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' SURREPLY

I. The MCN Judicial Officers Are Immune to This Suit.

In its Reply, the Town asserts that a "Tribe should not be compelled to expend time and effort on litigation in a court that does not have jurisdiction over them." Dkt. 181 at 3 (quotation marks omitted). Yet that is precisely what is happening in this case. "[T]ribal immunity protects tribal officials against claims in their official capacity." *Fletcher v. United States*, 116 F.3d 1315, 1324 (10th Cir. 1997). The MCN Judicial Officers have moved for dismissal on that basis, amply demonstrating their immunity, *see* Defs.-Appellees' Mot. to Dismiss (Dkt. 177) at 22–24, and have asserted it repeatedly in this case, *see* Suppl. Status Report (Dkt. 171) ¶ 12(A); Defs.' Response (Dkt. 180) at 20–21; Defs.' Reply Br. (Dkt. 182) at 8–9; Defs.' Reply in Support of Mot. to Disregard Pls.' Reply Br. (Dkt. 186) at 1 n.1. Yet after more than a year of litigation, including hundreds of pages of briefing and thousands of pages of attachments filed by the Town, it has *not once* acknowledged or addressed the MCN Judicial Officers' assertions of immunity and this Court's resulting lack of jurisdiction.

The Town's silence is a matter of necessity: it has no argument. According to its Complaint, "[t]his action is brought pursuant to *Ex parte Young*, 209 U.S. 123 (1908)[.]" Second Am. Compl. (Dkt. 47) ("Complaint") at 18. However, "for the *Ex parte Young* exception to apply, plaintiffs must show that they are … alleging an ongoing violation of federal law," *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1167 (10th Cir. 2012), and that inquiry focuses on the allegations in the complaint, *see, e.g.*, *Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (applicability of *Ex parte Young* turns on "whether *[the] complaint* alleges an ongoing violation of federal law" (emphasis added) (brackets in original) (citation omitted)); *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1155 (10th Cir. 2011) (same); *Muscogee (Creek) Nation*, 669 F.3d at 1168 (holding that "MCN's *complaint* satisfies

the *Ex parte Young* exception[]" because it "alleged an ongoing violation of federal law" (emphasis added)). Here, the Town's Complaint alleges no ongoing violation of federal law.[1]

The Town's Complaint instead asserts violations of federal law solely with respect to the exercise of jurisdiction by the MCN Courts in two cases. *See* Dkt. 47 at 19–53. That exercise of jurisdiction is no longer ongoing, as the Town concedes. *See* Pl.'s Mot. for Summ. J. (Dkt. 176) at 14 ("[T]he MCN Supreme Court affirmed the dismissal of CV-2007-39 and reversed and dismissed the CV-2011-08[.]"). Indeed, the Complaint contains no allegations of unlawful conduct by the MCN Judicial Officers that remains ongoing in any respect. Dkt. 47 at 19–51.

Nor can the Town's belated reframing of its chilling-effect argument under the rubric of "irreparable harm" cure that fatal deficiency in its Complaint. *See* Dkt. 181 at 1 (claiming that MCN Court's past exercise of jurisdiction over Town "is an 'irreparable harm' that will … continue to chill Thlopthlocco 'access to courts'"). When the Town filed (and twice amended) its Complaint, nothing prevented it from alleging that the MCN Court's exercise of jurisdiction over it would chill its right to access MCN Courts in the future and that this chill itself constituted the requisite ongoing violation of federal law under *Ex parte Young*. Yet the Complaint will be searched in vain for such allegations, and the Town has not raised any such argument (or any argument at all) in opposition to the MCN Judicial Officers' sovereign immunity to date.[2]

---

[1] In both *Crowe & Dunlevy* (challenge to tribal court exercise of jurisdiction) and *Muscogee (Creek) Nation* (challenge to state taxation of tribally licensed entities), the alleged violations of federal law were ongoing when the district court reached the merits and rendered its decision.

[2] To be clear, such a claim would have lacked merit in any event. *See Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 538 (2021) (stating that *Ex parte Young* requires a "concrete injury" and that the alleged "chilling effect" of a challenged law is "insufficient" to meet that requirement); *see also id*. at 542 (Thomas, J., concurring in part) (under *Ex parte Young*, "it is not enough that petitioners 'feel inhibited' or 'chill[ed]'" by abstract possibility of enforcement, "[n]or is a vague allegation of potential enforcement permissible" (quotation marks omitted)).

