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

REPLY BRIEF IN SUPPORT OF DEFENDANT TODD HEMBREE'S SUPPLEMENTAL MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

Defendant Todd Hembree submits this brief in support of his Supplemental Motion to Dismiss (Dkt. #56) and in reply to Plaintiffs' Response in Opposition to that Motion (the "Response," Dkt. #57).

INTRODUCTION

Plaintiffs admit that they have *already complied* with the very procedural requirements in Oklahoma adoption proceedings that they challenge in this action. (Dkt. #57, Plaintiffs' Response Br., p. 7.) They nonetheless maintain that this case is not moot because it is capable of repetition yet evading review. But a case only "evades review" if the challenged action—here, the obligation to comply with certain statutory requirements in an Oklahoma adoption proceeding—is *inherently* too short in duration to permit full appellate review. That is not the case here. The Court need look no further than Plaintiffs' Response: "Oklahoma law does not

impose a deadline for completing an adoption case once it is filed." (*Id.* at 2.) Nor does it impose a deadline for complying with the obligations challenged by Plaintiffs here. Plaintiffs voluntarily chose to give the required notice to the Cherokee Nation and to finalize the state adoption proceeding. Their case should be dismissed as moot.

ARGUMENT AND AUTHORITIES

I. Plaintiffs' challenge will not "evade review" in future litigation because adoption proceedings in Oklahoma do not have a fixed durational limitation.

Plaintiffs do not dispute that this case is moot unless it is "capable of repetition yet evading review." That exception only "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." *Brown v. Buhman*, 822 F.3d 1151, 1166 (10th Cir. 2016) (internal quotation marks omitted). Plaintiffs bear the burden of establishing both elements. *Ind v. Colorado Dep't of Corr.*, 801 F.3d 1209, 1215 (10th Cir. 2015). "The exception is narrow and is only to be used in exceptional situations" *Id.* (citation omitted) (internal quotation marks omitted).

Regarding the first requirement, the Supreme Court has held that a case "evades review" only if the action at issue is short-lived "by nature." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 547 (1976). In other words, the reason for a challenged action's short duration must be "inherent." *Disability Law Ctr. v. Millcreek Health Ctr.*, 428 F.3d 992, 997 (10th Cir. 2005). It is not enough that a challenged action happened to cease before full review in the present case or that it could do so again in the future. *Hickman v. Missouri*, 144 F.3d 1141, 1143 (8th Cir. 1998). "Rather, the proper inquiry is whether the challenged activity is *by its very nature short in duration*, so that it could not, or probably would not, be able to be adjudicated while fully live." *Id.* (emphasis in original) (quoting *Conyers v. Reagan*, 765 F.2d 1124, 1128 (D.C. Cir. 1985));

see also Spencer v. Kemna, 523 U.S. 1, 18 (1998) (holding the exception did not apply because the petitioner failed to show the duration of the challenged activity was "always so short as to evade review"). Common examples include cases involving pregnancies, elections, school years, or durational residency requirements. *See Conyers*, 765 F.2d at 1128; *Marshall v. Whittaker Corp., Berwick Forge & Fabricating Co.*, 610 F.2d 1141, 1146 (3d Cir. 1979).

Here, Plaintiffs challenge a procedural requirement applicable in Oklahoma adoption proceedings. As Plaintiffs acknowledge, "Oklahoma law does not impose a deadline for completing an adoption case once it is filed." (Dkt. #57, p. 2.) Such proceedings 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). This crucial fact distinguishes adoption proceedings from pregnancies, school years, elections, and residency requirements, all of which have a natural or set expiration date. The fact that Oklahoma law includes procedures allowing for expedited adoption proceedings does not change this result. (*See* Dkt. #57, pp. 3–6.) These procedures do not *require* that adoption proceedings move at any set speed and thus will not—and cannot—cause this same challenge to "evade review" in future cases.

In short, the only reason this dispute will evade review in future litigation is if the Plaintiffs cause it to do so—as they did here. Thus, Plaintiffs' challenge "will not necessarily evade review in future litigation" and therefore is now moot. *Disability Law Ctr.*, 428 F.3d at 997.

II. Plaintiffs' reliance on *Doe v. Piper* is misplaced.

Plaintiffs claim that the district court in *Doe v. Piper* endorsed their mootness argument "on almost identical facts." (Dkt. #57, p. 6.) The key word here is "almost." Plaintiffs fail to

mention that *Piper* involved a Minnesota statutory scheme that imposes deadlines that are not at issue here. *See* 165 F. Supp. 3d 789, 795 (D. Minn. 2016).

