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

THLOPTHLOCCO TRIBAL TOWN, a federally recognized Indian Tribe,	)	
Plaintiff,	)	
vs.	)	Case No. 4:09-CV-527-JCG-CDL
ROGER WILEY, et al.,	)	
Defendants.	)	

DEFENDANTS' RESPONSE BRIEF IN SUPPORT OF DISMISSAL FOR LACK OF JURISDICTION AND IN RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT[1]

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[1] The Muscogee Creek Nation's original-filed brief contained coding errors that also resulted in formatting errors. These items have been corrected in this filing, and no other changes have been made.

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INTRODUCTION

Defendants Roger Wiley, Chief Judge of the District Court of the Muscogee (Creek) Nation ("MCN" or "Nation"); Richard C. Lerblance, Chief Justice of the MCN Supreme Court; Amos McNac, Vice-Chief Justice of the MCN Supreme Court; and Andrew Adams, III, Kathleen R. Supernaw, Montie R. Deer, George Thompson, Jr., and Leah Harjo-Ware, Justices of the MCN Supreme Court (collectively "MCN Judicial Officers") respectfully file this Response in support of their March 6, 2023 motion to dismiss for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), and in opposition to the Thlopthlocco Tribal Town's ("Town" or "Tribal Town") March 6, 2023 motion for summary judgment.

ARGUMENT

I. The Town's Motion Confirms that This Matter Is Moot.

The Town has dropped its claim for an injunction, Mot. for Summ. J. (Dkt. 176) ("Town Mot.") 11, because there is nothing to enjoin. And while the Town contends that a live controversy endures to sustain this Court's jurisdiction to issue declaratory relief, its motion contradicts that contention at every turn.

The Town seeks a declaration that (1) it "is entitled to sovereign immunity in the courts of the MCN" and (2) "should it consent to jurisdiction in the courts of the MCN, it may … withdraw that consent to jurisdiction prior to judgment." *Id.* at 1. On neither point is there a live dispute.

As to the first, the Town concedes that "the issue of Thlopthlocco sovereignty has been resolved favorably to Thlopthlocco" by the MCN Supreme Court, *id*. at 32, which has accordingly "recognized Thlopthlocco sovereign immunity in MCN courts," *id*. at 11. Accordingly, there is no dispute there. And the Town acknowledges that "the MCN Supreme

Court affirmed the dismissal of CV-2007-39 and reversed and dismissed … CV-2011-08," *id*. at 14, and thus concedes that no MCN court is currently exercising jurisdiction over the Town, unconsented or otherwise. That ended any controversy as to both points on which the Town seeks declaratory relief because no declaration by this Court could conceivably alter the behavior of the MCN Judicial Officers toward the Town. It is thus "impossible for the court to grant any effectual relief" to the Town, *Fleming v. Gutierrez*, 785 F.3d 442, 445 (10th Cir. 2015) (citation omitted), and "federal courts are without power to decide questions that cannot affect the rights of the litigants in the case before them," *Ghailani v. Sessions*, 859 F.3d 1295, 1300 (10th Cir. 2017) (quotation marks and citations omitted); *see, e.g.*, *Bd. of Educ. for Gallup-McKinley Cty. Sch. v. Henderson*, 696 F. App'x 355, 357 (10th Cir. 2017) (stating, where litigant prevailed in tribal court but still challenged tribal court jurisdiction in federal court, that "[Appellant] won the [tribal court] lawsuit below. That victory terminated the legal controversy").[2]

In contending otherwise, the Town points in two directions: the past and the future. It asserts that "Thlopthlocco's 'stake'" in a declaratory judgment involves benefits "not just in the past, but in future litigation." Town Mot. 21. But to survive dismissal for mootness, the Town must have a stake in the *present* litigation. Despite its expanded briefing and over 2,200 pages of appendices, the Town identifies no such stake.

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[2] *See also, e.g.*, *Charles v. Ute Indian Tribe of the Uintah & Ouray Reservation*, Case No. 2:17-cv-00321-DN, 2018 WL 611469, at *1 (D. Utah Jan. 29, 2018) (stating, in federal court challenge to tribal court jurisdiction, that "[b]ecause [Plaintiff's] case in Ute [Tribal] Court has been dismissed … no case or controversy exists on which to decide the action"); *Sitton v. Native Vill. of Northway*, No. A03-0134-CV (HRH), 2005 WL 2704992, at *3 (D. Alaska Oct. 13, 2005) (where "tribal court terminated its jurisdiction," federal court claims challenging that jurisdiction were "moot" because "there is no ongoing, live dispute"); *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Fla.*, 898 F. Supp. 1549, 1559 (S.D. Fla. 1994) (dismissal of tribal court case "rendered moot" "the issue of the tribal court's jurisdiction"), *aff'd in part, dismissed in part*, 63 F.3d 1030 (11th Cir. 1995).

As to the past, the Town has not identified a single past harm that has continued into the present. The Town alleged in its Complaint five "ONGOING VIOLATION[S] OF FEDERAL LAW," Second Am. Compl. (Dkt. 47) ("Complaint") 52–53, but none of those allegations involves asserted conduct by the MCN Judicial Officers that remains ongoing. All instances of alleged unlawful conduct were ended and resolved in the Town's favor by the final and controlling order of the MCN Supreme Court, as the Town concedes in its motion. *See* Town Mot. 11, 14, 32. A declaration in the Town's favor on any of those allegations, then, "would not affect the defendants' behavior toward" the Town, "would serve only to announce that the [MCN Judicial Officers] had harmed [the Town]" in the past, and thus would have "no real-world effect," *Hendrickson v. AFSCME Council 18*, 992 F.3d 950, 958 (10th Cir. 2021), *cert. denied*, 142 S. Ct. 423 (2021), rendering any controversy over alleged past harms moot.

