UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Mille Lacs Band of Ojibwe, et al.,

Plaintiffs,

v.

County of Mille Lacs, Minnesota, et al.,

Defendants.

Case No. 17-cv-05155-SRN-LIB

DEFENDANTS WALSH AND LORGE'S SUPPLEMENTAL REPLY BRIEF ON MOOTNESS

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INTRODUCTION

When Plaintiffs brought this lawsuit in 2017, the parties disagreed as to whether Walsh's 2016 Opinion and Protocol was proper. That disagreement is now gone. Mille Lacs County Attorney Walsh has stated that because of *Cooley*, he could and would not reissue that Opinion and Protocol should the 2018 Cooperative Agreement terminate. (ECF 306-1 ¶ 16.) Under settled precedent of the Supreme Court, the Eighth Circuit and other circuits, Walsh's declaration should moot Plaintiffs' claims against both Walsh and Lorge. A contrary holding, however, will force the Court to determine in the abstract how far inherent tribal law enforcement goes beyond the facts of *Cooley*, a task that is beyond this Court's Article III authority.

ARGUMENT

I. Plaintiffs incorrectly claim that the Eighth Circuit only ruled under Fed. R. App. P. 42(b).

Plaintiffs assume that the Eighth Circuit's reference to Fed. R. App. P. 42(b) regarding costs necessarily precludes any conclusion that the court granted the substance of Walsh and Lorge's motion. But Rule 42(b) has nothing to say about a merits ruling, only voluntary dismissals. Walsh and Lorge's motion was a merits motion, as it addressed the Eighth Circuit's subject matter jurisdiction.

Likewise, Plaintiffs incorrectly argue that the Eighth Circuit's reference to Rule 42(b) is sufficient to explain its order of dismissal. Plaintiffs ignore Walsh and Lorge's analysis of *Terkel v. CDC*, 15 F.4th 683 (5th Cir. 2021). Plaintiffs do not address Walsh and Lorge's contention that the Eighth Circuit provided no

substantive explanation for granting their motion to dismiss, and that the allocation of costs, standing alone, is not a *substantive* ground for dismissal. The only explanation the Eighth Circuit provided was *procedural* under Rule 42(b) regarding cost allocation.

Furthermore, and as pointed out in Walsh and Lorge's opening brief, Plaintiffs already admitted before the Eighth Circuit that the court's reference to "on terms fixed by the court" under Rule 42(b) referred *only* to costs, which, *again,* is not a substantive basis for dismissal. (ECF 305 at 8-9, n.5.) Therefore, because there was only one substantive basis for dismissal, and that basis was mootness, the Eighth Circuit's granting of the motion, but silence as to the substance, nonetheless compels the conclusion that the motion was granted precisely on the one ground it was made.

II. The question whether Plaintiffs' case against Walsh and Lorge is moot is properly before this Court.

Plaintiffs contend Walsh and Lorge improperly filed supplemental briefing that was specifically invited by this Court because they "re-cast an argument that they already made" in July 2020 and "introduce[d] evidence or arguments that could have been made previously." (ECF 308 at 23.) This argument fails.

As stated in the November 15, 2021 status conference, the Court requested briefing so Walsh and Lorge's positions would be preserved regarding the Eighth Circuit's dismissal and mootness: "I'm structuring this in a way, Mr. Knudson, so your clients' position on the Eighth Circuit's actions are preserved, mootness is

preserved. Everything is fully briefed and preserved. That's my goal is to have a complete record here." (ECF 300 at 17-18.)

Walsh and Lorge believed the question of mootness—which implicates the Court's subject matter jurisdiction—was revived by Walsh's declaration following *Cooley* and necessarily required them to address *in toto* the reasons the case was moot. Rule 12 addresses this circumstance. *See* Fed. R. Civ. P 12(h)(3)("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."); *Hebert v. Winona County*, 111 F. Supp. 3d 970, 974 (D. Minn. 2015) ("Any party, however, may challenge subject-matter jurisdiction at any time, pursuant to Rule 12(h)(3)."); *see S.D. Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 591 (8th Cir.2003). Plaintiffs offer no reason why this Court should reject as improper the briefing it requested.

