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) **PLAINTIFFS' MEMORANDUM OF LAW IN RESPONSE TO DEFENDANTS WALSH AND LORGE'S RENEWED MOTION FOR SUMMARY JUDGMENT**

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I. INTRODUCTION

Plaintiffs submit this memorandum in partial opposition to Defendants Walsh and Lorge's renewed motion for summary judgment dismissing all claims against them in both their individual and official capacities.[1] Walsh and Lorge argue that: (1) all claims against them in their individual capacities should be dismissed because plaintiffs' claims against them arise only from actions taken in their official capacities; (2) plaintiffs' claims against them in their individual capacities for attorneys' fees and costs should also be dismissed because Walsh and Lorge have qualified immunity from liability for attorneys' fees and costs; and (3) plaintiffs' claims against them in their official capacities should be dismissed because they are redundant of plaintiffs' claims against Defendant Mille Lacs County. *See*, *e.g.*, Doc. 321 at 1. According to Walsh and Lorge, "[r]esolution of [their] motion, when coupled with the Court's ruling on [plaintiffs'] motion for declaratory and injunctive relief, should allow for entry of final judgment." *Id*.

Plaintiffs do not oppose Walsh and Lorge's motion to dismiss plaintiffs' claims against them in their individual capacities. Plaintiffs' complaint named Walsh and Brent Lindgren, Lorge's predecessor, as defendants in their individual and official capacities.[2] In response to Walsh and Lorge's previous motion for summary judgment on this issue, plaintiffs stated that they do not oppose dismissal of the individual-capacity claims if the

[1] *See* Defendants Walsh and Lorge's Motion for Summary Judgment (June 16, 2022) (Doc. 322); Defendants Walsh and Lorge's Memorandum Supporting Their Renewed Motion for Summary Judgment (June 16, 2022) (Doc. 321).

[2] Complaint at 1 (Nov. 17, 2017) (Doc. 1).

official-capacity clams are sufficient to invoke the doctrine of *Ex parte Young*, 209 U.S. 123 (1908).[3] In reply, Walsh and Lorge expressly acknowledged that the official capacity claims were sufficient to invoke *Young.*[4] Although Walsh and Lorge do not specifically address this point in their current motion, based on their prior representation and applicable case law it appears undisputed that plaintiffs can invoke *Young* by proceeding against Walsh and Lorge in their official capacities. Assuming the Court agrees, there is no need to preserve plaintiffs' claims against Walsh and Lorge in their individual capacities.

Plaintiffs have made clear that they are not seeking attorneys' fees or costs from Walsh and Lorge in their individual capacities and, therefore, there is no dispute before the Court with respect to such claims. *See*, *e.g.*, Doc. 173 at 52. Walsh and Lorge themselves have represented that dismissal of plaintiffs' individual-capacity claims against them "moots" their "request for immunity from attorney's fees and costs." Doc. 198 at 13. There is no need for the Court to rule on Walsh and Lorge's motion insofar as it seeks an order dismissing non-existent claims against them for attorneys' fees and costs in their individual capacities.

Plaintiffs oppose Walsh and Lorge's motion to dismiss plaintiffs' claims against them in their official capacities. Because Walsh and Lorge are independently elected

[3] Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment at 52 (July 29, 2020) (Doc. 173).

[4] Defendants Walsh and Lorge's Reply Brief in Support of Their Motion for Summary Judgment at 13 (Aug. 12, 2020) (Doc. 198).

officials whose actions are not controlled by Mille Lacs County, plaintiffs' claims against them are not redundant of plaintiffs' claims against the County.

Moreover, even if plaintiffs' official-capacity claims against Walsh and Lorge were redundant of plaintiffs' claims against the County, the Court should exercise its discretion to preserve plaintiffs' claims against Walsh and Lorge for several reasons. First, the usual reasons for dismissing redundant official-capacity claims—to avoid jury confusion and promote efficiency—are not present here, where the case does not involve a jury trial and Walsh and Lorge did not properly bring this issue before the Court until the case is nearing completion.

Second, plaintiffs' claims arise directly from the official actions of Walsh as County Attorney and Lorge's predecessor as County Sheriff, and the relief plaintiffs seek is directed specifically to Walsh and Lorge as County Attorney and County Sheriff. In such cases, involving actions by locally elected officials that allegedly violated the federal rights of their constituents, the preservation of official-capacity claims against the officials serves the interest of public accountability, which is an interest "of utmost importance." *Chase v. City of Portsmouth*, 428 F. Supp. 2d 487, 490 (E.D. Va. 2006)

Third, Walsh and Lorge were necessary parties throughout this litigation and have been separately represented and participated extensively in every phase of the case. For example, in discovery, Walsh and Lorge produced thousands of documents not produced by the County and throughout the case they have taken positions not taken by the County.