As to the future, the Town concedes that its asserted harms depend entirely on hypothetical future possibilities. It contends that "an opinion [would] in no way [be] advisory" because "[e]ntry of the requested declaratory judgment will protect Thlopthlocco from future disruption[.]" Town Mot. 11; *see also, e.g.*, *id.* at 1–2 (a "declaratory judgment will serve as a bulwark … for Thlopthlocco in any future litigation"); *id.* at 19 (referring to possibility of "future litigation"); *id.* at 21 (same). In fact, the Town admits that the speculative prospect of "any future effort by MCN courts to … ignore[e] Thlopthlocco's sovereign immunity" is "[p]erhaps *the most urgent reason* to enter a declaratory judgment[.]" *Id*. at 33 (emphasis added). That the Town can point to nothing more urgent than a hypothetical future possibility is by itself sufficient grounds to dismiss the Complaint. *See Chihuahuan Grasslands All. v. Kempthorne*, 545 F.3d 884, 891 (10th Cir. 2008) (claim for declaratory relief is moot absent "a substantial controversy of *sufficient immediacy and reality*" (emphasis added)).

Indeed, the MCN Judicial Officers placed the Town squarely on notice of governing Tenth Circuit precedent that "matters relating to a hypothetical unfiled suit are not cognizable reasons for continuing litigation that is otherwise moot," Suppl. Status Report Regarding Tribal Ct. Remedies (Dkt. 171) ("Status Report") 6 (quoting *Schell v. OXY USA Inc.*, 814 F.3d 1107, 1115 (10th Cir. 2016)). Yet the Town, despite its expanded briefing, fails to acknowledge that case, much less grapple with it or the many other Tenth Circuit and Supreme Court cases that enforce the same rule. *See, e.g.*, *United States v. Juvenile Male*, 564 U.S. 932, 937 (2011) (per curiam) ("True, a favorable decision in this case might serve as a useful precedent for respondent in a hypothetical lawsuit …. But this possible, indirect 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) (the "speculative possibility of a future controversy [can]not provide [courts] with Article III jurisdiction"); *id.* (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)).[3]

The Town not only relies on a hypothetical future lawsuit, it compounds the infirmity by positing a hypothetical, not to mention implausible, outcome of such a suit in which the MCN courts "ignor[e] Thlopthlocco sovereign immunity" and "make another run at [its] sovereignty[.]" Town Mot. 33. But the MCN Supreme Court's decisions are "final" under the MCN Constitution, MCN Const. art. VII, § 5, and are binding precedent on all MCN courts. *See* MCN Mot. to Dismiss (Dkt. 177) ("MCN Mot.") 19–21; *Graham v. Muscogee (Creek) Nation Citizenship Bd.*, Case No. SC 2020-01, 2020 Muscogee Creek Nation Supreme LEXIS 1, at *8

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[3] *See also, e.g.*, *Jordan v. Sosa*, 654 F.3d 1012, 1026 (10th Cir. 2011) ("[T]he controversy must be real and substantial …, as distinguished from an opinion advising what the law would be upon a hypothetical set of facts." (original brackets and quotation marks omitted)); *Wyoming v. U.S. Dep't of Interior*, 587 F.3d 1245, 1250 (10th Cir. 2009) (Gorsuch, J.) (referring to "[m]ootness doctrine, and our consequent inability to render judgment on nice hypothetical … questions").

(M(C)N Sup. Ct. Sept. 17, 2020) ("Finality is an essential aspect of the Nation's judicial system, and is key to establishing reliable judicial precedent."); *McIntosh v. Beaver*, No. CV 97-22, 1998 WL 34067257, at *1 (M(C)N Dist. Ct. May 7, 1998) ("Stare decisis and Muscogee (Creek) Nation law guide this Court."), *aff'd*, No. SC-99-01, 1999 WL 33589146 (M(C)N Supreme Ct. Sept. 16, 1999); *see also, e.g.*, *Glacier Cty. v. Arrowtop*, CV-14-27-GF-BMM, 2014 WL 12899871, at *3 (D. Mont. Aug. 26, 2014) (finding challenge to tribal court jurisdiction moot where highest tribal court found lack of tribal jurisdiction over claimant, and stating that in any future tribal court action against claimant "[t]he Tribal Court would be compelled to dismiss the claim for lack of jurisdiction … based upon the decision of the Tribal Appellate Court"). The Town has pointed to no evidence that the MCN courts will flout the MCN Supreme Court's order, because none exists.

Venturing even further into hypothetical realms outside the boundaries of Article III, the Town asserts that a declaration would "have the salutatory effect of … strengthening any claim of sovereign immunity by two other federally recognized Creek tribal towns[.]" Town Mot. 2. But the mere fact "[t]hat a declaration might guide *third parties* (i.e., those not parties to the lawsuit) … is insufficient" to defeat mootness because it "would involve the very sort of speculative, 'hypothetical' factual scenario that would render such a judgment a prohibited advisory opinion." *Jordan*, 654 F.3d at 1026; *Hendrickson*, 992 F.3d at 958 n.10 (mootness cannot be defeated by assertion that there are "similarly situated" non-parties that "a declaration would benefit" because "our cases prevent us from applying the mootness exception based on a risk to others" (quotation marks and citations omitted)). The interests of other tribal towns thus have no bearing on mootness here. *See also, e.g.*, *R.M. Inv. Co. v. U.S. Forest Serv.*, 511 F.3d 1103, 1107 (10th Cir. 2007) (for case to remain live, "[t]he real-world effect … must be on the

legal relationship *between the parties*" (emphasis added)); *Schell*, 814 F.3d at 1114 (to avoid mootness "an actual case or controversy *between the parties* must exist" (emphasis added)).

Finally, the Town asserts that the mere presence of legal questions posed to this Court constitutes an Article III controversy. Town Mot. 11 ("Until this court rules on the pending federal common law questions regarding Thlopthlocco sovereign immunity, this lawsuit is not over."). This contention is based on desire, not law. As a matter of law, "[i]n every case dismissed as moot, legal questions are necessarily left unresolved," *E.E.O.C. v. Joslin Dry Goods Co.*, 240 F. App'x 255, 258–59 (10th Cir. 2007) (brackets in original) (citation omitted), including in cases involving issues of extreme public interest, *see, e.g.*, *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974) (affirmative action case rendered moot); *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 1525, 1526–27 (2020) (per curiam) (Second Amendment case rendered moot). The question is not whether there are unresolved legal issues, but whether they qualify as a case or controversy under Article III. *See also, e.g.*, *Lorance v. Commandant, U.S. Disciplinary Barracks*, 13 F.4th 1150, 1165 (10th Cir. 2021) (referring to "an unanswered question lost to ... mootness" (citation omitted)). As demonstrated above, the Town has identified no such case or controversy.