Plaintiffs' suggestion that Walsh and Lorge improperly filed their brief pursuant to the Court's request and Rule 12 because they could have argued the impossible in July 2020—based on a change in law that occurred only in 2021—is inexplicable. The impetus for Walsh and Lorge's mootness argument in the Eighth Circuit was simply that. In any event, a change in law, along with briefing requested by the Court because of an ambiguous Eighth Circuit judgment, is sufficiently "extraordinary" under Local Rule 7.1(j). "A motion for reconsideration may be justified on the basis of an intervening change in law." *In re Monosodium Glutamate*, Civ. 00-MDL-1328 (PAM), 2005 WL 2810682, at *2 (D. Minn. Oct. 26, 2005), *aff'd sub nom. In re Monosodium Glutamate Antitrust Litig.*, 477 F.3d 535

(8th Cir. 2007); *Grozdanich v. Leisure Hills Health Ctr., Inc.*, 48 F. Supp. 2d 885, 888 (D. Minn. 1999). Hence, the issue of mootness is properly before this Court.

III. Walsh and Lorge have met their burden to show Plaintiffs' case against them is moot.

Plaintiffs urge the Court to hold their case against Walsh and Lorge is not moot because they have not met the high standard the Supreme Court articulated in *Friends of the Earth v. Laidlaw Environ. Services (TOC), Inc.*, 528 U.S. 167 (2000), for what is denoted the voluntary cessation exception to the mootness doctrine. Plaintiffs wrongly assert Walsh and Lorge conceded in their opening brief that *Friends of the Earth* is "controlling here," (ECF 308, at 24), even though Walsh and Lorge explicitly argued "This case, however, is not controlled by the voluntary cessation exception to the mootness doctrine," (ECF 305, at 11.)[1]

Plaintiffs' interpretation of that case ignores precedent of the Supreme Court, the Eighth Circuit, and other circuits. *See Defunis v. Odegaard*, 416 U.S. 312, 317 (1974) ("And it has been the settled practice of the Court, in contexts no less significant, fully to accept representations such as these as parameters for decision."). Indeed, more than one circuit court has held that where the defendant is a government actor, there is a "rebuttable presumption" the allegedly offending

[1] Walsh and Lorge noted the rule of *Friends of the Earth*, but they did not concede it was controlling here. Additionally, by noting a "*defendant* moving for dispositive relief on mootness grounds bears a high burden", (ECF 305 at 10 (emphasis added)), Walsh and Lorge are perfectly consistent with what they argued in response to Plaintiffs' mootness motion, (ECF 176 at 53, n.24 (arguing "*Friends of the Earth* is distinguishable" where, among other things, a defendant does not move on mootness grounds).)

conduct will not recur. *Chicago United Industries, Ltd. v. City of Chicago*, 445 F.3d 940, 947 (7th Cir. 2006) (quoting *Troiano v. Supervisor of Elections in Palm Beach Cty.*, 382 F.3d 1276, 1283 (11th Cir. 2004)); a*ccord Moore v. Brown*, 868 F.3d 398, 407 (5th Cir. 2017) (public servants are provided a *presumption* of good faith). Plaintiffs ignore this precedent. Instead, they elevate the *Friends of Earth* standard to a metaphysical impossibility even though recent caselaw in this Circuit and elsewhere—even in cases Plaintiffs cite—refute Plaintiffs' application of the *Friends of the Earth* standard.

For example, the Eighth Circuit very recently held a change in public policy mooted a case. In *Young America's Foundation v. Kaler*, 14 F.4th 879 (8th Cir. 2021), at issue was the University of Minnesota's policy regarding where a student group could host a speaker whose message was expected to provoke protests. The plaintiffs argued the university's policy denied them a preferred location. By the time the case reached the Eighth Circuit, the university had changed its policy regarding hosting major events with "more defined terms and standards." *Id.* at 887.[2] The Eighth Circuit held a policy change should be analyzed as a case capable of repetition yet evading review, *id.* at 886, not a voluntary cessation case under *Friends of the Earth*. *Id.* at 886-87. A policy is not "capable of repetition yet evading review" merely because it could be reenacted after the lawsuit is dismissed.

[2] The Eighth Circuit received the appellants' notice of appeal on September 29, 2020; the new hosting policy took effect nearly six months earlier, on March 27, 2020. *Young America's Found.*, 14 F.4th at 886.