Under these circumstances, plaintiffs' official-capacity claims against Walsh and Lorge are not redundant and should not be dismissed now that the case is nearly over.

Plaintiffs agree with Walsh and Lorge that "[r]esolution of [their] motion, when coupled with the Court's ruling on [plaintiffs'] motion for declaratory and injunctive relief, should allow for entry of final judgment." Doc. 321 at 1. The prevailing parties will then have 14 days to file a motion for attorneys' fees and 30 days to file a cost bill. *See* Fed. R. Civ. P. 54(d)(2); Local Rule 54.3(c)(1).[5]

II. PLAINTIFFS DO NOT OPPOSE WALSH AND LORGE'S MOTION TO DISMISS PLAINTIFFS' INDIVIDUAL-CAPACITY CLAIMS.

A. Plaintiffs Named Walsh and Lindgren in Their Individual Capacities Solely to Invoke the *Young* Doctrine and Did Not Seek Any Personal Relief Against Them.

As a general rule, claims against state officials in federal court are barred by a state's sovereign immunity as recognized in the Eleventh Amendment. *See*, *e.g.*, *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100-02 (1984). However, the Supreme Court "has recognized an important exception to this general rule: a suit challenging the constitutionality of a state official's action is *not one against the State*." *Id*. at 102 (emphasis added). This exception was first recognized in *Young*, "in which a federal court enjoined the Attorney General of the State of Minnesota from bringing suit to enforce a state statute that allegedly violated the Fourteenth Amendment." *Pennhurst*, 465 U.S. at 102. The *Pennhurst* Court explained:

[5] Plaintiffs have not yet determined whether to seek attorneys' fees from any party. To obtain attorneys' fees, plaintiffs must be prevailing parties and one of the exceptions to the American rule that each party pays its own fees must be applicable. *See*, *e.g.*, *Johnson v. United States Dep't of Housing & Urban Dev.*, 939 F.2d 586, 590 (8th Cir. 1991). Those determinations can only be made upon entry of final judgment.

> The theory of [*Young*] was that an unconstitutional enactment is "void" and therefore does not "impart to the officer any immunity from responsibility to the supreme authority of the United States." [*Young*, 209 U.S.] at 160. Since the State could not authorize the action, the officer was "*stripped of his official or representative character and was subjected in his person to the consequences of his individual conduct*." [*Id*.]

Id. (emphasis added) (internal modifications normalized); *see also id*. at 102-03 (under the theory of *Young*, "when a plaintiff sues a state official alleging a violation of federal law … such a suit would *not be one against the State* since the federal-law allegation would *strip the state officer of his official authority*") (emphasis added). As the Court explained in *Young*, the doctrine is premised on a federal court's "right to enjoin *an individual*, even though a state official," from taking actions in violation of federal law. 209 U.S. at 163 (emphasis added).

Under *Young*, an "[a]ction in violation of valid federal law is necessarily beyond the scope of any official authority." *United States ex rel. Hixson v. Health Mgmt. Sys.*, 657 F. Supp. 2d 1039, 1058 (S.D. Iowa 2009) (citing *Young*, 209 U.S. at 159-60). If a court agrees that "the complaint alleges violations of state and federal law carried out by individual officials not pursuant to any state policy[,] then it would have no trouble finding that the allegations were sufficient to show that the individual defendants acted outside their official duties." *Id*.

Similar principles govern suits against federal officials. "The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' … or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.'" *Dugan*

v. Rank, 372 U.S. 609, 620 (1963) (quoting *Land v. Dollar*, 330 U.S. 731, 738 (1947), and *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 704 (1949)). However, there are two exceptions to the general rule: "(1) action by officers beyond their statutory powers and (2) even though within the scope of their authority, the powers themselves or the manner in which they are exercised are constitutionally void." *Id*. at 621-22 (citing *Malone v. Bowdoin*, 369 U.S. 643, 647 (1962)). According to *Dugan*, "[i]n either of such cases the officer's action 'can be made the basis of a suit for *specific relief against the officer as an individual*.'" *Id*. at 622 (quoting *Malone*, 369 U.S. at 647) (emphasis added); *accord Law v. United States Dep't of Agric.*, 366 F. Supp. 1233 (N.D. Ga. 1973) (under "recognized *Dugan* exceptions to sovereign immunity," jurisdiction is "present as to the individual [government] employees").