* * *

In sum, the Town asks this Court to opine on questions unmoored from any actual controversy between the parties and that would in no way affect their real-world behavior. With no case or controversy before it, the Court should deny the Town's motion for summary judgment and dismiss its Complaint. As demonstrated next, the Town has identified no exception to the mootness doctrine that could sustain the Court's jurisdiction.

II. No Exception to Mootness Applies.

The Town argues that several exceptions to the mootness doctrine apply to defeat mootness here. None does.

A. The Voluntary-Cessation Exception Does Not Apply.

The "voluntary-cessation" exception to the mootness doctrine "exists to counteract the possibility of a defendant ceasing illegal action long enough to render a lawsuit moot and then resuming the illegal conduct." *Chihuahuan Grasslands All.*, 545 F.3d at 892. The exception "is based on 'the principle that a party should not be able to evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior.'" *Id*. (quoting *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284 n.1 (2001)).

In its motion, the Town includes block quotes from *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 289 (1982), to argue that the voluntary-cessation exception applies to defeat mootness here. Town Mot. 24. The argument is meritless. As the Tenth Circuit has explained, "a critical factor in the *Aladdin's Castle* decision was the City's openly-announced intention to reenact the unconstitutional ordinance if the case was dismissed as moot." *Camfield v. City of Okla. City*, 248 F.3d 1214, 1223 (10th Cir. 2001); *see Aladdin's Castle*, 455 U.S. at 289 & n.11 (noting the city could resume challenged conduct and it "has announced just such an intention"). Accordingly, the Tenth Circuit has joined other circuits to "hold that *Aladdin's Castle* is inapposite in cases such as this where there is no evidence in the record to indicate that the legislature intends to reenact the prior version of the disputed statute." *Camfield*, 248 F.3d at 1223–24. And it has since applied this principle to all "governmental officials." *See Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1116–17 (10th Cir. 2010).

"[I]n this governmental context," the Tenth Circuit has said, the voluntary-cessation exception requires "*clear showings* of reluctant submission by governmental actors and a desire

to return to the old ways." *Id.* at 1117 (emphasis in original) (original brackets and quotation marks omitted). This is because "government self-correction provides a secure foundation for mootness so long as it seems genuine." *Brown v. Buhman*, 822 F.3d 1151, 1167–68 (10th Cir. 2016) (quotation marks and ellipsis omitted). To invoke the voluntary-cessation exception against a governmental defendant, then, the plaintiff must make the required "clear showings." *See, e.g.*, *Smith v. Becerra*, 44 F.4th 1238, 1251–53 (10th Cir. 2022) (addressing only plaintiff's arguments on this point and then dismissing case as moot); *Am. Charities for Reasonable Fundraising Regulation, Inc. v. O'Bannon*, 909 F.3d 329, 334 (10th Cir. 2018) (same); *Citizen Cent. v. Gessler*, 777 F.3d 900, 908 (10th Cir. 2014) (same). The Tenth Circuit is clear: If the plaintiff cannot make that showing, "the voluntary-cessation exception *has no application*[.]" *Rio Grande Silvery Minnow*, 601 F.3d at 1117 (emphasis added).

Despite submitting over 2,200 pages of appendices, the Town cannot make a single "clear showing[] of reluctant submission" or "a desire to return to old ways" on the part of the MCN Judicial Officers. *See* MCN Mot. 20–21 (citation omitted). To the contrary, the controlling decision by the Nation's highest Court makes clear that an assertion by MCN courts of jurisdiction over the Town absent a valid immunity waiver "cannot reasonably be expected to start up again." *Ind v. Colo. Dep't of Corr.*, 801 F.3d 1209, 1214 (10th Cir. 2015) (citation omitted); *see supra* at 4–5; MCN Mot. 19–21.

The Town counters with three arguments, but none persuade; and in making them, the Town distorts both the law and the facts.

1. <u>The MCN District Court's Ruling Provides No Support for the Voluntary-Cessation Exception</u>.

The Town asserts that the voluntary-cessation exception applies because an MCN district judge allegedly "disregard[ed]" prior district court decisions in "*Tomah I* and *Tomah II*," which

recognized the Town's sovereign immunity. *See* Town Mot. 25–26. This argument is self-defeating. The MCN Supreme Court *reversed* that district court ruling in CV-2011-08, MCN Supreme Court Order and Op. (Dkt. 168-4) 25. In so doing, it affirmed the Town's sovereign immunity and endorsed the reasoning of "the *Tomah* cases" that the district court allegedly disregarded, *id.* at 27. The Town does not explain how these circumstances even suggest (much less constitute the requisite clear showing) that the MCN courts, going forward, intend to assert jurisdiction over the Town absent a valid waiver sufficient to invoke voluntary-cessation.

2. The MCN Courts' Management of Their Dockets Is Irrelevant.

Next, the Town quotes a United States Supreme Court statement that "[q]uestions of jurisdiction … should be given a priority—since if there is no jurisdiction there is no authority to sit in judgment of anything else." Town Mot. 26–27 (quoting *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 778 (2000)). From there, it seemingly argues that voluntary-cessation is met because the MCN courts did not make the Town's cases a "priority" and that "Thlopthlocco's sovereignty was not a matter of urgency before the tribal courts," *id.*

This argument fails to carry the Town's burden. The Town does not muster a single case to suggest that such allegations are even relevant to the voluntary-cessation exception, much less satisfy the requisite "clear showing[]" that the MCN courts intend to assert jurisdiction over it going forward absent a valid waiver. Further, *Vermont Agency* has nothing to do with mootness, the voluntary-cessation exception, or courts' docket management. The quoted statement instead addresses the sequence in which a court should address the issues presented to it within a given case, underscoring the core principle that Article III jurisdiction is a threshold question in federal courts. *See* 529 U.S. at 778–79. In this, *Vermont Agency* reaffirms the principle that the MCN Judicial Officers ask this Court to enforce: "[W]hen [jurisdiction] ceases to exist, the only

function remaining to the court is that of announcing the fact and dismissing the cause." *Id.* (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868)).