Id. at 886. (citing *Teague v. Cooper*, 720 F.3d 973, 977 (8th Cir. 2013)). Significantly, the Eighth Circuit concluded the challenges to the former policy were moot because the plaintiff-appellant *opposing* mootness "ha[d] not shown that it is 'virtually certain' that the [former policy] will be reenacted," and a judgment providing declaratory and injunctive relief with respect to the former policy would have no effect on a new policy distinct from the old. *Id.* at 887 (citing *Teague*, 720 F.3d at 977). Here, Walsh's declaration made clear that the 2016 Opinion and Protocol *cannot* be reenacted because of *Cooley*, and therefore, were a new policy be issued, it necessarily must be distinct from the revoked policy central to Plaintiffs' case.

Plaintiffs futilely attempt to distinguish *Prowse v. Payne*, 984 F.3d 700 (8th Cir. 2021). As Walsh and Lorge explained previously, in *Prowse* the Arkansas prison authorities abandoned their blanket policy refusing hormone therapy for inmates with gender dysphoria, thereby mooting Prowse's case. Plaintiffs claim Walsh's August 2021 declaration was "merely made for the sole purpose of mooting the case" (ECF 308 at 26), but Walsh's declaration is functionally the same as the affidavit the Arkansas prison official submitted in *Prowse* after the court requested briefing on mootness. Both explained the change in policy. As in *Prowse*, the Walsh declaration is entitled to deference, even more so, because Walsh revoked his 2016 opinion in 2018 because the Band and the County had a new cooperative agreement, one that was not negotiated to obviate this lawsuit. Thus, even under the voluntary cessation exception, the case against Walsh and Lorge is moot.

Further, contrary to what Plaintiffs apparently claim (ECF 308 at 32), there is no ambiguity to the Walsh declaration. As Walsh explains, the legal basis for his 2016 opinion is gone, erased by the *Cooley* decision. Plaintiffs try to limit the significance of *Cooley*. But they do not dispute that the high Court in *Cooley* applied for the first time the second *Montana* exception in a criminal setting. Nor do they dispute that the Ninth Circuit in *Cooley* did not identify a circuit conflict (and nor did the Solicitor General in seeking certiorari). Taken together, these facts underscore there was indeed a change in law that Walsh notes in his declaration.

Of similar effect to *Prowse* is *McCarthy v. Ozark School Dist.*, 359 F.3d 1029 (8th Cir. 2004), cited by Plaintiffs. That case involved a challenge to an Arkansas statute mandating that school children receive a hepatitis vaccine unless they could claim an exemption as adherents to a recognized church or religious denomination. *Id.* at 1032. While the case was on appeal, the legislature broadened the statute to allow exemptions for general religious or philosophical beliefs, which prompted the appellate court to seek supplemental briefing on mootness. *Id.* at 1034. The opponents of the vaccine mandate argued the case was not moot because the legislature "might repeal the new exemption provision at any time if not prohibited from doing so by court order." *Id.* at 1036. The Eighth Circuit rejected that argument as a mere "speculative possibility" that was "not a basis for retaining jurisdiction over a moot case." *Id.*

Another of Plaintiffs' cited cases supports Walsh and Lorge. In *Harnett v. Penn State Ed. Ass'n.*, 963 F.3d 301 (3rd Cir. 2020), the issue was the validity of

agency fees that a public school teachers' union charged nonmembers. Certain nonunion teachers challenged the union's imposition of agency fees. During the course of the lawsuit, the Supreme Court decided *Janus v. AFSCME Council 31*, 138 S.Ct. 2448 (2018), which overruled existing precedent and struck down an Illinois law that allowed agency fees. *See Harnett*, 963 F.3d at 305. The Third Circuit ruled *Janus* mooted the case. While recognizing the *Friends of the Earth* standard on voluntary cessation, the court held that *Janus* made "[t]he facts here present an especially strong case of mootness by voluntary cessation." *Id.* at 307.