Although Walsh and Lindgren were County, not State, officials, plaintiffs anticipated that they might assert an Eleventh Amendment defense to plaintiffs' claims.[6] In light of the foregoing authorities, plaintiffs' complaint named them in their individual (as well as their official) capacities to invoke the *Young* doctrine. *See* Doc. 1 at 1 (caption). As discussed above, plaintiffs' "federal-law allegation[s] … strip[ped] [Walsh and

[6] As it turned out, Walsh and Lindgren's Answers did not assert an Eleventh Amendment defense. *See* Defendant Brent Lindgren's Answer (Dec. 22, 2017) (Doc. 19); Amended Answer of Joseph Walsh (Jan. 4, 2018) (Doc. 21). However, Walsh and Lorge's 2020 motion for summary judgment did raise the Eleventh Amendment as a defense, placing the *Young* doctrine in issue. *See* Defendants Walsh and Lorge's Memorandum Supporting Motion for Summary Judgment at 38-42 (July 8, 2020) (Doc. 164). Plaintiffs' response argued that Walsh and Lorge were not 'arms of the State' and so could not invoke the State's Eleventh Amendment immunity, but also argued that, if they were 'arms of the State,' plaintiffs' claims fell within the *Young* doctrine. *See* Doc. 173 at 39-43.

Lindgren] of [their] official authority[,]" *Pennhurst*, 465 U.S. at 103, and allowed plaintiffs to seek "specific relief against [them] as … individual[s.]" *Dugan*, 372 U.S. at 622.

Given the limited purpose of plaintiffs' individual-capacity claims, the body of plaintiffs' complaint sought no personal relief against Walsh or Lindgren. *See* Doc. 1 at 7-8 (Demand for Relief). Plaintiffs confirmed the absence of any claim for personal relief against Walsh and Lindgren when they stipulated to Lorge's substitution for Lindgren under Fed. R. Civ. P. 25(d).[7] In so stipulating, all parties recognized that this is not an action "against officers seeking to make them pay damages out of their own pockets[,]" which is outside the ambit of Rule 25(d). *See* Fed. R. Civ. P. 25(d), Advisory Committee Note on 1961 Amendment.

Plaintiffs again confirmed that they sought no personal relief against Walsh and Lorge (including attorneys' fees and costs) in responding to Walsh and Lorge's initial motion for summary judgment dismissing plaintiffs' individual-capacity claims against them.[8] Plaintiffs explained that the purpose of their individual-capacity claims against Walsh and Lorge was to invoke the *Young* doctrine and stated that, if it was unnecessary to name Walsh and Lorge in their individual capacities to invoke *Young*, "plaintiffs have

[7] Stipulation for Substitution of Party under Rule 25(d) at 1 (Feb. 27, 2019) (Doc. 61).

[8] *See* Doc. 173 at 4-5 (describing plaintiffs' claims and noting that plaintiffs "seek no money damages from any defendant"), 38 (reiterating that plaintiffs do not seek a money judgment), 40-41 (explaining that plaintiffs seek only "prospective declaratory and injunctive relief," not "an award of damages"), 44 (again noting that "plaintiffs seek no money damages"), 52 (stating that plaintiffs "do not seek to recover attorney's fees and costs from Walsh and Lorge in their individual capacities").

no objection to dismissal of the individual-capacity claims against them." Doc. 173 at 51-52.

B. Walsh and Lorge Agreed that Plaintiffs' Individual-Capacity Claims Were Unnecessary to Invoke *Young* but the Court Did Not Decide the Issue.

In their reply brief in support of their initial motion, Walsh and Lorge stated that plaintiffs' individual-capacity claims against them were unnecessary to invoke *Young*, arguing that "*Young* requires only official-capacity claims against state officials." Doc. 198 at 13 & n.7 (citing *Young*, 209 U.S. at 197-98 (Harlan, J., dissenting), and *Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 648 (2002)). Walsh and Lorge noted that, accordingly, "Plaintiffs 'have no objection to dismissal of the individual-capacity claims'" and that this moots Walsh and Lorge's "alternative request for immunity from attorney's fees and costs." Doc. 198 at 13 (quoting Doc. 173 at 52).

However, this Court did not rule on Walsh and Lorge's initial motion to dismiss plaintiffs' individual-capacity claims because Walsh and Lorge had not sought leave to file an early dispositive motion on that issue. Memorandum Opinion and Order at 46 (Dec. 21, 2020) (Doc. 217) (citing Third Am. Pretrial Scheduling Order (Doc. 138) at 6 and Jt. Mot. (Doc. 132) at 1-2). The Court stated that Walsh and Lorge could raise the argument again, "if and when it is appropriate to do so." *Id*.