3. <u>The Tenth Circuit's Mandate Did Not Issue Against the MCN Courts</u>.

The Town finally contends that the voluntary-cessation exception applies because MCN courts allegedly defied the "Tenth Circuit's mandate that they consider Thlopthlocco's ability to withdraw its consent once given," Town Mot. 28, and "reach a final decision on the jurisdictional issue before it considers ordering an election," *id.* 29 (citation omitted). The Town cites no case or principle under which such allegations bear the slightest relevance to the voluntary-cessation exception. For this reason alone, the argument warrants rejection.

In any event, the argument fails on its own terms because the Tenth Circuit's mandate said no such thing. It contained instructions only to *this* Court. *See, e.g.*, *Thlopthlocco Tribal Town v. Stidham*, 762 F.3d 1226, 1236 (10th Cir. 2014) ("The district court did not consider the feasibility of joining [other parties] and should do so on remand."); *id.* at 1237 ("[W]e instruct the district court … to abate its proceedings[.]"); *id.* at 1242 ("[W]e direct the district court to abate further proceedings until the plaintiffs exhaust tribal court remedies."). This is consistent with the mandate rule, as the Town's own caselaw makes clear. *See United States v. Dutch*, 978 F.3d 1341,1345 (10th Cir. 2020) ("[T]he mandate consists of our instructions to the district court[.]" (original brackets and citation omitted)).

Regarding subsequent proceedings in the MCN courts, the Tenth Circuit merely observed 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." *Thlopthlocco Tribal Town*, 762 F.3d at 1240. That is not a directive to the MCN Supreme Court. Nor is its statement that "we expect the tribal court to reach a final decision on the jurisdictional issue before it considers" a merits ruling, *id*. at 1241 n.8. That statement, as is clear from its context, *see id.*, simply notes the

sequence of court rulings that the Tenth Circuit anticipated based on the status of proceedings before the MCN Supreme Court. Had the Tenth Circuit levied a command to the MCN courts, it would have violated the very purpose of tribal exhaustion, which, it explained, "is grounded in the federal policy supporting tribal self-government," *id.* at 1240. The Tenth Circuit did not take away with one hand what it gave with the other.

* * *

In sum, the Town has come forth with no evidence remotely suggesting that the MCN Supreme Court affirmed the Town's sovereign immunity and dismissed the cases pending against it in order to moot this case and clear the way for the MCN courts to thereafter assert jurisdiction over the Town absent a valid waiver. *See Chihuahuan Grasslands All.*, 545 F.3d at 892 (voluntary-cessation exception "exists to counteract the possibility of a defendant ceasing illegal action long enough to render a lawsuit moot and then resuming the illegal conduct"). Absent a "clear showing[]" to that effect, "the voluntary-cessation exception has no application[.]" *Rio Grande Silvery Minnow*, 601 F.3d at 1117. That is the case here.

B. The "Capable of Repetition Yet Evading Review" Exception Does Not Apply.

The "capable of repetition yet evading review" exception to the mootness doctrine "applies where (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 735 (2008) (quotation marks and citation omitted). The Town contends that this exception applies here and that "[t]he U.S. Supreme Court routinely invokes such an exception in election cases[.]" Town Mot. 21. This argument is meritless.

To start, the exception is not applied "routinely"; it is "'narrow' and 'only to be used in exceptional situations.'" *Marks v. Colo. Dep't of Corr.*, 976 F.3d 1087, 1093 (10th Cir. 2020)

(quoting *Jordan*, 654 F.3d at 1034–35); *see also* MCN Mot. 18–21. In establishing that such an exceptional situation exists, "[t]he plaintiff invoking the exception bears the burden of proof." *Marks*, 976 F.3d at 1093. To carry it, a plaintiff must meet "*both* elements" of the exception, *Jordan*, 654 F.3d at 1035 (emphasis in original), but the Town cannot meet either.

As to the first, the Town does not even attempt to carry its burden other than to perfunctorily refer to the matter before this Court as an "election case[]," Town Mot. 21. It makes no other effort to explain how it meets the first element. *See id*. at 21–23. This is insufficient. To begin, "not every election case fits within [the] four corners" of the exception. *Garbett v. Herbert*, 514 F. Supp. 3d 1342, 1350 n.71 (D. Utah 2021) (citation omitted). Those that do involve challenges to election laws.[4] The Tenth Circuit has explained why this is so:

> Challenges to election laws may readily satisfy the first element, as injuries from such laws are capable of repetition every election cycle yet the short time frame of an election cycle is usually insufficient for litigation in federal court.

Rio Grande Found. v. Oliver, 57 F.4th 1147, 1166 (10th Cir. 2023); *see also, e.g.*, *Parker v. Winter*, 645 F. App'x 632, 635 (10th Cir. 2016) ("Challenges to election laws are one of the quintessential categories of cases capable of repetition yet evading review because litigation has only a few months before the remedy sought is rendered impossible by the occurrence of the relevant election." (quotation marks omitted)).

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[4] *See, e.g.*, *Davis*, 554 U.S. at 736 (plaintiff challenging a contribution limits scheme); *Anderson v. Celebrezze*, 460 U.S. 780, 782 (1983) (plaintiff challenging filing deadlines); *Rio Grande Found. v. Oliver*, 57 F.4th 1147, 1152–53 (10th Cir. 2023) (plaintiff challenging disclosure requirements); *Emrit v. Oliver*, 735 F. App'x 501, 502 (10th Cir. 2018) (plaintiff challenging petition and signature requirements for being placed on the ballot); *Parker*, 645 F. App'x at 634 (plaintiff challenging signature requirements for being placed on the ballot); *City of Herriman v. Bell*, 590 F.3d 1176, 1178 (10th Cir. 2010) (plaintiff challenging voting scheme for school districts); *Libertarian Party of N.M. v. Herrera*, 506 F.3d 1303, 1305 & n.1 (10th Cir. 2007) (plaintiff challenging signature requirements for being placed on the ballot); *Homans v. City of Albuquerque*, 366 F.3d 900, 902–03 & n.3 (10th Cir. 2004) (plaintiff challenging campaign expenditure limits).