Also supporting Walsh and Lorge is Plaintiffs' citation to the Eighth Circuit case *United States v. Mercy Health Services*, 107 F.3d 632 (8th Cir. 1997). In *Mercy Health* the government sued two health systems to prevent their merger. At trial, the government failed to prove the merger would have anti-competitive effects on the "relevant geographic market." *Id.* at 634. During the pendency of the government's appeal, the two health systems announced they had decided to call off their merger, though both expressed a desire to merge in some manner in the future. *Id.* at 635. Both the United States and the health systems argued the case was nevertheless not moot. *Id.* at 636. The Eighth Circuit rejected the parties' argument. Given there was no current illegal conduct to enjoin, the court declined "to issue a judgment which has no present relevance on the mere chance that it could have some marginal utility in an uncertain future." *Id.* at 637.

Plaintiffs have no persuasive response to the simple fact that what they now seek is purely speculative. The 2016 Opinion is gone; Walsh revoked it in 2018.

True, the current cooperative agreement may terminate at some point, but the parties could enter into another similar agreement. And, since 2017, the Band has a deputation agreement with the Bureau of Indian Affairs, and several Band police officers have now been delegated federal law enforcement authority, giving Band's police another avenue to apply their law enforcement powers.[3]

A critical flaw in Plaintiffs' opposition to mootness is the presumption that Walsh will resort to his 2016 opinion, potentially every jot and tittle. That assertion ignores Walsh's declaration that states he could not and would not do so, given *Cooley*.[4] As noted above, the case law provides that his declaration should be given deference. Moreover, Walsh has no incentive to reinstate his 2016 opinion in the context of this dispute over reservation status.

Cooley effected a change in law that moots the case against Walsh and Lorge because it nullified a key basis for Walsh's 2016 Opinion and Protocol—there is no longer an obvious dispute about Plaintiffs' inherent authority, and there is only a dispute about the geographic scope of that authority. As Walsh and Lorge pointed out in their Eighth Circuit reply on their motion to dismiss, "The only question would be where inherent tribal authority extends. That is a standalone boundary

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[3] The deputation agreement and accompanying special law enforcement commissions (SLECs) held by Band police officers were not in place when Walsh issued the Opinion and Protocol in 2016, which obviously did not address the significance of the deputation agreement or the SLECs.

[4] Contrast this fact with *Mercy Health*, where the two systems expressed a desire to merge in some manner in the future, and the Eighth Circuit still found mootness.

question, not a law enforcement authority question." *Mille Lacs Band et al. v. Walsh et al.*, No. 21-1138 (8th Cir.), Appellants' Reply to Appellees' Opposition to Mot. to Dismiss at 5 (filed Sept. 17, 2021).) What was sufficient to maintain standing here (the alleged injury to Plaintiffs law enforcement authority and a dispute about the substantive scope of that authority) is no longer a live controversy: there is no ongoing injury to Plaintiffs, and *Cooley* addressed Plaintiffs' inherent law enforcement authority under the second *Montana* exception, which alleviates a concern that led Walsh to issue his 2016 Opinion and Protocol. The only issue here is whether the former reservation has been disestablished. How that issue may impact the geographic scope of the Band's law enforcement authority cannot sustain a nonjusticiable case against Walsh and Lorge.

Plaintiffs' argument is one step more speculative than what was described by *Young America's Foundation*. Plaintiffs do not (and cannot) argue that Walsh would re-issue his 2016 Opinion and Protocol. Instead, they argue that some other, different dispute will arise. (ECF 308 at 3-4, 33-35.) But in showing mootness, Walsh and Lorge need not prove that there will never be a future law enforcement dispute with Plaintiffs. For example, in finding mootness in *Young America's Foundation*, the Eighth Circuit did not examine whether the University of Minnesota had shown that there would never be a dispute regarding how future event policies might be applied to the plaintiff in that case. It sufficed for mootness that the policy formerly applied was no longer in effect, notwithstanding that the

policy could potentially be re-enacted someday after dismissal. *Young America's Found.*, 14 F.4th at 886.

