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

(1) JANE DOE; (2) JOHN DOE; (3) MARY ROE; (4) RICHARD ROE, individually and on behalf of (5) BABY DOE, Plaintiffs, vs. (1) SCOTT PRUITT, in his official capacity as Oklahoma Attorney General; (2) TODD HEMBREE, in his official capacity as Cherokee Nation Attorney General; and (3) ED LAKE, in his official capacity as the Director of the Department of Human Services. Defendants.	)	Case No. 15-CV-471-JED-FHM

DEFENDANT TODD HEMBREE'S SUPPLEMENTAL MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

Pursuant to Fed. R. Civ. P. 12(b)(1), Defendant Todd Hembree, in his official capacity as Cherokee Nation Attorney General, respectfully moves the Court to dismiss this action for lack of subject matter jurisdiction. The present motion is filed as a supplement to Hembree's pending Motion to Dismiss (Dkt. #23) and addresses a jurisdictional defect recently raised by Plaintiffs' Notice to Court of Completion of Adoption (Dkt. #48).

STATEMENT OF FACTS

1. Plaintiffs Jane and John Doe are the biological parents of a child, Baby Doe, who qualifies as an "Indian child" under both the Oklahoma Indian Child Welfare Act ("OICWA") and its federal counterpart, the Indian Child Welfare Act ("ICWA"). (Am. Compl. ¶ 7, Dkt. #22.)

2. OICWA requires an Indian child's tribe be given notice of an adoption proceeding involving that child. *See* Okla. Stat. tit. 10, § 40.4.

3. Plaintiffs Mary and Richard Roe sought to adopt Baby Doe through a private adoption. (Am. Compl. ¶ 8, Dkt. #22.)

4. While adoption proceedings were ongoing in state court, Plaintiffs filed this action challenging the constitutionality of OICWA's tribal notice requirement. (*See* Dkt. #22.) Plaintiffs claimed OICWA violates their due process "right to privately pursue a direct private placement adoption," unlawfully discriminates against them on the basis of race, and infringes on the federal government's "exclusive jurisdiction to deal with the Indian Tribes." (*Id.* at 12–13.)

5. In their prayer for relief, Plaintiffs requested that the Court enter judgment declaring OICWA's tribal notice requirement unconstitutional and a permanent injunction barring Defendants from enforcing the requirement. (*Id.* at 15.)

6. Defendant Hembree filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction and Failure to State a Claim (Dkt. #23) on October 9, 2015. In the motion, Hembree asserted that ongoing state adoption proceedings precluded the court from exercising jurisdiction over Plaintiffs' claims pursuant to *Younger v. Harris*, 401 U.S. 37 (1971). Hembree also argued Plaintiffs had failed to state a claim for relief under the Equal Protection or Due Process Clauses of the United States Constitution.

7. Briefing on Hembree's Motion to Dismiss concluded on December 7, 2015. (*See* Dkt. #36.) The Court held a hearing on the motion on January 12, 2016. (*See* Dkt. #42.) The Court has not yet ruled on Hembree's motion.

8. On January 13, 2016, *i.e.,* the day after the hearing, Plaintiffs notified the Cherokee Nation of Baby Doe's adoption proceeding, as required by Okla. Stat. tit. 10, § 40.4.[1] (Plaintiffs

[1] Hembree does not attach copies of any documents from the adoption proceeding because of their sensitive nature and because Hembree does not believe they are essential to the mootness argument. If the Court disagrees or otherwise wishes to review these documents, Hembree is prepared to provide them under seal.

did not inform the Nation that the adoption proceeding involved Baby Doe and the parties to this case, and the Nation did not learn this fact until after Plaintiffs notified this Court of the adoption in October 2016.) The Nation intervened in the adoption proceeding on February 10, 2016, but it did *not* object to the adoption. A final decree of adoption was filed two days later, on February 12, 2016. Under Okla. Stat. tit. 10, § 7505-7.1, the right to appeal from that decree expired on March 13, 2016. Further, Okla. Stat. tit. 10 §750 5-7.2, prohibits a collateral attack on the final decree of adoption after May 12, 2016.

9. On October 3, 2016—almost eight months after the final adoption decree was entered, Plaintiffs filed their notice advising the Court and Defendants of the decree and the conclusion of Baby Doe's adoption proceedings. (*See* Dkt. #48.) In that filing, Plaintiffs argued this case is not moot because Plaintiffs' challenge "falls within a special category of disputes that are 'capable of repetition' while 'evading review.'" (*Id.* at 1.)

ARGUMENT

Federal courts may exercise jurisdiction only over "'Cases'" and "'Controversies.'" *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (quoting U.S. Const. art. III, § 2). This constitutional limitation requires "that 'an actual controversy be extant at all stages of review, not merely at the time the complaint is filed.'" *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 669 (2016) (alteration omitted) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997)). "If an intervening circumstance deprives the plaintiff of a personal stake in the outcome of the lawsuit, at any point during litigation, the action can no longer proceed and must be dismissed as moot." *Id.* (quoting *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1528 (2013)).