This rationale is premised on two key features: (1) the challenge is to an existing election law; and (2) the mooting event is the end of the election. Neither feature is present here. The matter before this Court is not a challenge to an election law at all, or any other kind of election dispute. That characterization confuses the merits of the now-dismissed MCN tribal court cases with the dispute before *this* Court, which is a challenge to an assertion of tribal court jurisdiction. And here, the mooting event was not the Town election, but the Town's victory in the MCN Supreme Court affirming its sovereign immunity, dismissing the pending MCN court cases, and thus ending the assertion of tribal court jurisdiction that the Town filed this action to end.

Indeed, regardless of how this dispute is characterized, the Town cannot meet the first element. To do so, it must establish that there was "insufficient time for [it] to obtain review of [its] claim in federal court[.]" *Ind*, 801 F.3d at 1215. That is, it must establish that "the challenged action [i.e., the assertion of jurisdiction over it by MCN courts] was in its duration too short to be fully litigated prior to its cessation[.]" *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam). In fact, the first element is "limited to th[at] situation[.]" *Id.*; *see also, e.g.*, *Marks*, 976 F.3d at 1094 (plaintiff "must establish that … the challenged action ended too quickly to be fully litigated").

The Town has made no attempt to address this element because, given the protracted history of this case, it cannot plausibly claim that there was "insufficient time for [it] to obtain review of [its] claim in federal court[.]" *Ind*, 801 F.3d at 1215. This matter, spanning roughly a decade, has involved an initial round in this Court, round two in the Tenth Circuit, and round three back in this Court—all while the merits of the underlying dispute were litigated in the tribal courts, ending in victory for the Town. The Town accordingly has no hope of establishing what it "*must* establish" to meet the first element: "that … the challenged action ended too quickly to

be fully litigated[.]" *Marks*, 976 F.3d at 1094 (emphasis added). That did not happen here. Nor can the Town establish that challenges to tribal court jurisdiction are "*necessarily* of short duration," *Jordan*, 654 F.3d at 1036 (emphasis in original), and therefore "*always* so short as to evade review." *Spencer v. Kemna*, 523 U.S. 1, 18 (1998) (emphasis added). The Town thus fails at this element.

Because the Town has failed to meet the first element, its argument under this exception fails as a matter of law. *See Jordan*, 654 F.3d at 1035–36 (plaintiff must meet "*both* elements" and because "Mr. Jordan has not carried his burden regarding the first element (i.e., the duration element), … we need not go further"); *United Urban Indian Council, Inc. v. U.S. Dep't of Labor*, 31 F. App'x 627, 628 (10th Cir. 2002) (similar).

In addition, the Town cannot meet the second element either. Its only argument is this: "There is a realistic expectation that in future elections … Thlopthlocco will need access to a judicial forum by way of consent, then cho[o]se to withdraw that consent to jurisdiction." Town Mot. 21. This is no more than a claim that such an event is theoretically *possible*. But that is insufficient: As the Supreme Court has explained, it "has never held that a mere … theoretical possibility was sufficient to satisfy the [capable of repetition] test …. If this were true, virtually any matter of short duration would be reviewable." *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (per curiam). In discussing *Murphy*, the Tenth Circuit has stated:

> In *Murphy,* the Supreme Court limited the application of the "capable of repetition, yet evading review" exception to the mootness doctrine to those factual circumstances where the plaintiff can demonstrate a "reasonable expectation" or a "demonstrated probability" that the same controversy will recur involving the same complaining party. *Murphy*, 455 U.S. at 482, 102 S. Ct. at 1183. The Court pointed out that "a mere physical or theoretical possibility" of recurrence was insufficient to satisfy the test.

Cent. Wyo. Law Assocs., P.C. v. Denhardt, 60 F.3d 684, 687 (10th Cir. 1995). The Town does not satisfy these criteria. It simply speculates that "Thlopthlocco may very well require access to a judicial forum in the future," points to a Town ordinance allowing it to withdraw an immunity waiver, and states that "there is an upcoming tribal election." Town Mot. 22–23.

The Town goes no further in developing its logic because it turns on precisely the sort of speculative conjecture that fails the capable of repetition test: to wit, an election dispute (1) *might* arise (or not); if it does, the dispute (2) *might* lead to litigation in the tribal courts (or not); if it does, the Town (3) *might* waive its immunity related to the suit (or not); if it does, events (4) *might* transpire that cause the Town to seek to withdraw the waiver (or not); and if they do, the MCN courts (5) *might* determine that the circumstances call for rejection of that withdrawal.[5]

As the Tenth Circuit has admonished, "conditional and speculative" possibilities do not satisfy the capable of repetition element. *Rio Grande Found.*, 57 F.4th at 1166–67 (where plaintiff had "intent" but no "credible plan" to engage in the challenged conduct, there was "thus no reasonable expectation of recurrence"); *see also, e.g.*, *Soc'y of Prof'l Journalists v. Sec'y of Labor*, 832 F.2d 1180, 1185 (10th Cir. 1987) ("'[C]apable of repetition' is not a synonym for 'mere speculation'" (citation omitted)); *Nathan M. by & through Amanda M. v. Harrison Sch. Dist. No. 2*, 942 F.3d 1034, 1044 (10th Cir. 2019) ("A plaintiff must point to something more in the record to lift th[e] possibility [of repetition] beyond the speculative." (brackets in original) (citation omitted)); *White v. Colorado*, 82 F.3d 364, 366 (10th Cir. 1996) (contingencies that are

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[5] This last event is of course the only link in the Town's chain of conjecture that would trigger the alleged injury it invokes. Yet even here, the Town sees that event as far from certain. *See* Town Mot. 28 (withdrawal question "was not answered by the MCN district court nor was it taken up by the MCN Supreme Court"); *id*. at 18 (MCN Supreme Court did not hold "that Thlopthlocco may not withdraw consent"); *id*. at 19 ("[T]he MCN Supreme Court ruling bodes no objection to Thlopthlocco's withdrawal of consent[.]").

"too speculative" cannot meet capable of repetition exception "which is only to be used in exceptional situations" (quotation marks and citations omitted)).