As noted above, Walsh and Lorge also sought summary judgment on the grounds that the Eleventh Amendment barred plaintiffs' claims against them. *See* n.6 *supra.* In its December 2020 Order, this Court rejected that argument based on its determination that,

as elected County officials, Walsh and Lorge do not share in the State's sovereign immunity from suit. *See* Doc. 217 at 41-43. Accordingly, the Court did not need to address the applicability of *Young* or to decide whether plaintiffs' individual-capacity claims were necessary to invoke *Young*. *See id.*

C. Walsh and Lorge Continued to Assert an Eleventh Amendment Defense in Their Interlocutory Appeal.

In January 2021, Walsh and Lorge filed an interlocutory appeal challenging, *inter alia*, this Court's denial of their Eleventh Amendment defense. *See* Notice of Appeal (Jan. 19, 2021) (Doc. 218); *see also* Brief of Appellants Joseph Walsh and Don Lorge at 52-58 (Apr. 2, 2021) in *Mille Lacs Band of Ojibwe, et al. v. Walsh, et al.,* Eighth Cir. No. 21-1138.[9] Although the Eighth Circuit dismissed Walsh and Lorge's appeal, it did not address their Eleventh Amendment argument. *See* Order at 5-7, 9-10 (Mar. 3, 2022) (Doc. 312) (this Court's Order discussing Walsh and Lorge's interlocutory appeal and the Eighth Circuit's order dismissing the appeal).

D. Assuming the Court Agrees that Plaintiffs' Individual-Capacity Claims Are Unnecessary to Invoke *Young*, Plaintiffs Do Not Oppose Dismissal of Those Claims.

Plaintiffs seek to preserve their ability to invoke *Young* in the event Walsh and Lorge attempt to renew their Eleventh Amendment defense in a future appeal. In their current

[9] In that appeal, plaintiffs again confirmed that they were seeking no personal relief against Walsh and Lorge, stating in their merits brief that "[t]he complaint names Walsh and Lindgren in their individual and official capacities … but seeks no personal relief against them." Appellees' Eighth Circuit Resp. Br. at 2 (June 1, 2021) in Eighth Cir. No. 21-1138; *see also id.* at 37 (reiterating that "plaintiffs seek no relief against Walsh and Lorge in their personal capacities").

motion, Walsh and Lorge do not expressly address plaintiffs' ability to invoke *Young*. *See* Doc. 321 at 4 (noting plaintiffs' position regarding *Young* without addressing whether plaintiffs' individual-capacity claims are necessary to invoke *Young*). Walsh and Lorge's standing and justiciability arguments, *see* Doc. 321 at 2-8, are all premised on the assertion that their challenged actions were taken in their official capacities, but, as discussed in Part II.A *supra*, *Young*, *Pennhurst* and *Dugan* indicate that plaintiffs' "federal-law allegation[s] … strip[ped] [Walsh and Lorge's predecessor] of [their] official authority," subjecting them to an action for prospective injunctive relief in their individual capacities. *Pennhurst*, 465 U.S. at 103; *see also Ex parte Young*, 209 U.S. at 160; *Dugan*, 372 U.S. at 622.

There is, however, authority supporting the proposition that plaintiffs' individual-capacity claims are not necessary to invoke *Young*. For example, in a case cited by Walsh and Lorge in their reply brief in support of their initial motion, Doc. 198 at 13 n.7, the Supreme Court stated that a plaintiff "may proceed against the individual [officers] *in their official capacities*, pursuant to the doctrine of *Ex parte Young*[.]" *Verizon*, 535 U.S. at 645 (emphasis added). The Eighth Circuit has likewise stated that "[u]nder the *Ex Parte Young* doctrine, a private party can sue a state officer *in his official capacity* to enjoin a prospective action that would violate federal law." *281 Care Comm. v. Arneson*, 638 F.3d 621, 632 (8th Cir. 2011) (emphasis added); *accord Randolph v. Rogers*, 253 F.3d 342, 348 (8th Cir. 2001) ("*Young* … permits an injunction against a state official *in his official capacity* to stop an ongoing violation of federal law") (emphasis added). And, in a case cited by Walsh and Lorge in support of their current motion, *see* Doc. 321 at 6, the Seventh Circuit concluded that "a case may proceed under the *Young* exception *only* when a state official

is sued *in his official capacity*." *Ameritech Corp. v. McCann*, 297 F.3d 582, 586 (7th Cir. 2002) (emphasis added).