Nor should the Town be given any leeway at oral argument to challenge the MCN Judicial Officers' sovereign immunity on *any* basis. The Town has foregone all opportunities to do so thus far and it is now too late. As the Tenth Circuit explains, "[i]t is unfair to lie in wait until oral argument to present issues[.]" *United States v. Almaraz*, 306 F.3d 1031, 1041 (10th Cir. 2002); *see also, e.g.*, *McWilliams v. Dinapoli*, 40 F.4th 1118, 1126 (10th Cir. 2022) (party "did not make this argument in his briefing, and oral argument was too late"); *Caldara v. City of Boulder*, 955 F.3d 1175, 1182 n.6 (10th Cir. 2020) ("[I]ssues may not be raised for the first time at oral argument[.]" (citation omitted)). As then-Judge Merrick Garland has explained, while "[t]he *defense* of sovereign immunity may be raised at any time …. [a] *challenge* to sovereign immunity … is an argument that can be waived." *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1161 n.10 (D.C. Cir. 2002). That is the case here. The MCN Judicial Officers are immune to this suit and that should end it. *See, e.g.*, *E.F.W. v. St. Stephen's Indian High Sch.*, 264 F.3d 1297, 1305 (10th Cir. 2001) (affirming dismissal of claims against tribal officials on sovereign immunity grounds); *Fletcher*, 116 F.3d at 1334 (reversing district court for its "error in refusing to honor the sovereign immunity of the Osage Tribe urged repeatedly by Tribal Defendants"); *Walton v. Tesuque Pueblo*, 443 F.3d 1274 (10th Cir. 2006) (reversing district court's denial of motion to dismiss based on tribal officials' sovereign immunity).

II. The Town's "Irreparable Harm" Argument Does Not Rescue Its Claims from Mootness.

The Town offers a variety of arguments that the "irreparable harm" it has alleged renders this case a live controversy sufficient to survive a mootness challenge. None has merit.

A. The Town's "Irreparable Harm" Twist on Its Chilling-Effect Argument Does Not Appear in the Complaint.

As noted, the Town asserts that the MCN Courts' past exercise of jurisdiction over

it "is an 'irreparable harm' that will … continue to chill Thlopthlocco 'access to courts[.]'" Dkt. 181 at 1. But labeling its alleged harm as "irreparable harm" cannot salvage the Town's chilling-effect argument. As set forth in detail in Dkt. 182 at 1–2, the Town made no allegation in its Complaint of a harm—whether a chilling effect or any other harm—that would endure past the end of the challenged jurisdiction of the MCN Courts. The Town now asserts that its "injury still exists because Thlopthlocco can only return to the MCN courts as a crippled sovereign restricted from the ability to withdraw consent in litigation before MCN courts." Dkt. 181 at 2. But again, if the Town had sought to base a claim on harm that would continue beyond the then-ongoing exercise of jurisdiction by the MCN Courts in case Nos. CV-2007-39 and CV-2011-08, it could and should have pleaded such a claim. It did not, and it may not backfill or effectively amend its Complaint with later allegations it failed to include in the Complaint. *See Lawmaster v. Ward*, 125 F.3d 1341, 1346 n.2 (10th Cir. 1997) ("Because [the Plaintiff] failed to raise the … claim … in his complaint, we refuse to consider it" in resolving motion to dismiss); *Doyle v. Okla. Bar Ass'n*, 998 F.2d 1559, 1566 (10th Cir. 1993) (declining to consider "allegations newly made" against motion to dismiss "since it is only the sufficiency of the complaint which is being reviewed"); Dkt. 182 at 1–2 (citing cases of this district stating same).

