

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
NORTHWEST DIVISION**

MARK SPLONSKOWSKI,)	
)	
Plaintiff,)	
)	
v.)	Case No. 1:23-cv-00123-DMT-CRH
)	
ERIKA WHITE, in her capacity as State)	
Election Director of North Dakota,)	
)	
Defendant.)	

PLAINTIFF MARK SPLONSKOWSKI'S ADDITIONAL BRIEFING REPLY

Defendant concedes that state law does not preclude this action. This case should therefore proceed to disposition under ordinary standing principles.

The Court asked the parties to address a specific question: “whether the Complaint should be dismissed because Splonskowski **lacks approval from the Burleigh County Commission** to initiate this lawsuit in his official capacity as Burleigh County Auditor.” (Doc. 27 at 22 (emphasis added).) The basis for this question is N.D.C.C. § 11-11-14(1), which gives the “board of county commissioners” the power to “[t]o institute and prosecute civil actions for and on behalf of the county and in its name.”

Defendant explains that “from Defendant’s perspective, the problem is not so much that Section 11-11-14 or Section 11-16-01 specifically precludes Plaintiff from bringing *this action*[.]” (Doc. 27, ¶ 12 (emphasis in original).) However, whether those statutes require Plaintiff to obtain approval for this action is the precise question the Court ordered the parties to address. (Doc. 22, ¶ 5.) Defendant skirts that issue. Instead, Defendant quibbles with Plaintiff’s reliance on his official

duties. But Defendant never says whether that reliance requires him to obtain approval under Section 11-11-14(1). In fact, Defendant says Plaintiff's lack of approval is "not so much" the problem. (Doc. 27, ¶ 12.) Defendant thus concedes the point. Defendant also effectively concedes that if this case is brought in Plaintiff's individual capacity—which it is—Section 11-11-14(1) is no bar to suit. (Doc. 27, ¶ 2.)

Defendant chooses to answer a question the Court did not pose—namely, whether a government official may "combine two separate capacities to establish the requisite injury." (Doc. 27, ¶ 12.) Because the parties were not asked to brief this question, Plaintiff did not brief it, and the Court should disregard Defendant's arguments. It matters not, in any event, because Plaintiff's reliance on his official duties does not transform this case into one brought in his official capacity. But even if this case combines some elements of Plaintiff's individual and official capacities, Defendant identifies no barrier to standing.

Section 11-11-14(1) is the only basis identified by the Court for Plaintiff's needing approval for this action. Defendant does not argue that Section 11-11-14(1) requires Plaintiff to seek such approval. (Doc. 27, ¶ 12.) Defendant otherwise cites no authority from this Court or the Eighth Circuit, and the authorities she does cite do not support her argument. (Doc. 27, ¶ 6.) In fact, *Arpaio v. Obama*, 27 F. Supp. 3d 185, 200 (D.D.C. 2014), *aff'd*, 797 F.3d 11 (D.C. Cir. 2015), supports Plaintiff. There, the plaintiff alleged, in his **individual capacity**, a fear of criminal prosecution and removal from office if he complied with state law as part of his **official duties** as the "elected County Clerk for Erie County." *Id.* at 322, 328-336.

In an attempt to defeat Plaintiff's standing, Defendant takes a position that would effectively prevent all elected officials facing criminal prosecution from challenging their

prosecution, because such actions would “combine” their official duties with their personal injuries. Such a result is absurd and should be avoided.

For these reasons, this action should proceed for disposition under Federal Rule of Civil Procedure 12.

Dated: October 12, 2023.

Respectfully submitted,

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**Admitted Pro Hac Vice*