Although it is difficult to reconcile these holdings with the theory of *Young* as explicated in *Pennhurst* and *Dugan*, they support the proposition that plaintiffs' individual-capacity claims are not necessary to invoke *Young*. Given these decisions and Walsh and Lorge's own previous statement that plaintiffs' official-capacity claims are sufficient to invoke *Young* (which Walsh and Lorge do not disavow in their current motion), it appears undisputed that plaintiffs' claims against Walsh and Lorge in their official capacities are sufficient to invoke *Young*. As noted above, this remains important to plaintiffs in the event Walsh and Lorge seek to renew their Eleventh Amendment defense in a future appeal. Thus, assuming the Court agrees that plaintiffs' individual-capacity claims are unnecessary to invoke *Young*, plaintiffs, consistently with their prior representation, do not oppose the dismissal of those claims.

III. PLAINTIFFS MAKE NO CLAIM FOR ATTORNEYS' FEES AND COSTS AGAINST WALSH AND LORGE IN THEIR INDIVIDUAL CAPACITIES.

Walsh and Lorge next assert that they are entitled to qualified immunity from plaintiffs' demand for an award of attorneys' fees and costs against them in their individual capacities. *See* Doc. 321 at 8. They argue that, *if* plaintiffs' "individual-capacity claims are allowed to proceed, the Court should immunize Walsh and Lorge in their individual capacities from Plaintiffs' demand for attorneys' fees and costs, lest they be punished for conduct they did not undertake personally and have no authority to change." *Id.*

As discussed above, plaintiffs have stated repeatedly that they do not seek any relief against Walsh and Lorge in their personal capacities, including an award of attorneys' fees or costs. *See*, *e.g.*, Doc. 173 at 4-5, 40-41, 51-52; *see generally* Part II *supra*. Moreover, Walsh and Lorge themselves acknowledged that the dismissal of plaintiffs' individual-capacity claims against them "moots" Walsh and Lorge's alternative request for immunity from attorney's fees and costs. Doc. 198 at 13. For these reasons, there is no live dispute regarding nonexistent claims for attorneys' fees and costs against Walsh and Lorge in their individual capacities and no basis for the Court to rule on Walsh and Lorge's motion to dismiss those nonexistent claims based on qualified immunity.[10]

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[10] In plaintiffs' response to Walsh and Lorge's previous motion on this issue, plaintiffs explained that there is no basis for dismissing plaintiffs' prayer for attorneys' fees and costs against Walsh and Lorge in their *official* capacities, *see* Doc. 173 at 52-55, and Walsh and Lorge make no argument for dismissal of those claims here. Plaintiffs' response also showed that qualified immunity is not available here because, at the time Walsh issued his Opinion and Protocol, it was clearly established that the Band had inherent law enforcement authority to investigate violations of state law, at least on trust lands. *See id.* at 54 n.17 (citing *United States v. Terry*, 400 F.3d 575, 579-80 (8th Cir. 2005)). In their current motion, Walsh and Lorge persist in disregarding *Terry* and instead rely on the *Cooley* litigation. *See* Doc. 321 at 11 (citing *United States v. Cooley*, 141 S. Ct. 1638 (2021). That reliance is misplaced because *Cooley* did not involve trust land, where every court to have considered the issue has held that tribal officers have the authority to investigate violations of state law. *See* Plaintiffs' Memorandum of Law in Support of Motion for Summary Judgment Awarding Declaratory and Injunctive Relief (June 6, 2022) (Doc. 319) at 10-16 (discussing *Cooley*), 20-28 (discussing other applicable law); *see also* Doc. 312 at 20-22 (this Court's Order discussing *Cooley* and *Terry* and noting Walsh's deposition testimony "that he did not consider Eighth Circuit decisions to be controlling authority").

IV. PLAINTIFFS' OFFICIAL-CAPACITY CLAIMS AGAINST WALSH AND LORGE ARE NOT REDUNDANT AND SHOULD NOT BE DISMISSED.

Walsh and Lorge's final argument is that plaintiffs' claims against them in their official capacities should be dismissed because they are redundant of plaintiffs' claims against Mille Lacs County. *See* Doc. 321 at 11-13. Walsh and Lorge argue that plaintiffs' claims against them are, in effect, claims against the County and that, as "elected officials employed by the County[,]" they would be bound by any "injunctive relief against the County." *Id.* at 13.