B. The Town's "Irreparable Harm" Argument Fails on the Merits.

The Town spends a significant portion of its Reply asserting the unremarkable proposition that impairments to tribal sovereignty can be "irreparable" harm. Dkt. 181 at 1–5. The clear implication of this argument is that irreparable harm is, by definition, ongoing harm for Article III purposes. No case or other authority exists to support such a novel proposition, which is why the Town cites none. It simply cites Tenth Circuit case law stating that an interference with tribal sovereignty can constitute irreparable harm for purposes of an injunction analysis. But

none of those cases, or others cited by the Town regarding impairments to tribal sovereignty, addresses mootness in any way or remotely suggests that a harm that qualifies as "irreparable" in the contexts of those cases per se meets Article III's live controversy requirement.

Indeed, if that were the law, no case involving a violation of, for example, a constitutional right could ever become moot because violations of constitutional rights are by definition irreparable. *See Free the Nipple–Fort Collins v. City of Fort Collins*, 916 F.3d 792, 806 (10th Cir. 2019) (discussing what makes a harm "irreparable" and stating that "[a]ny deprivation of any constitutional right fits that bill"). Yet such cases are regularly dismissed as moot. *See, e.g.*, *Beierle v. Colo. Dep't of Corr.*, 79 F. App'x 373, 375 (10th Cir. 2003) (dismissing claims of violation of constitutional rights as moot after government ceased challenged conduct); *Jones v. Temmer*, 57 F.3d 921, 923 (10th Cir. 1995) (same); *Robinson v. Cody*, 38 F.3d 1220 (10th Cir. 1994) (unpublished table decision) (same); *McKillip v. Norwood*, No. 22-3100, 2022 WL 17069582, at *3 (10th Cir. Nov. 17, 2022) (same). Labeling an alleged harm "irreparable" is immaterial to whether a case is moot.

The Town's reliance on *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877 (1986), fares no better. The Town contends that *Wold* stands for the proposition that a "[r]equired waiver of [tribal] sovereign immunity to litigate in State court denies 'access to court.'" Dkt. 181 at 3 n.4. *Wold* says no such thing. It was not the immunity waiver per se that troubled the Court, as the Court expressly noted; it was the requirement that as a condition of access to state courts, the tribe had to submit to the application of state civil law in all cases to which it was a party:

> To be sure, not all conditions imposed on access to state courts which potentially affect tribal immunity, and thus tribal self-government, are objectionable. For instance, … tribal immunity does not extend to protection from the normal processes of the state court in which [a tribe] has filed suit…. [and] a non-Indian

> defendant may assert a counterclaim arising out of the same transaction or occurrence …. It is clear, however, that the extent of the waiver presently required by Chapter 27–19 is unduly intrusive on the Tribe's common law sovereign immunity, and thus on its ability to govern itself according to its own laws. By requiring that the Tribe open itself up to the coercive jurisdiction of state courts for *all* matters occurring on the reservation, the statute invites a potentially severe impairment of the authority of the tribal government, its courts, and its laws.

476 U.S. at 891. The Town patently mischaracterizes *Wold*.

It likewise mischaracterizes the Court's decision two years earlier involving the same statute and parties. According to the Town, the Court "struck down a State Supreme Court's interpretation of a statute that required an Indian tribe to waive sovereign immunity as a condition of access to state court." Pl.'s Resp. to Defs.' Mot. to Dismiss (Dkt. 178) at 3 (citing *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 467 U.S. 138 (1984)). In fact, that case did not involve the sovereign immunity provision of the statute at all and accordingly makes no mention of it. Nor did the Court strike down the North Dakota Supreme Court's interpretation of the statute. *See id*. at 159.

The Town's attempts to distinguish some of the MCN Judicial Officers' caselaw are likewise off the mark. Footnote 5 of the Town's Reply simply characterizes the facts of those cases without making any credible attempt to explain why those facts represent legally material distinctions or otherwise render the bedrock mootness principles applied in those cases inapplicable here. *See* Dkt. 181 at 5–7 n.5. That those cases did "not necessarily involve an irreparable harm to a sovereign's immunity from suit," *id*., hardly renders them inapposite. The Town has identified no exception to mootness or the strictures of Article III's case or controversy requirement based on that distinction because none exists.

