

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

(1) Jane Doe and (2) John Doe and)	
(3) Mary Roe and (4) Richard Roe,)	
Individually and on behalf of)	
(5) Baby Doe)	
)	
v.)	CASE NO. 2015-cv-471-JED-FHM
(1) Scott Pruitt, in his official capacity as)	
Oklahoma Attorney General,)	
(2) Todd Hembree, in his official capacity)	
as Cherokee Nation Attorney General.)	
(3) Ed Lake, in his official capacity as the)	
Director of the Department of Human)	
Services)	
)	

**PLAINTIFFS' RESPONSE TO DEFENDANT
TODD HEMBREE'S SUPPLEMENTAL MOTION TO DISMISS**

The Plaintiffs, Jane Doe, John Doe, Mary Roe, Richard Roe, and Baby Doe hereby respond to the Supplemental Motion to Dismiss (Docket #56) filed by the Defendant, Todd Hembree ("Hembree").

The Defendant, Hembree, claims that the Plaintiffs' case is moot because the Plaintiffs notified the Court that the adoption had been completed in Tulsa County District Court. Contrary to Hembree's assertion, completion of the adoption does not render this case moot because it falls within a special category of disputes that are "capable of repetition" while "evading review." This dispute remains live because the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and there is a reasonable expectation that the same complaining party will be subjected to the same action again. *Turner v. Rogers*, 131 S. Ct. 2507, 2514 (2011).

While Article III standing applies to “actual ‘cases’ and ‘controversies,’” *Turner v. Rogers*, 131 S.Ct. 2507, 2514 (2011), there are exceptions to the “mootness” doctrine. The first applies when a matter is “capable of repetition yet evades review.” *Advantage Media, L.L.C. v.*

City of Hopkins, 408 F. Supp. 2d 780, 794 (D. Minn. 2006) (citing *Arkansas AFL-CIO v. F.C.C.*, 11 F.3d 1430, 1435 (8th Cir. 1993) (en banc)). The second is the voluntary cessation exception: “It is well settled that a defendant’s voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.” *Advantage Media*, 408 F. Supp. 2d at 794 (quoting *City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 289 (1982)).

The Plaintiffs' injury is capable of repetition yet evading review.

A dispute falls into this “category, and a case based on that dispute remains live, if ‘(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again.’” *Turner*, 131 S.Ct. at 2514. In *Turner*, the Court found that a twelve-month imprisonment period was brief enough to meet the “too short” prong. *Id.* at 2515. *Turner* relied on Supreme Court precedent recognizing time periods of eighteen months and two years as “too short.” *Id.* (citing *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 774 (1978); *Southern Pacific Terminal Co. v. Interstate Commerce Comm’n*, 219 U.S. 498, 514-16 (1911)).

The usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated. *Roe v. Wade*, 410 U.S. 113, 125 (1973)

But when, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid. Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be 'capable of repetition, yet evading review.'

Roe v Wade at 125.

While in the present case there is not a time period limited by the term of a pregnancy, and Oklahoma law does not impose a deadline for completing an adoption case once it is filed, the overall tenor of the Oklahoma Adoption Code is that adoption

cases are time sensitive matters and should be completed in less time than other civil matters. 10 O.S. §7501-1.2 states that

The Legislature of this state believes that every child should be raised in a secure, loving home and finds that adoption is the best way to provide a permanent family for a child whose biological parents are not able or willing to provide for the child's care or whose parents believe the child's best interest will be best served through adoption. The purpose of the Oklahoma Adoption Code is to:

1. Ensure and promote the best interests of the child in adoptions and to establish an *orderly and expeditious process* for movement of adoption matters through the courts;

* * *

7. Encourage prebirth planning for adoption as a means of *facilitating adoption of a child into a permanent family as soon as possible*. To that end, the Oklahoma Adoption Code provides for a prebirth notice of a plan for adoption and for procedures by which a *putative father may give his consent or otherwise respond to the notice*;

* * *

9. Promote and strengthen the integrity and finality of adoptions by *limiting the time and circumstances* for a consent to be withdrawn or a challenge to the adoption filed;

Emphasis added

In addition, Adoption petitions are to be given priority on the court's docket,¹ and adoption appeals are to have priority on the Oklahoma Supreme Court's docket.²

¹ **§10-7505-1.4. Priority on docket - Proceedings to be expedited.**

Any petitions filed with the court pursuant to the Oklahoma Adoption Code when docketed shall have priority over all cases pending on said docket. Any other proceedings concerning the adoption of a child shall be expedited by the court.