District Courts have discretion to dismiss redundant official-capacity claims but are not required to do so. *See*, *e.g.*, *Navajo Nation Human Rights Comm'n v. San Juan Cnty.*, 281 F. Supp. 3d 1136, 1171 (D. Utah 2017); *Fetters v. Mearkle*, 2016 U.S. Dist. LEXIS 198403 at *18-19 (M.D. Pa. Jan. 11, 2016); *Crump v. Passaic Cnty.*, 147 F. Supp. 3d 249, 259 (D.N.J. 2015); *Chase*, 428 F. Supp. 2d at 489 (citing *Brandon v. Holt*, 469 U.S. 464, 471-73 (1985); *Crighton v. Schuykill County*, 882 F. Supp. 411, 415 (E.D. Pa. 1995); *Kenny v. Whitpain Twp.*, 1996 U.S. Dist. LEXIS 11421 at *8 n.2 (E.D. Pa. Aug. 5, 1996)). Two common reasons for dismissing such claims are to avoid confusing the jury and to promote efficiency. *See*, *e.g.*, *Crump*, 147 F. Supp. 3d at 259. These concerns are not present in this case, which is not being tried to a jury and where Walsh and Lorge did not properly present this issue to the Court until the last stage of the case.[11]

[11] Walsh and Lorge could have moved to dismiss plaintiffs' official-capacity claims against them before answering plaintiffs' complaint but did not do so. *See Crump*, 147 F. Supp. 3d at 251, 259 (redundancy claim raised on motion to dismiss). They also could have sought leave to file an early dispositive motion seeking dismissal of plaintiffs' official-capacity claims against them but did not so. *See* Doc. 217 at 46. And, they could have

In *Chase*, the court declined to dismiss official-capacity claims against the members of a city council because, "as the City Council is popularly elected, it may provide the plaintiffs with the public accountability they seek if they succeed on the merits" and because "it gives the Council Members the ability to participate fully in defense of their actions as parties to the litigation." 428 F. Supp. 2d at 490. As the court explained, "[i]n cases such as these, where elected officials are alleged to have violated federal laws protecting a local constituency, public accountability is of utmost importance." *Id.*; *accord Tubbs v. Sacramento Cnty. Jail*, 2008 U.S. Dist. LEXIS 116568 at * 7 (E.D. Cal. Oct. 14, 2008); *Cole v. Buchanan Cnty. Sch. Bd.*, 504 F. Supp. 2d 81, 85 n.4 (W.D. Pa. 2007).

These and several other factors counsel against dismissal of plaintiffs' official-capacity claims against Walsh and Lorge in this case. First, in advancing their Eleventh Amendment argument here and in the Eighth Circuit, Walsh and Lorge repeatedly argued they were acting on behalf of the State and that a judgment against them in their official capacities would bind the State. *See* Defendant Walsh and Lorge's Memorandum Supporting Motion for Summary Judgment at 39-42 (July 8, 2020) (Doc. 164); Doc. 198 at 9; Brief of Appellants Joseph Walsh and Don Lorge at 52-58 (Apr. 2, 2021) in Eighth Cir. No. 21-1138; Reply Brief of Appellants Joseph Walsh and Don Lorge at 22-27 (June 24, 2021) in Eighth Cir. No. 21-1138. If plaintiffs' official-capacity claims against Walsh

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filed a dispositive motion on this issue upon completion of all discovery, simultaneously with the parties' motions for summary judgment on the Reservation-boundary issue, but did not do so. Instead, they waited until the final stage of the case to properly present this issue to Court, at a time where there is nothing to be gained in terms of efficiency by dismissing plaintiffs' official-capacity claims against them.

and Lorge are claims against the State (even in part), the claims are not redundant of plaintiffs' claims against the County.[12]

Second, contrary to Walsh and Lorge's claim, the County Attorney and County Sheriff are not treated as County employees under Minnesota law. *Spaulding v. Bd. of Cnty. Comm'rs*, 306 Minn. 512, 514 (1976) ("There is a well-recognized distinction between county employees and county officers. . . The sheriff is a county officer.") (citing Minn. Stat. §382.01); Minn. Op. Atty. Gen. 390a-6, 1994 Minn. AG LEXIS 7, *8 (Oct. 31, 1994) (distinguishing between "the sheriff as an elected county officer and . . . other peace officers who are employed by units of government"); *see also* Minn. Stat. § 179A.03 subd. 14(a)(1) (elected public officials are not employees of a public entity). Consistent with this Minnesota law, plaintiffs' official-capacity claims against Walsh and Lorge are best understood as claims against the County Attorney and County Sheriff as independently elected officials, not as claims against the County.[13] As Walsh and Lorge stated when they

[12] In its recent decision rejecting Walsh and Lorge's indemnity claim, the Minnesota Supreme Court held that Walsh and Lorge were not acting on behalf of the State for purposes of Minnesota's State Tort Claims Act but recognized that they were "acting for the State … in their roles as officers of the county." *Walsh v. State*, No. A20-1083, 2022 Minn. LEXIS 220 at *28-29 (Minn. 2022).