A case becomes moot when "the relief sought can no longer be given or is no longer needed." *Unified Sch. Dist. No. 259, Sedgwick Cty., Kan. v. Disability Rights Ctr. of Kansas*, 491

F.3d 1143, 1150 (10th Cir. 2007); *see also Friends of the Earth, Inc. v. Bergland*, 576 F.2d 1377, 1379 (9th Cir. 1978) ("Where the activities sought to be enjoined have already occurred, and the appellate courts cannot undo what has already been done, the action is moot."). Where, as here, a plaintiff seeks declaratory judgment, "the mootness inquiry looks to whether the requested relief will actually alter the future conduct of the named parties." *Schell v. OXY USA Inc.*, 814 F.3d 1107, 1114 (10th Cir. 2016). In such cases, to remain a live controversy, declaratory relief must be capable of "settling . . . some dispute which [actually] affects the behavior of *the defendant toward the plaintiff*." *Jordan v. Sosa*, 654 F.3d 1012, 1025 (10th Cir. 2011) (emphasis in original) (quoting *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1110 (10th Cir. 2010)); *accord Hewitt v. Helms*, 482 U.S. 755, 761 (1987).

Here, the finalization of Baby Doe's adoption moots Plaintiffs' claims. Plaintiffs brought this action to avoid OICWA's requirement that the Cherokee Nation be notified of Baby Doe's adoption. (*See* Am. Compl. at 10–11, Dkt. #22.) That adoption is now complete. Plaintiffs notified the Cherokee Nation of Baby Doe's adoption proceedings, and the Nation did not object to the adoption. No amount of declaratory or injunctive relief will allow the Plaintiffs to turn back the clock and withdraw their notice. Any such relief at this point would be nothing more than an advisory opinion. The case is moot and must be dismissed.

Plaintiffs contend that their challenge falls within the exception to the mootness doctrine for cases that are "capable of repetition yet evading review." This "narrow" exception, however, is only available if "the challenged action is *inherently* too short in duration to be fully litigated before its cessation or expiration." 15 James Wm. Moore et al., *Moore's Federal Practice* § 101.99[1], at 413, 415 (3d ed. 2016) (emphasis added); *accord Disability Law Ctr. v. Millcreek Health Ctr.*, 428 F.3d 992, 997 (10th Cir. 2005). Common examples include cases involving pregnancies, elections, school years, or durational residency requirements. *See Conyers v.*

Reagan, 765 F.2d 1124, 1128 (D.C. Cir. 1985); *Marshall v. Whittaker Corp., Berwick Forge & Fabricating Co.*, 610 F.2d 1141, 1146 (3d Cir. 1979). Here, Plaintiffs are challenging laws applicable to an adoption proceeding. Adoption proceedings, unlike pregnancies or school years, do not have an inherent durational limitation. They can be stayed and, although certainly not ideal, may remain pending for several years. *See, e.g.*, *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2558–59 (2013).

Plaintiffs could have avoided mooting their constitutional challenge. They could have sought a stay of Baby Doe's adoption proceedings, delayed the initiation of those proceedings until after the conclusion of the present case, or simply requested a preliminary injunction from this Court. Having failed to take any of those steps, Plaintiffs cannot now claim that their case "evaded review." *See Armstrong v. F.A.A.*, 515 F.3d 1294, 1297 (D.C. Cir. 2008) ("We join every other circuit to have considered the matter and conclude that a litigant who could have but did not file for a stay to prevent a counter-party from taking any action that would moot his case may not, barring exceptional circumstances, later claim his case evaded review."); *Protestant Mem'l Med. Ctr., Inc. v. Maram*, 471 F.3d 724, 731 (7th Cir. 2006) (holding that the "capable of repetition, yet evading review" exception is inapplicable where "the claim may not have evaded review had [the plaintiff] sought a preliminary injunction"); Moore, *supra*, § 101.99[1], at 420 ("[A] litigant who could have filed for a stay to prevent a counter-party from taking any action that would moot the case, but did not, cannot later claim his case evaded review."). Indeed, Plaintiffs did not just fail to take action to avoid mooting their constitution challenge. By providing the requisite notice to the Nation and finalizing the adoption, Plaintiffs themselves *caused* the mootness. In doing so, they eliminated the case or controversy required by Article III of the Constitution, thus ending any jurisdiction this Court otherwise may have had over this case.

WHEREFORE, Defendant Todd Hembree respectfully prays that the Court dismiss this action for lack of subject matter jurisdiction.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANT TODD HEMBREE, IN HIS OFFICIAL CAPACITY AS CHEROKEE NATION ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of December, 2016, I electronically transmitted the attached document to the Clerk of the Court using the ECF System for filing. Based on the records currently on file, the Clerk of the Court will transmit a Notice of Electronic Filing to the following ECF registrants:

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