudicate their cases. *See United States v. Dutch*, 978 F.3d 1341, 1345 (10th Cir. 2020) (stating that "[w]hen we remand a case, …. the mandate consists of our instructions *to the district court*" and that an appellate mandate has force "within a single judicial system" (brackets, quotation marks, and citation omitted)).

Federal courts certainly may determine whether a tribal court has exceeded its jurisdiction under federal law after the exhaustion of tribal remedies. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 857 (1985). And

the point of that exhaustion requirement is to promote "tribal self-government" and the "federal policy of deference to tribal courts." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16, 17 (1987). These policies require "a federal court to stay its hand in order to give the tribal court a full opportunity to determine its own jurisdiction," *id.* at 16 (quotation marks omitted), and to "not intervene" in that determination, *id*. at 17.

For a federal court to direct a tribal court *how* to approach that determination would violate those policies. This Court accordingly did no such thing. Its observation that "we may benefit from the [MCN Supreme Court's] analysis of the effect of the Tribal Town's withdrawal of its waiver of sovereign immunity," 762 F.3d at 1240, hardly constitutes a directive to the MCN courts, much less one that those courts defied. To the contrary, *the MCN district court addressed the withdrawal issue*; it simply arrived at an outcome unsatisfactory to the Town by limiting its analysis to the narrow, fact-bound circumstances of Case No. CV-2007-39, and in ultimately deciding the case on different grounds, on which the MCN Supreme Court affirmed. In so doing, the MCN courts did what state and federal courts do every day—they exercised their judgment on how best to resolve the particular dispute before them.

The Town further errs in contending that "[j]ust because the MCN courts refused to answer this question does not preclude the Federal District Court from

completing this Court's mandate." Town Resp. 30. An appellate mandate does not suspend Article III's case or controversy requirement. If a live controversy ceases to exist "*at any point during litigation*, the action … must be dismissed as moot." *Smith*, 44 F.4th at 1247 (emphasis added) (citation omitted); *see also Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1182 (10th Cir. 2000) ("An actual controversy must be extant at all stages of review[.]" (brackets and citation omitted)).

CONCLUSION

The MCN Judicial Officers respectfully request that the Court reverse the district court's grant of summary judgment for the Town, vacate its decision, and remand with an order to enter a judgment of dismissal.

Respectfully submitted this 20th day of June, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2024, I electronically filed the foregoing using the Court's CM/ECF system, which will send notification of such filing to the following:

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CERTIFICATE OF COMPLIANCE

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