[13] Walsh and Lorge's claim that the State was required to defend and indemnify them in this case was predicated on *distinguishing* the claims against them from the claims against the County, because plaintiffs' claims against the County clearly are not subject to indemnification by the State. *See Walsh*, 2022 Minn. LEXIS 220 at *16 ("Walsh and Lorge claim that although the definition of 'State' expressly carves out specific entities—cities, towns, *counties*, school districts, and other local governmental bodies—it does not specifically carve out *individual municipal officers and employees* like county attorneys and country sheriffs.") (emphasis added). Indeed, the fact that the County, Walsh, Lorge and Lorge's predecessor have been separately represented throughout this case is evidence

first moved for summary judgment on this issue, "[t]he relief sought by Plaintiffs may only be imposed on the individual defendants in their official capacities as Mille Lacs County Attorney and Sheriff." Doc. 164 at 48.

Notably, as independently elected officials whose offices were created by the State Legislature, Walsh and Lorge exercise independent prosecutorial and law enforcement authority free of County supervision or control. The positions of County Attorney and County Sheriff were created and their duties defined in Minnesota statutes. *See* Minn. Stat. §§ 382.01 (creating offices of county attorneys and sheriffs), § 388.051 (setting county attorneys' duties), § 387.03 (setting sheriffs' powers and duties). As elected County officials, the County Attorney and County Sheriff can only be removed from office if the removal process is started by a petition of 25 percent of the number of registered voters who voted in the preceding election for the office. *See* Minn. Stat. §§ 351.14 subd. 5 (including county attorneys and sheriffs as "elected county officials"), 351.16 *et seq*. (setting forth county official removal procedure). There is nothing in Chapters 387 or 388 of the Minnesota Statutes putting either the County Attorney or County Sheriff under the County Board of Commissioners' direction or control.

Furthermore, the County itself has no power to exercise the State's law enforcement authority. *See* Minn. Stat. § 373.01 (listing county powers). Rather, it is the County's position that the County Sheriff and the County Attorney are the elected "senior officials in charge of public safety and law enforcement within the County[.]" Memorandum of

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that no one believed that plaintiffs' claims against the County Attorney and County Sheriff were equivalent to plaintiffs' claims against the County.

Law of Mille Lacs County in Opposition to the Motion to Dismiss or Strike Counterclaim under Rules 12(b)(1), 12(b)(6) and 12(f) at 20 (Mar. 12, 2018) (Doc. 35).

According to Sheriff Lorge, "[t]he Sheriff's Office" – *not* the County – "is responsible for keeping and preserving the peace throughout the County." Declaration of Don Lorge, ¶ 2 (July 8, 2020) (Doc. 166); *see also* Minn. Stat. § 387.03 ("sheriff shall keep and preserve the peace of the county"); *Gramke v. Cass Cnty.*, 453 N.W.2d 22, 26 (Minn. 1990) (statutory duty to keep and preserve the peace is "a broad grant of authority to the county sheriff"). Sheriff Lorge testified that it is the Sheriff that sets his office's law enforcement policy, without interference from the County Board. *See* Declaration of Beth Baldwin in Opposition to Walsh and Lorge's Motion for Summary Judgment, Ex. H (Lorge Deposition 8: 2-21, 21: 5-25, 22: 1-8) (July 29, 2020) (Doc. 174-8).

The County Attorney likewise enjoys broad autonomy from the County. *See* Minn. Stat. § 388.051 subd. 3 (county attorneys to adopt own charging and plea negotiation policies and practices); *St. James v. City of Minneapolis*, No. 05-2348 (DWF/JJG), 2006 U.S. Dist. LEXIS 68036, at *12 (D. Minn. June 12, 2006) ("[T]he county board has no authority to hire or fire an elected county attorney or to set policies related to prosecution of felonies within the county."). Notably, Walsh has never suggested he was required to obtain County Board approval to adopt the 2016 Opinion and Protocol that gave rise to plaintiffs' claims in this case. He declared that his "obligations to prosecute crimes" are "subject to standards [of] professional responsibility" applicable to attorneys and guided by his "office's prosecutorial discretion," not the oversight of the County Board. Declaration of Joseph J. Walsh, ¶ 15 (July 8, 2020) (Doc. 165).

In analogous circumstances, the Seventh Circuit has held that an official-capacity suit against "an independently elected [Sheriff] who is accountable only to the people, rather than the County board" is not equivalent to a suit against the County. *Thomas v. Cook Cnty. Sheriff's Dep't*, 604 F.3d 293, 305 n.4 (7th Cir. 2009); *see also Franklin v. Zaruba*, 150 F.3d 682, 686 (7th Cir. 1998) ("the lack of identity between the county sheriff's department and the general county government indicates that § 1983 suits against sheriffs in their official capacities are in reality suits against the county sheriff's department rather than the county board"); *accord*, *Bertha v. Hain*, 787 Fed. Appx. 334, 339 (7th Cir. 2019). Under such circumstances, courts in the Seventh Circuit have permitted plaintiffs to sue independently elected county officials in their official capacities. *See*, *e.g.*, *Willis v. Edgcomb*, 791 F. Supp. 755, 757 (C.D. Ill. 1992).