At the end of the day, what the Town seeks from this Court is an advisory opinion that it believes will aid it in a hypothetical future lawsuit. The Town concedes this: Because of "the

likelihood Thlopthlocco will again need a judicial forum, this dispute is 'live enough' to entitle Thlopthlocco to declaratory judgment." Dkt. 181 at 4. But controlling Tenth Circuit and Supreme Court precedent is directly to the contrary:

> Seeking to litigate this ostensible controversy now over unfiled, potential future … claims is the very sort of speculative, hypothetical factual scenario that would render such a [declaratory] judgment a prohibited advisory opinion…. [M]atters relating to a hypothetical unfiled suit are not cognizable reasons for continuing litigation that is otherwise moot. *See 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.")[.] We are specifically prohibited from advising what the law would be upon a hypothetical state of facts.

Schell v. OXY USA Inc., 814 F.3d 1107, 1115 (10th Cir. 2016) (first brackets and third ellipsis in original) (quotation marks and citations omitted); *see also, e.g.*, *Front Range Equine Rescue v. Vilsack*, 782 F.3d 565, 569 (10th Cir. 2015) (stating that the "speculative possibility of a future controversy [can]not provide [courts] with Article III jurisdiction").

C. The Town's "Capable of Repetition Yet Evading Review" Arguments Are Meritless.

The Town asserts several bases on which it claims that the capable of repetition yet evading review exception to mootness applies here. None has merit.

The Town begins with a strawman: "Defendants … claim[] that plaintiff has made no showing of either element because there is no 'election law' challenged here and there is no election to moot the matter." Dkt. 181 at 7. In fact, the MCN Judicial Officers made those points in response to the Town's own suggestion that election disputes per se meet the capable of repetition exception. *See* Dkt. 180 at 12 ("[T]he Town does not even attempt to carry its burden other than to perfunctorily refer to the matter before this Court as an 'election case[].' It makes

no other effort to explain how it meets the first element. This is insufficient." (citation omitted) (second brackets in original)).

The Town next asserts that the capable of repetition yet evading review exception applies here because the "alleged mootness was conjured by MCN," Dkt. 181 at 8, and it likens the MCN Judicial Officers to "colluders" who schemed "to avoid judgment" by this Court on the issue of the Town's sovereign immunity, *id*. at 10. This argument is absurd. The case became moot when the MCN Supreme Court dismissed the two pending cases against the Town, *as expressly requested by the Town*, and based on the Town's sovereign immunity, *as argued by the Town*. *See also* Dkt. 180 at 7–9 (rebutting Town's "voluntary-cessation" arguments).

As to the requisite elements of the exception, the MCN Judicial Officers set forth in detail how the Town cannot meet the "evading review" element under controlling Supreme Court and Tenth Circuit precedent, including that the party invoking the exception "must establish that … the challenged action ended too quickly to be fully litigated," *Marks v. Colo. Dep't of Corr.*, 976 F.3d 1087, 1094 (10th Cir. 2020), and that such actions (i.e., assertions of tribal court jurisdiction) are "*necessarily* of short duration," *Jordan v. Sosa*, 654 F.3d 1012, 1036 (10th Cir. 2011), and thus "always so short as to evade review," *Spencer v. Kemna*, 523 U.S. 1, 18 (1998). *See* Dkt. 180 at 12–14. The Town's only answer is to assert, in self-defeating fashion, that the MCN Court proceedings lasted *too long*. *See* Dkt. 181 at 7–8 (accusing MCN Judicial Officers of "significantly delaying the case").

Nor has the Town made any attempt to rebut the MCN Judicial Officers' arguments on the "capable of repetition" element. The Town's entire argument under this element in its Reply appears in a single sentence: "[T]here is a reasonable expectation Thlopthlocco will need access to a judicial forum in the future." Dkt. 181 at 7. The MCN Judicial officers set forth in detail in

their Response how such assertions fail to meet the capable of repetition element under controlling Supreme Court and Tenth Circuit precedent. *See* Dkt. 180 at 14–16. The Town responds to none of those arguments or cases in its Reply. "A litigant who fails to press a point … in the face of contrary authority, forfeits the point." *Phillips v. Calhoun*, 956 F.2d 949, 953–54 (10th Cir. 1992) (brackets and citation omitted).

III. The Town Does Not Respond to the MCN Judicial Officers' Merits Arguments Opposing the Town's Motion for Summary Judgment.