How Walsh or any successor Mille Lacs County Attorney would address the situation of Band police authority in the absence of a cooperative agreement is open to speculation. The fundamental concern Walsh had in 2016 was relying on potentially inadmissible evidence to prosecute crimes referred to his office by Band police. Thus, Walsh was correct when he testified at his deposition (ECF 308 p. 7) that an Eighth Circuit decision, for example, *Terry*, would not control the admissibility rulings in state court.[5] Federal circuit decisions, even if persuasive, do not bind state courts. *See Jendro v. Honeywell, Inc.*, 392 N.W.2d 688, 691 n.1 (Minn. App. 1986)(noting that "construction given by lower federal courts to federal law is entitled to due respect in state courts, but only decisions of United States Supreme Court bind state courts"); *accord Lockhart v. Fretwell*, 506 U.S. 364, 368 (1993) (reversing Eighth Circuit panel that "believed that the Arkansas trial court was bound under the Supremacy Clause to obey the Eighth Circuit's interpretation of the Federal Constitution").

[5] Plaintiffs' brief notes that *Terry* was cited in *State v. Thompson*, 937 N.W.2d 418, 421 (Minn. 2020). But *Thompson* involved the Red Lake reservation, which is unique as the only closed reservation in Minnesota. And the Minnesota Supreme Court's recognition of the Red Lake Band's detain-and-remove authority is not inconsistent with Walsh's 2016 Opinion and Protocol. Indeed, *Thompson* relied on *Strate v. A-1 Contractors*, 520 U.S. 438, (1997) and other Supreme Court caselaw. But the 2021 *Cooley* decision was a change in law inconsistent with the 2016 Opinion and Protocol.

As Plaintiffs concede, (ECF 308 at 31), the contours of *Cooley* are being developed, and the extent to which tribal police can investigate state law crimes involving non-Indians within a reservation remains an open question. Those developments would affect any exercise of prosecutorial discretion Walsh as County Attorney might exercise. Because application of *Cooley* to different circumstances remains open, the injunctive relief is especially problematic. An open-ended injunction will simply invite "contempt proceedings, continuously expanded." *See Chicago United Industries*, 445 F.3d at 947; *cf. Ahmad v. City of St. Louis,* 995 F.3d 635, 644 (8th Cir. 2021)(rejecting Rule 23(b)(2) class certification because potential class members were harmed in different ways). The declaratory and injunctive relief Plaintiffs seek here is moot (1) because of a change in law and (2) because deciding what might occur if the current cooperative agreement ends is only crystal-ball gazing. One can only speculate what the County Attorney 's opinion will be if the 2018 cooperative agreement terminates. But it is certain that it will not be the 2016 Opinion, and it is premature to speculate on what the new opinion would provide. *See Young America's Found.*, 14 F.4th at 887 (declining to pass judgment on the University's new venue hosting policy); *cf. Dixon v. City of St. Louis*, 19-cv-0112, 2021 WL 4709749 at *10 (E.D. Mo., Oct. 8, 2021)(declining to scrutinize the local courts' bail-setting practices under new judicial rules). What Plaintiffs seek is, at its core, an advisory opinion of what might constitute interference with inherent tribal law enforcement authority, which is

neither concrete nor a federal question. *Cf. Mercy Health*, 107 F.3d at 637 (the parties "cannot seek an advisory decision by this Court for their use tomorrow.").

CONCLUSION

The Eighth Circuit decisions in *Young America's Foundation* and *Prowse* should settle the issue of mootness. Simply put, the voluntary cessation exception to mootness does not apply to Walsh's declaration. Accordingly, this Court should dismiss Plaintiffs' claims against Walsh and Lorge.

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TAFT STETTINIUS & HOLLISTER LLP

By s/ *Scott G. Knudson*

Scott G. Knudson (#141987)
Scott M. Flaherty (#388354)
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
Tel: (612) 977-8400
Email: sknudson@taftlaw.com
sflaherty@taftlaw.com

Attorneys for Defendant Joseph Walsh

Dated: January 13, 2022

KELLEY, WOLTER & SCOTT, P.A.

By: s/ *Douglas A. Kelley*
Douglas A. Kelley (#54525)
Brett D. Kelley (#397526)
Stacy L. Bettison (#315886)
Centre Village Offices, Suite 2530
431 South Seventh Street
Minneapolis, MN 55415
Tel: (612) 371-9090
Fax: (612) 371-0574
Email: dkelley@kelleywolter.com
bkelley@kelleywolter.com
sbettison@kelleywolter.com

Attorneys for Defendant Don Lorge