Here, because they occupy independently elected offices and exercise the authority at issue in this case free of County supervision or control, plaintiffs' official-capacity claims against Walsh and Lorge are not redundant of plaintiffs' claims against the County. Moreover, as in *Chase*, 428 F. Supp. 2d at 490, retaining plaintiffs' official-capacity claims against Walsh and Lorge will serve the interest of public accountability, which is of "utmost importance" "where [as here] elected officials are alleged to have violated federal laws protecting a local constituency[.]"

Third, the cases in which courts have dismissed official-capacity claims as redundant of claims against an entity, *e.g.*, *Veatch v. Bartels Lutheran Home*, 627 F.3d 1254 (8th Cir. 2010); *Artis v. Francis Howell N. Band Booster Ass'n*, 161 F.3d 1178 (8th Cir. 1998), are distinguishable from this case. In those cases, the plaintiffs sought money

damages, which would be paid by the employing entity and would not be affected by the presence of the official-capacity defendants. Here, plaintiffs do not seek money damages; they seek declaratory and injunctive relief directed specifically to the County Attorney and County Sheriff as the independently elected officials whose actions gave rise to plaintiffs' claims. As plaintiffs have acknowledged, *see* Doc. 173 at 25, injunctive relief may need to be tailored to avoid interference with the County Attorney and County Sheriff's discretionary authority to prosecute and enforce the law. Because the County exercises no control over their exercise of such discretionary authority, Walsh and Lorge's presence as defendants in their official capacities is important to shape the relief and is not redundant. In these circumstances, retaining plaintiffs' official-capacity claims against Walsh and Lorge has and will continue to give them "the ability to participate fully in defense of their actions as parties to the litigation" and to shape the relief. *Chase*, 428 F. Supp. 2d at 490.

Finally, during the four-and-a-half years in which this case has been pending, Walsh and Lorge have been necessary parties to the prosecution of plaintiffs' case. For example, in discovery, they provided separate responses from the County (and each other), producing thousands of pages of official documents from their respective offices that were not produced by the County. *See* Defendants' Unopposed Motion to Extend the Pretrial Schedule Deadlines at 1-2 (Aug. 29, 2019) (Doc. 77) (describing discovery responses). They have also taken different positions than the County during the litigation; their Answers and Affirmative Defenses, while similar, are not the same; they did not file a Counterclaim as did the County; and they moved for summary judgment on grounds not advanced by the County, including lack of subject matter jurisdiction. These differences

further indicate that plaintiffs' claims against them are not redundant of the claims against the County and should not be dismissed at the eleventh hour.[14]

V. CONCLUSION

For the reasons discussed above, plaintiffs do not object to the dismissal of their individual-capacity claims against Walsh and Lorge. There is no need for the Court to address Walsh and Lorge's qualified immunity defense to claims for attorneys' fees and costs against Walsh and Lorge in their individual capacities because there are no such claims. The Court should deny Walsh and Lorge's motion to dismiss plaintiffs' official-capacity claims against them because those claims are not redundant of plaintiffs' claims against the County and multiple factors, including the interest in public accountability, favor retention of those claims.

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[14] Walsh and Lorge assert that in moving to dismiss the County's counterclaims at the outset of this case, "Plaintiffs made a similar argument that the county's counterclaims against Plaintiffs Rice and Naumann were likewise redundant, adding 'nothing to the litigation between the Band and the County.'" Doc. 321 at 13 n.5 (quoting [Plaintiffs'] Memorandum of Law in Support of Motion to Dismiss or Strike Counterclaim under Rules 12(b)(1), 12(b)(6) and 12(f) at 27 (Feb. 5, 2018) (Doc. 27)). Apart from the notable difference in timing—plaintiffs moved to dismiss the County's counterclaim at the very beginning of this case, not at the very end—the critical distinction is that the County's counterclaim made "*no allegations* against the individual counterclaim defendants[,]" Doc. 27 at 27 (emphasis in original), and sought *no relief* against any individual defendant; instead, it sought only to litigate the same issues that were already present in the case as a result of plaintiffs' complaint and the County's answer. *See id*. at 23-28. Here, plaintiffs' complaint makes specific, detailed allegations against the County Attorney and County Sheriff that form the basis for plaintiffs' claims in this case and that have been the focal point of this litigation for four-and-a-half years. *See* Doc. 1 at 5-7.

DATED: July 14, 2022

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