In its motion for summary judgment, the Town asserted that it 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." Dkt. 176 at 1. That is, the Town seeks summary judgment that, as a matter of federal law, it may unilaterally terminate a suit that it initiated in the MCN courts any time prior to judgment. In addition to arguing that the motion should be denied on mootness grounds, the MCN Judicial Officers argued for denial on the merits, should the Court reach them. *See* Dkt. 180 at 21–24.

On the merits, the MCN Judicial Officers demonstrated that the Town's case law does not support its position and that, to the contrary, caselaw from this district, the Tenth Circuit, and the Supreme Court clearly and directly contradict the Town's position.[3] The Town makes no attempt in its Reply to respond to these arguments or address the cases. Again, "[a] litigant who fails to press a point … in the face of contrary authority, forfeits the point." *Phillips*, 956 F.2d at 953–54 (brackets in original) (citation omitted); *see also, e.g.*, *Pertile v. Gen. Motors, LLC*, Civil Action

[3] *See* Dkt. 180 at 22–24 (discussing *Iowa Tribe of Kan. and Neb. v. Salazar*, 607 F.3d 1225 (10th Cir. 2010); *Beers v. Arkansas*, 61 U.S. (20 How.) 527 (1857); *Lapides v. Bd. of Regents Univ. Sys. of Ga.*, 535 U.S. 613 (2002); *Sutton v. Utah State Sch. for Deaf and Blind*, 173 F.3d 1226 (10th Cir. 1999); *Estes v. Wyo. Dep't of Transp.*, 302 F.3d 1200 (10th Cir. 2002); *Trant v. Oklahoma*, 754 F.3d 1158 (10th Cir. 2014); and *Walstrom v. Oklahoma, ex rel. Bd. of Regents of Univ. of Okla.*, No. 09-CV-0071-CVE-PJC, 2009 WL 1652467 (N.D. Okla. June 11, 2009)).

No. 15-cv-0518-WJM-NYW, 2017 WL 4237870, at *6 (D. Colo. Sept. 22, 2017) (quoting same and stating that "[i]n their [summary judgment] Reply brief, TRW does not distinguish these cases, cite any contrary authority, or respond to this argument in any other way…. The Court therefore treats Plaintiffs' argument on this point as conceded and unopposed"). To be clear, the Town has failed to respond to the MCN Judicial Officers' cases and arguments on the sole issue that it claims remains a live controversy.

IV. Conclusion

The Town's briefing in this case is pervaded by assertions of the inviolable sanctity of tribal sovereign immunity. Yet it has failed to even acknowledge the Muscogee (Creek) Nation's sovereign immunity, invoked by its officials here, much less explain why that immunity is not entitled to the respect in this Court that the Town demands for its own. It instead asks this Court to rule on its sovereign immunity for purposes of a hypothetical future lawsuit by trampling on the Muscogee (Creek) Nation's sovereign immunity in the case actually before the Court, and it does so based on a legal theory that the Town cannot even be bothered to defend.

The Town's egregiously unsound position is compounded by the clear mootness of this case. The MCN Supreme Court affirmed the Town's sovereign immunity and dismissed the pending MCN court cases on that basis, ending the very assertion of tribal court jurisdiction that the Town filed this action to end. That terminated the controversy, full stop. The Town's ever-shifting theories to the contrary—none of which appear in its Complaint—cannot change that fact. The MCN Judicial Officers respectfully request that the Court deny the Town's motion for summary judgment and dismiss its Complaint.

Dated: August 22, 2023

Respectfully submitted,

/s/ *David A. Giampetroni*
David A. Giampetroni
KANJI & KATZEN, P.L.L.C.
P.O. Box 3971
Ann Arbor, MI 48106
(734) 769-5400
dgiampetroni@kanjikatzen.com

Counsel for Defendants

CERTIFICATE OF SERVICE

I certify that on the 22nd day of August 2023, I electronically transmitted the above and foregoing document 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:

Micheal Salem
SALEM LAW OFFICE
101 East Gray, Suite C
Norman, OK 73069
Telephone: (405) 366-1234
msalem@msalemlaw.com

Counsel for Plaintiff

/s/ *David A. Giampetroni*