* * *

In sum, to salvage its case, the Town must meet "*both* elements" of the capable of repetition yet evading review exception, *Jordan*, 654 F.3d at 1035, and it has met neither. Under the first, it cannot establish that the MCN courts' challenged assertion of jurisdiction over it "was in its duration too short to be fully litigated prior to its cessation," *Weinstein*, 423 U.S. at 149; *Marks*, 976 F.3d at 1094 (substantially same). Under the second, it has offered nothing beyond a "conditional and speculative" chain of conjecture, *Rio Grande Found.*, 57 F.4th at 1166. Accordingly, this case is moot.

C. The Tenth Circuit's Mandate Does Not Keep This Case Alive.

In its effort to avoid dismissal, the Tribal Town asserts that this case cannot be moot because "[t]his Court is obligated to follow the mandate of the Tenth Circuit which requires further proceedings." Town Mot. 10. In the Town's view, the mandate requires that this Court now answer whether the Town could withdraw its waiver of sovereign immunity in the MCN courts. *Id.* at 15. But this is a flatly inaccurate account of the Tenth Circuit's mandate. And this Court can easily fulfill the actual mandate by dismissing this case for lack of jurisdiction.[6]

1. <u>The Tenth Circuit's Mandate Does Not Instruct This Court To Preside over an Otherwise Moot Case</u>.

The Town points to language from the Tenth Circuit's opinion stating: "Abatement will enable the district court to exercise its jurisdiction on the merits after exhaustion in tribal court

[6] For the sake of accuracy, the Town's contention that the Tenth Circuit held that the Town enjoys sovereign immunity in the MCN courts, Town Mot. 13, is incorrect. *See Thlopthlocco Tribal Town*, 762 F.3d at 1234 (the Town "has sufficiently *pleaded* that it is a separate and independent Indian tribe beyond the reach of Muscogee court jurisdiction" (emphasis added)).

regardless of the outcome there." *Id.* at 11 (quoting *Thlopthlocco Tribal Town*, 762 F.3d at 1241). According to the Town, this sentence shows that the "Tenth Circuit recognized" that tribal exhaustion "is only a precursor result to adjudication" in federal court. *Id.* But this reading of the Tenth Circuit's language ignores the precept that parties must "interpret general language in cases 'as referring in context to circumstances then before the Court,'" *United States v. Herrera*, 51 F.4th 1226, 1282 (10th Cir. 2022) (quoting *Illinois v. Lidster*, 540 U.S. 419, 424 (2004)); *see also Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 35 (2012) ("[G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used." (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821) (Marshall, C.J.))). The context in which the Town's quoted language appears is as follows:

> Abatement will protect the Tribal Town's position in this litigation. The Tribal Town argues that if the tribal courts rule in favor of Anderson, he may gain control of the Tribal Town's governing body, the Business Committee, and thereby of the Tribal Town's role in this litigation. In that event, the Tribal Town argues he could prevent it from filing a cause of action in federal court. *Abatement will enable the district court to exercise its jurisdiction on the merits after exhaustion in tribal court regardless of the outcome there.*

Thlopthlocco Tribal Town, 762 F.3d at 1241 (emphasis added).

As this context shows, the Court was addressing the Town's fear that an adverse ruling in the MCN courts could leave the Town unable to assert its rights in federal court. The Tenth Circuit further explained that it abated the case so that the Town would "have the opportunity to exhaust its tribal court remedies" on the question of jurisdiction and then "return to federal court before the tribal court has taken an action that the Tribal Town might not be able to challenge effectively." *Id.* at 1241 n.8. In sum, the "outcome" referred to in that paragraph was the potential worst-case scenario for the Town. The Tenth Circuit thus did not address the possibility that the Town would *prevail* before the MCN courts, as it ultimately did. As such,

mootness was simply not before the Tenth Circuit when it stated that this Court could exercise jurisdiction "regardless of the outcome" in the MCN courts.

And there is another reason the Town's account of the mandate is wrong: It is unconstitutional. "[A] merits question," such as a question on the scope of tribal court jurisdiction, "cannot be given priority over an Article III question." *United States ex rel. Burlbaw v. Orenduff*, 548 F.3d 931, 944 (10th Cir. 2008) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 97 n.2 (1998)). This rule is "inflexible and without exception." *Steel Co.*, 523 U.S. at 95 (citation omitted); *see also, e.g.*, *Rio Grande Silvery Minnow*, 601 F.3d at 1109 ("Mootness is a threshold issue because the existence of a live case or controversy is a constitutional prerequisite to federal court jurisdiction." (citations omitted)). Had the Tenth Circuit's mandate required this Court to consider the MCN courts' jurisdiction in an otherwise moot case, that would have constituted legal error in "conflict with the Supreme Court's prohibition of 'hypothetical jurisdiction.'" *Orenduff*, 548 F.3d at 943; *see also Dutcher v. Matheson*, 733 F.3d 980, 986 (10th Cir. 2013) ("For a court to pronounce upon the meaning … of … federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires." (citation omitted)). The mandate does not mean what the Town wishes it to mean.

2. This Court Can Satisfy the Tenth Circuit's Mandate by Dismissing This Case for Lack of Subject-Matter Jurisdiction.

Consistent with the Tenth Circuit's actual mandate, this Court can, and should, dismiss this matter for lack of jurisdiction. *See* MCN Mot. 16–17. The mandate is the Court of Appeals' "instructions to the district court at the conclusion of the opinion, and the entire opinion that preceded those instructions." *Dutch*, 978 F.3d at 1345 (citation omitted). Here, the Tenth Circuit instructed, in relevant part, that "the district court should consider the feasibility of

joining certain necessary parties," *Thlopthlocco Tribal Town*, 762 F.3d at 1242, and should "abate its proceedings until the Tribal Town has exhausted its claims in tribal court," *id.* at 1237.