² 10 O.S. § 7505-2.1K. Any appeal when docketed should have priority over all cases pending on said docket. Adjudication of the appeals and in any other proceedings concerning the relinquishment of the child or the termination of parental rights pursuant to this section shall be expedited by the Supreme Court.

10 O.S. §7505-4.1 J. Any appeal when docketed should have priority over all cases pending on said docket. Adjudication of appeals and any other proceedings concerning the termination of parental rights or the determination that a child is eligible for adoption without consent which does not terminate parental rights pursuant to this section shall be expedited by the Supreme Court.

The following procedures under the Oklahoma Adoption Code show that an adoption case is time sensitive compared to a "regular" civil matter.

1. No adoption may be challenged on any ground either by a direct or collateral attack more than three (3) months after the entry of the final adoption decree regardless of whether the decree is void or voidable. 10 O.S. §7505-7.2
2. A temporary order of custody issued pursuant to the Adoption Code shall by its own terms, expire no later than ninety (90) days after it has been issued. 10 O.S. §7503-4.1
3. An extrajudicial consent can be executed by a putative father before the birth of the child and is revocable for any reason for fifteen (15) calendar days after the execution of the consent before the notary public. Where no notice of revocation is filed in the time period specified, the extrajudicial consent shall operate as a waiver of the putative father's right to notice in any adoption proceedings or termination of parental rights proceedings. 10 O.S. §7503-2.6.
4. A notice of hearing on an application for adoption without consent or an application to terminate parental rights must be served on the parent in question fifteen (15) days before a hearing rather than giving the parent 20 or 35 days to respond to a summons under 12 O.S. 2012A. 10 O.S. 7505-2.1, 10 O.S. 7505-4.1
5. An Oklahoma consent to adoption or a relinquishment of parental rights is irrevocable unless the parent can prove that an adoption petition was not filed within nine (9) months after the child was placed for adoption, or that before a decree of adoption is issued, or within three (3) months of the discovery of the fraud, that the consent was obtained by fraud or duress. 10 O.S. §7503-2.7.
6. A Notice of Plan for Adoption can be served upon a putative father before the birth of the child and if the putative father does not respond to the notice within thirty days (30), he is not entitled to further notice of the proceedings. 10 O.S. § 7503-3.1, 10 O.S. §7505-4.2M
7. A petition for approval of the payment of living expenses of a birth mother must be heard by the trial court within ten (10) days of filing.
8. After examination of the adoptive parent's home study, the court can enter an interlocutory decree which requires a six (6) month waiting period. However, the court can waive the interlocutory decree and waiting period

10 O.S. §7505-7.1E . Any appeal when docketed should have priority over all cases pending on said docket. Adjudication of appeals and any other proceedings concerning the adoption of the minor described in this section shall be expedited by the Supreme Court.

and set the matter for hearing on a final decree. 10 O.S. §7505-6.1, 10 O.S. §7505-6.3

9. Any adoption appeal has priority over all cases pending on the docket. Adjudication of the appeals and in any other proceedings concerning the relinquishment of the child or the termination of parental rights pursuant shall be expedited by the Supreme Court. 10 O.S. §7505-2.1 K

Similarly, most of the deadlines applicable to an adoption appeal are significantly less than those that apply to appeals of other civil matters:

	Adoption Appeal	Non-Adoption Appeal
Petition in error	Thirty (30) days of the filing of the order appealed from. §10 O.S. §7505-2.1, §10 O.S. §7505-4.1, 10 O.S. §7505-7.1.	Thirty (30) days from the date the judgment, decree, or appealable order. OK Sup Rule 1.21
Response to Petition in Error	Twenty (20) days from the filing of the petition in error. §10 O.S. §7505-2.1, §10 O.S. §7505-4.1, 10 O.S. §7505-7.1.	Twenty (20) days after the petition in error is filed OK Sup Rule 1.25
Designation of record	Ten (10) days after the date of the judgment. §10 O.S. §7505-2.1, §10 O.S. §7505-4.1, 10 O.S. §7505-7.1. OK Sup Rule 1.25	Concurrently with or prior to filing a copy of the petition in error in the trial court, OK Sup Rule 1.28
Counter designation of record	Ten (10) days after designation of record is filed in the trial court. §10 O.S. §7505-2.1, §10 O.S. §7505-4.1, 10 O.S. §7505-7.1.	Twenty (20) days after designation of record is filed OK Sup Rule 1.28
Completion of record	Thirty (30) days from the filing of the petition in error. §10 O.S. §7505-2.1, §10 O.S. §7505-4.1, 10 O.S. §7505-7.1., OK Sup Rule 1.34	Six (6) months after the filing of the order from which the appeal was taken. OK Sup Rule 1.33
Brief in chief	Twenty (20) days after the trial court clerk notifies all parties that the record is complete §10 O.S. §7505-	Sixty (60) days from the date the Notice of Completion of Record is filed. OK S.Ct. Rule 1.10

	2.1, §10 O.S. §7505-4.1, 10 O.S. §7505-7.1. OK S.Ct. Rule 1.10	
Answer brief	Fifteen (15) days after the brief in chief is filed, §10 O.S. §7505-2.1, §10 O.S. §7505-4.1, 10 O.S. §7505-7.1. OK S.Ct. Rule 1.10	Forty (40) days after the filing of the Brief-in-chief OK S.Ct. Rule 1.10
Reply brief	Ten (10) days after the answer brief is filed. §10 O.S. §7505-2.1, §10 O.S. §7505-4.1, 10 O.S. §7505-7.1. OK S.Ct. Rule 1.10	Twenty (20) days after the filing of the Answer Brief OK S.Ct. Rule 1.10

It is reasonably likely that Jane and John Doe, together or separately, could have another child they may choose to put up for adoption, which would again force them to confront OICWA's unconstitutional notice and intervention provisions. Jane Doe is a Tribal member and any child she gives birth to is going to be subject to OICWA. Mary Roe and Richard Roe are also reasonably likely to adopt a child again that would be an Indian Child because they meet the preferences of ICWA. This case is not moot because it falls under the capable of repetition yet evading review exception.

In a recent case, with almost identical facts as the case before the Court, *Jane Doe v. Piper*, 165 F. Supp. 3d 789 (D. Minn., 2016), the Plaintiffs were challenging the constitutionality of Minnesota's state version of ICWA. The United States Court for the District of Minnesota in denying the Motion to Dismiss of one of the defendants found that the case was not moot even though the Plaintiff's had complied with the notice provisions of the state's ICWA statute. The Court determined that the Plaintiff's case fell into the category of "capable-of-repetition" exception 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. The Court stated that "it is perfectly reasonable to expect that the Does may bear more children in the future because the Does have borne children

in the past. *See Davis*, 554 U.S. at 735-36 (holding it reasonable that Davis might run for election again at a later date); *Roe*, 410 U.S. at 125 ("Pregnancy provides a classic justification for a conclusion of nonmootness."). See also *Frontier Airlines, Inc. v. Civil Aeronautics Bd.*, 621 F.2d 369 (C.A.10, 1980), *Stewart v. Taylor*, 953 F.Supp. 1047 (S.D. Ind., 1997)

Contrary to the contentions of Hembree, the Plaintiff's actions did not moot this case. The Plaintiff's complied with an unconstitutional statute and their actions of obeying a law did not moot the dispute between the parties. *Carroll v. President and Commissioners of Princess Anne.*, 393 U.S. 175, 178, (1968) *Walker v. City of Birmingham*, 388 U.S. 307 (1967)

WHEREFORE, the Plaintiffs, Jane Doe, John Doe, Mary Roe, Richard Roe, and Baby Doe hereby pray that the Court deny the Defendant, Hembree's Motion to Dismiss.

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CERTIFICATE OF SERVICE

I hereby certify that on January 9, 2017, I electronically transmitted the foregoing to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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