Like the present case, *Piper* involved a constitutional challenge to a state statute requiring that Indian tribes be notified of adoption proceedings involving children eligible for tribal membership. *See id.* at 795–96. The plaintiffs in *Piper* were parents of an Indian child. Like the parents here, they sought to avoid compliance with their state's tribal notice requirement in a voluntary adoption proceeding. *Id.* After initiating a direct placement adoption, the parents filed a federal lawsuit challenging the state's tribal notice requirement. *Id.* Their challenge, unlike the present case, faced a looming deadline: the parents had 60 days from the date of their child's preadoptive custody order in which to comply with the state's tribal notice requirement and consent to the adoption. *Id.* at 795.

Six days before the deadline, the district court denied the parents' motion for a preliminary injunction. *Id.* at 796–97. Rather than face the consequences for failure to timely consent, *see* Minn. Stat. § 259.47, subd. 8, the parents notified the relevant tribe of their child's adoption proceedings and recorded their consent to the adoption.[1] *Piper,* 165 F. Supp. 3d at 797.

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[1] In their briefing on the mootness issue, the parents in *Piper* emphasized that the only reason they complied with the challenged statute was to avoid the legal consequences of missing the consent deadline:

> Parties required to comply with MIFPA's [the Minnesota Indian Family Preservation Act's] notice and intervention provisions in voluntary adoption proceedings are given a very brief period to comply. The biological parents must execute their consents to adoption within 60 days of the date of their adoptive placement. Minn. Stat. § 259.47, supd. 7. ICWA requires that Indian parents consent to adoption in court. 25 U.S.C. § 1913(a). MIFPA requires tribal notification. Minn. Stat. § 260.761, supd. 3. If biological parents fail to execute consents in 60 days, the state juvenile court is required to refer the matter to the county child protection agency to investigate whether Plaintiffs should have their rights terminated on the basis of abandonment. Minn. Stat. § 259.47, supd. 8. Thus, biological parents who place a child with adoptive parents at or near the

The Minnesota deadline in *Piper* caused that case to "evade review." *See id.* at 795–97, 807. Plaintiffs do not cite to a comparable compliance deadline in Oklahoma. This fact distinguishes *Piper* from the present case and further reinforces why Plaintiffs' challenge need not evade review in future litigation.[2]

III. Because Plaintiffs could have but did not take steps to avoid mooting their constitutional challenge, they cannot now claim that their case "evaded review."

Plaintiff could have taken several steps to avoid 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* 15 James Wm. Moore et al., *Moore's Federal Practice* § 101.99[1], at 420 (3d ed. 2016); *Armstrong v. F.A.A.*, 515 F.3d 1294, 1297 (D.C. Cir. 2008); *Protestant Mem'l Med. Ctr., Inc. v. Maram*, 471 F.3d 724, 731 (7th Cir. 2006).

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time of birth, are given mere months before they are required to comply with MIFPA's unconstitutional notice and intervention provisions.

See Combined Reponses to Defendants' Motion to Dismiss at 23–24, *Doe v. Piper*, 165 F. Supp. 3d 789 (D. Minn. 2016) (15-CV-2639), ECF No. 43. A copy of the parents' response brief is attached as Exhibit 1.

[2] The other cases cited in Plaintiffs' response all involve controversies with inherent durational limitations. *See Turner v. Rogers*, 564 U.S. 431, 440 (2011) (challenging a 12-month prison term); *Roe v. Wade*, 410 U.S. 113, 125 (1973) (challenging abortion restrictions); *Frontier Airlines, Inc. v. Civil Aeronautics Bd.*, 621 F.2d 369, 370 (10th Cir. 1980) (challenging an order that only remained operative for 30 days); *Stewart v. Taylor*, 953 F. Supp. 1047, 1049–50, 1053 (S.D. Ind. 1997) (challenging an election rule governing a candidate's distribution of campaign literature); *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 177 (1968) (challenging an injunction that only remained operative for 10 months). Without explanation, Plaintiffs also cite *Walker v. City of Birmingham*, 388 U.S. 307 (1967). That case does not discuss the issue of mootness or Article III jurisdiction more generally. Its relevance to this case is unclear.

This argument featured prominently in Mr. Hembree's Supplemental Motion to Dismiss. (*See* Dkt. #56, p. 5.) Plaintiffs offer no response. This ground alone renders the "capable of repetition yet evading review" exception inapplicable.

CONCLUSION

Mr. Hembree and the Cherokee Nation understand and appreciate Plaintiffs' desire to finalize Baby Doe's adoption as quickly as possible. But that desire cannot serve to expand this Court's subject matter jurisdiction. Adoption proceedings in Oklahoma do not have a fixed durational limitation that would cause this case to evade review. The case is moot and must be dismissed.

Respectfully submitted,

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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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