Satisfying joinder here is simple. The MCN Judicial Officers have already been substituted for their previously named predecessors under Federal Rule of Civil Procedure 25(d), and this Court can complete the rest of that instruction by considering the feasibility of adding parties to a moot case. *See* MCN Mot. 14–15; *see also Shaw v. AAA Eng'g & Drafting Inc.*, 138 F. App'x 62, 67 (10th Cir. 2005) (admonishing parties for having "overlooked the critical threshold issue of whether the district court had subject matter jurisdiction to join parties"). The Town has moreover conceded that the Anderson defendants are not "necessary" to add to this case "since the issue of Thlopthlocco sovereignty has been resolved favorably to Thlopthlocco and the Anderson parties were … dismissed" in the MCN courts. Town Mot. 32.

And tribal exhaustion occurred as the Tenth Circuit instructed. While this matter was abated, the MCN Supreme Court dismissed one of the two pending MCN cases and affirmed the dismissal of the other, and it squarely held that the Tribal Town enjoys sovereign immunity in the MCN courts. *See* MCN Mot. 7–9. That decision ended the Town's injury here, depriving this Court of subject-matter jurisdiction and rendering this matter moot. This Court can easily fulfill the Tenth Circuit's mandate by dismissing this case for lack of subject-matter jurisdiction.

III. The Town's Motion Does Not Undermine that This Case Is Prudentially Moot.

This matter is also prudentially moot for the reasons stated in the MCN Judicial Officers' Motion to Dismiss. MCN Mot. 11–13. The MCN Judicial Officers do not repeat those arguments here. As demonstrated above, the Town's Motion has raised no basis to undermine the fact that—even were the Court to detect an inkling of an Article III controversy here—continuation of this case offers the Town no meaningful relief, risks unnecessary federal court

intrusion into tribal sovereignty, and portends the wasteful expenditure of public resources. As the Tenth Circuit has stated:

> After all, if events so overtake a lawsuit that the anticipated benefits of a remedial decree no longer justify the trouble of deciding the case on the merits, equity may demand not decision but dismissal. When it does, we will hold the case "prudentially moot." Even though a flicker of life may be left in it, even though it may still qualify as an Article III "case or controversy," a case can reach the point where prolonging the litigation any longer would itself be inequitable. *See S–1 v. Spangler*, 832 F.2d 294, 297 (4th Cir.1987) (case prudentially moot because the relief sought "no longer has sufficient utility to justify decision ... on the merits").

Winzler v. Toyota Motor Sales U.S.A., Inc., 681 F.3d 1208, 1210 (10th Cir. 2012) (Gorsuch, J.) (ellipsis in original) (citation omitted). Such is the case here.

IV. Sovereign Immunity Deprives This Court of Subject-Matter Jurisdiction Because There Is No Ongoing Violation of Federal Law.

In its Complaint, the Town stated that "[t]his action is brought pursuant to *Ex parte Young*, 209 U.S. 123 (1908) to stop an ongoing violation of federal law in the exercise of jurisdiction in derogation of the sovereign rights of Thlopthlocco." Complaint 18. It set forth five claims of "ONGOING VIOLATION[S] OF FEDERAL LAW," each premised on the then-ongoing assertion of jurisdiction over the Town by MCN courts. *Id*. at 52–53.

In the Status Report, the MCN Judicial Officers asserted sovereign immunity to further adjudication of the Town's claims in this Court. They argued that the Town "plainly cannot allege an 'ongoing' violation of federal law given the MCN Supreme Court's ruling" dismissing the pending MCN court actions. Status Report 5. In its January 20, 2023 Scheduling Order (Dkt. 172), this Court, noting the parties' positions in the Status Report, directed "that the parties are to *fully brief their respective positions* for proceedings before this court" (emphasis added).

In its present motion, the Town repeatedly emphasized the sanctity of sovereign immunity and how its own assertion of that immunity must be respected, yet it did not even acknowledge the MCN Judicial Officers' assertion of sovereign immunity or otherwise explain

how its invocation of *Ex parte Young* remains viable. Nor could it. "*Ex parte Young* is designed to end *continuing* violations of federal law," *Johns v. Stewart*, 57 F.3d 1544, 1552 (10th Cir. 1995) (emphasis added)—not to address "cases in which federal law [was allegedly] violated … over a period of time in the past," *Papasan v. Allain*, 478 U.S. 265, 277–78 (1986). The Town did not contend in its motion that there exists any ongoing violation of federal law; it instead acknowledged that "the MCN Supreme Court affirmed the dismissal of CV-2007-39 and reversed and dismissed … CV-2011-08," Town Mot. 14. Nor did the Town contend that some other exception to the MCN Judicial Officers' sovereign immunity applies here.

The Town has no viable argument that the MCN Judicial Officers do not enjoy sovereign immunity to its claims. The MCN Judicial Officers stand by their initial briefing on this issue, *see* MCN Mot. 22–24, and will not reiterate it here. The Town no longer alleges a continuing wrong, and thus, sovereign immunity must preclude the Town's claims for declaratory relief.

V. The Town's Motion for Summary Judgment Should Be Dismissed as Moot or, Alternatively, Denied on the Merits with Judgment Granted to the MCN Judicial Officers.

A. The Town's Motion for Summary Judgment Should Be Dismissed as Moot.

As both a matter of mootness and, independently, the MCN Judicial Officers' sovereign immunity, this Court no longer has subject-matter jurisdiction. Therefore, the Town's Motion for Summary Judgment should be dismissed. *See, e.g.*, *Little v. Jones*, No. 11-CV-598-GKF-TLW, 2012 WL 2465686, at *3 (N.D. Okla. June 27, 2012) (dismissing motion for summary judgment after granting motion to dismiss because the "requests for declaratory injunctive relief [were] moot"); *Staples v. United States*, No. CIV-10-1007-D, 2011 WL 1194660, at *1 (W.D. Okla. Mar. 30, 2011) (dismissing motion for summary judgment after granting motion to dismiss because action was "barred by sovereign immunity").

B. The Town's Motion Should Be Denied on the Merits with Judgment Granted to the MCN Judicial Officers.

Should the Court disagree that this matter is moot and disagree that the MCN Judicial Officers enjoy sovereign immunity, it should deny the Town's motion on the merits and grant judgment to the MCN Judicial Officers. To prevail on summary judgment, the Town must show that it "is entitled to judgment as a matter of law," *Dullmaier v. Xanterra Parks & Resorts*, 883 F.3d 1278, 1283 (10th Cir. 2018) (quoting Fed. R. Civ. P. 56(a)). The Town cannot do that.

To be clear, the Town does not seek a declaration regarding the *scope* of any extant immunity waiver or consent to jurisdiction. *See, e.g.*, *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505 (1991). Instead, as the Town states in its motion, "Thlopthlocco is … entitled to declaratory judgment that should it consent to jurisdiction in the courts of the MCN, it may, consistent with federal common law, withdraw that consent to jurisdiction prior to judgment." Town Mot. 1. That is, the Town seeks a declaration that, as a matter of federal law, it may unilaterally and wholly terminate, on sovereign immunity grounds, a suit that it initiated in the MCN courts any time prior to judgment.

In arguing that it can, the Town invokes two federal cases, *Iowa Tribe of Kansas and Nebraska v. Salazar*, 607 F.3d 1225 (10th Cir. 2010), and *Beers v. Arkansas*, 61 U.S. (20 How.) 527 (1857), Town Mot. 15, 17, for the proposition that "Thlopthlocco, like other sovereigns including Indian tribes, is able to withdraw a consent to jurisdiction under appropriate circumstances," *id.* at 15. It then asserts, without more, that "[i]t was in the public interest for Thlopthlocco to withdraw its consent." *Id.* at 17. A party cannot, of course, establish its entitlement to judgment as a matter of law under Rule 56 with "conclusory arguments," *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 672 (10th Cir. 1998). But the Town's argument is insufficient for a more fundamental reason: It is plain wrong as a statement of federal law.

Both *Beers* and *Iowa Tribe* are inapposite. In neither case did the sovereign voluntarily invoke the jurisdiction of the forum in which it later sought to assert its immunity, as was the case with the Town's initiation of CV-2007-39. In *Beers*, Arkansas was haled into state court as a defendant under an existing waiver of sovereign immunity; its legislature withdrew the waiver; and it then moved to dismiss the claims. 61 U.S. (20 How.) at 528–29. In *Iowa Tribe*, the United States was sued under an existing statutory immunity waiver and later withdrew the waiver. 607 F.3d at 1232–36. As *Iowa Tribe*, quoting *Beers*, explained the relevant principle underlying both cases, a sovereign may "permit itself *to be made a defendant*" and "consent[] to be sued" and may thereafter "withdraw its consent" and end the case. *Id*. at 1234 (quoting *Beers*, 61 U.S. (20 How.) at 529) (emphasis added).

But federal law is different when a sovereign *initiates* the litigation in a given forum and thereafter challenges that forum's ability to hear the case: "[W]here a [sovereign] *voluntarily* becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking" sovereign immunity. *Lapides v. Bd. of Regents Univ. Sys. of Ga.*, 535 U.S. 613, 619 (2002) (emphasis in original) (quoting *Gunter v. Atl. Coast Line R.R. Co.*, 200 U.S. 273, 284 (1906)); *see Sutton v. Utah State Sch. for Deaf and Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999) (favorably quoting same); *see also Lapides*, 535 U.S. at 622 (distinguishing between where a sovereign "*voluntarily* invoked the jurisdiction of the federal court" and where it was "*involuntarily* made a defendant" there); *Estes v. Wyo. Dep't of Transp.*, 302 F.3d 1200, 1206 (10th Cir. 2002) (rule that sovereign may not assert immunity after voluntarily invoking jurisdiction of forum does not apply where it is "involuntarily brought into" that forum); *Walstrom v. Oklahoma, ex rel. Bd. of Regents of Univ. of Okla.*, No. 09-CV-0071-CVE-PJC, 2009 WL 1652467, at *3 (N.D. Okla. June 11, 2009)

(discussing *Lapides*, *Sutton*, and *Estes* and finding that state could not assert immunity after "it chose to invoke this Court's jurisdiction").[7]

This rule "governing voluntary invocations of … jurisdiction" is "clear" and "easily applied" and stems from "the problems of inconsistency and unfairness that a contrary rule of law would create." *Lapides*, 535 U.S. at 622-23; *see Trant v. Oklahoma*, 754 F.3d 1158, 1173 (10th Cir. 2014) (describing "the principle" that federal law "cannot permit [sovereigns] to take inconsistent litigating positions by invoking and [then] challenging … jurisdiction"); *Sutton*, 173 F.3d at 1236 (where state invoked jurisdiction of federal court and "litigated throughout on the merits," it would be "grossly inequitable to allow assertion" of sovereign immunity thereafter).

Finally, the Town's conclusory assertion that "[i]t was in the public interest for Thlopthlocco to withdraw its consent," Town Mot. 17, even if true, is unavailing under federal law because "[a] benign motive … cannot make the critical difference" in cases where the sovereign invokes the court's jurisdiction, *Lapides*, 535 U.S. at 621; *Estes*, 302 F.3d at 1204 (same). Otherwise, a sovereign could "achieve unfair tactical advantages, if not in this case, in others." *Lapides*, 535 U.S. at 621.

For these reasons, should the Court reach its merits, the Town's Motion for Summary Judgment as to the meaning of federal law with respect to withdrawals of immunity waivers when a sovereign initiates suit should be denied, and judgment on this point of law should be issued in favor of the MCN Judicial Officers.

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[7] *See Bonnet v. Harvest (U.S.) Holdings, Inc.*, 741 F.3d 1155, 1161 (10th Cir. 2014) (applying Eleventh Amendment immunity principles to tribal immunity and explaining that the only distinction is that the latter "is subject to congressional control and modification" (citation omitted)).

CONCLUSION

The MCN Judicial Officers respectfully request that the Town's Complaint be dismissed as moot and as barred by their sovereign immunity and that its motion for summary judgment also be denied on that basis. Alternatively, if the Court disagrees and reaches the merits, the Town's Motion for Summary Judgment should be denied, with judgment as a matter of law in favor of the MCN Judicial Officers on the Town's claim regarding the withdrawal of its immunity waiver.

Dated: March 27, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 27th day of March 2023, I electronically transmitted the above and foregoing document with attached exhibit(s) (if any) to the Clerk of the United States District Court for the Northern District of Oklahoma using the ECF System for filing and transmittal of a Notice of Electronic Filing to:

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